

No. 34059-7-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED

NOV 21, 2016
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN LOPEZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY

The Honorable Judge Vic Vanderschoor

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The prosecutor erroneously quantified the State's burden of proof.
2. The court erred by permitting references to I.G. as a "victim" and being repeatedly "re-victimized."
3. The prosecutor committed misconduct by commenting on the evidence.
4. The court erred by admitting an in-life photograph of I.G.
5. The court erred by limiting Mr. Lopez's right to present a defense regarding the investigation, or lack thereof, of another suspect.
6. The court erred by permitting vouching testimony.
6. The court erred by finding Mr. Lopez had the ability to pay and imposing discretionary legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the prosecutor committed misconduct that denied the defendant a fair trial when she quantified the State's burden of proof as "more than 50 percent but it's not a 100 percent."

Issue 2: Whether repeated references to the child as a "victim" by the State and law enforcement, and additional commenting on the evidence by the prosecutor during closing argument, should result in a new trial.

Issue 3: Whether the court abused its discretion by admitting, over defense objection, an irrelevant and unduly prejudicial photograph of the child at eight-years-old, which was designed to merely appeal to the jury's emotions rather than capacity for reason.

Issue 4: Whether the court erroneously limited the defendant's constitutional right to present a defense when it refused to allow cross examination about the lack of investigation into another suspect living in the child's home.

- a. The court erred by denying Mr. Lopez the right to cross examine the State's witnesses on the thoroughness of their investigation.
- b. Alternatively, Mr. Lopez was denied his constitutional right to present "other suspect evidence" after laying a sufficient foundation connecting Nemecio Lopez to the offenses.

Issue 5: Whether the court erred by admitting vouching testimony designed to bolster I.G.'s credibility, over objection.

Issue 6: Whether the court’s finding that Mr. Lopez had the ability to pay legal financial obligations, and its imposition of \$2,312.44 in discretionary costs against the defendant, was unsupported by the record and law.

Issue 7: Whether this Court should deny the imposition of any costs against Mr. Lopez on appeal.

C. STATEMENT OF THE CASE

Adrian Lopez was convicted of two counts of child rape and one count of child molestation after accusations made by his step-sister I.G. in 2013, regarding alleged incidences from 2011. CP 193-95. He now appeals those convictions. CP 246.

I.G. (DOB: 12-20-2002) is the daughter of Amanda Gustafson and the step-daughter of Nemecio Lopez. RP 111-12, 141, 173. I.G.’s siblings include her little brother “Junior,” older stepbrother Adrian Lopez (DOB: 2-7-1991), and older stepsister Andrea Peyton (Adrian and Andrea are Nemecio Lopez’s children from a prior relationship). RP 111-12, 114, 141, 174. Adrian Lopez initially resided with his mother, but then he moved into his father and stepmother’s home with I.G. and Junior around 2009; he resided with this family periodically thereafter. RP 117-19, 143.

In July 2013, I.G. told her mother and stepfather that her stepbrother Mr. Lopez had touched her inappropriately two years prior. RP 146. The child said she chose to talk about the touching after a friend told her the Grim Reaper visited at death and sent people to Hell who lied. RP 123-24. Law enforcement was contacted the next day. RP 34, 44,

124, 147, 192. Sergeant Scott Warren (RP 36-40, 46-47), Detective Jonathan Davis (RP 67), child forensic interviewer Martha Murstig (RP 107-08), I.G.'s mother Ms. Gustafson (RP 146), and I.G.'s stepfather Mr. Nemecio Lopez (RP 119) all testified the child told them Mr. Lopez had touched her inappropriately in the summer of 2011. I.G.'s mother knew of no reason I.G. would have made up the accusations against her stepbrother Mr. Lopez. RP 172. Child forensics interviewer Ms. Murstig said she makes every child promise to tell the truth: "having them promise they will tell the truth is enough to have the children be truthful." RP 103. Over objection, Nemecio Lopez described I.G. as a child who would not make up a story to get attention. RP 122.

After the above witnesses testified about the child disclosing inappropriate touching by her stepbrother, I.G. took the stand to describe her allegations in detail. I.G. said the first incident occurred after her tonsils were removed on June 6, 2011. RP 79-80, 145, 175. Mr. Lopez was babysitting I.G. after her surgery, and I.G. said the defendant touched her vagina over her clothing. RP 177, 199, 217. This incident was charged as child molestation in the first (count IV). CP 133; RP 250, 292.

I.G. said a few days or a week later, her stepbrother Mr. Lopez was babysitting her and Junior at their house. RP 178-79, 217, 220. While Junior was playing videogames in another room, I.G. and Mr. Lopez built

a fort in I.G.'s room. *Id.* Inside the fort, I.G. said Mr. Lopez put his fingers in her vagina and it hurt a little. RP 182-83. This incident was charged as child rape in the first degree (count I). CP 132; RP 251.

For the third incident, in chronological order, I.G. said she was home with Mr. Lopez while her mother walked to the school bus stop to pick up Junior. RP 183-86. Junior's last day of school before summer vacation had been June 10th (RP 51-52), and Junior did not return to school from summer vacation until August 29, 2011. RP 81-82. I.G. said Mr. Lopez watched out the front door window toward the bus stop, he asked her to put her mouth on his penis, she complied, and his penis got bigger. RP 183-86, 217. I.G. said Mr. Lopez told her not to tell their mom or dad, and she acted like it never happened. RP 187. This incident was charged as first-degree child rape (count II). CP 132, RP 252.

A fourth allegation (count III, CP 133) was dismissed after the State initially argued for conviction, but then told the jury there was not sufficient proof to establish this count beyond a reasonable doubt (RP 293; CP 228). I.G. claimed this final touching incident occurred when Mr. Lopez came in her room one morning, woke her up by pulling the covers off, and went away when she told him "no." RP 189, 191, 217.

I.G. said the four incidences did not span more than two months in time from the first incident on or about June 6, 2011, to the last incident

when the defendant pulled the blankets off of her. RP 214. I.G. said there were no further instances of inappropriate touching after this time. *Id.*

I.G.'s mother and stepfather testified I.G.'s behavior never changed after the summer of 2011, other than some weight gain, and there was no concern that something had happened to her. RP 133-34, 145. I.G. never became withdrawn. *Id.* Mr. Lopez continued to babysit I.G. without incident, and I.G. did not appear reluctant around her stepbrother. RP 133-35, 159-63, 168, 215-16. Even after she made her accusations against her stepbrother in 2013, I.G.'s sister Andrea said the child appeared excited and unafraid when seeing Mr. Lopez. RP 224, 226.

Between 2013 and 2015, I.G. engaged in numerous interviews pertaining to her accusations against her stepbrother. RP 25, 34, 43-45, 65, 67, 69, 147. The details described did vary at times between interviews. RP 43, 67, 107-08, 178, 203-12, 230-32, 271-76, 281. The initial detective on the case did not compare I.G.'s statements to determine if her story changed. RP 58. Ultimately, other than the child's repeated disclosures to the various testifying witnesses, there was no physical or other first-hand evidence to corroborate the child's allegations. RP 47, 58, 60, 88, 98. "[Defense counsel:] The only thing we know is [I.G.] said it happened and that's it? [Detective:] Correct." RP 98.

In September 2015, a first jury trial was held. At that trial, the defense elicited testimony from Sergeant Warren that he never interviewed Nemecio Lopez. Supp VRP¹ 13. Nemecio Lopez, I.G.'s stepfather, had lived with I.G. since she was four months old. RP 111-12. Andrea Payton, Nemecio's older daughter, had apparently made a sexually related allegation against her father Nemecio when Andrea was a teenager. CP 128-29. At the first trial, Sergeant Warren said he agreed it would have been important to know if someone else living in the home was an admitted child molester, but he never questioned I.G.'s mother or father about Nemecio Lopez's past. Supp VRP 21, 23, 29.

After hearing this evidence in the first trial, the first jury was unable to reach a verdict against Adrian Lopez. CP 119. This first jury informed the prosecutor after trial, "this mere insinuation alone was enough to make it impossible to render a verdict." CP 128. Over the defendant's objection, the court granted the State's motion to exclude this evidence at the second trial. RP 21-22, 24, 94; CP 128-29, 136-37. Defense counsel raised concern with this evidence being excluded, including both at trial and sentencing. *Id.*; 2RP 8-9; CP 211.

The second jury trial was held in December 2015. In addition to the testimonies detailed above, the court admitted a photograph of I.G. at

¹ "Supp VRP" refers to those testimonies transcribed from the first trial on September 17, 2015.

eight-years-old, over objection, to show what she looked like at the time of the alleged incidences, which defense counsel argued in closing was merely designed to “elicit sympathy” from the jury. RP 170, 267.

Later, during closing arguments, the prosecutor described the State’s burden of proof as follows:

The State has the burden of proof... Every element of every crime beyond a reasonable doubt. It’s a burden I accept and a burden I welcome. It’s a high burden. It’s more than 50 percent but it’s not a 100 percent. The reasonable doubt doesn’t mean beyond all doubt or a shadow of a doubt but beyond a reasonable doubt...

RP 248 (emphasis added).

The prosecutor then, over defense counsel’s objection, characterized I.G. as being “re-victimized and re-victimized and re-victimized... And re-victimized.” RP 290-91. The prosecutor and two law enforcement officers had previously referred to I.G. as a “victim” at least eight times during witness examination. RP 33, 34, 37, 39, 41, 44, 70.

After deliberating, the jury returned guilty verdicts as to the three counts put before it: first-degree child rape for the fort incident (count I), first-degree child rape for the oral sex incident (count II), and first-degree child molestation for the first touching (count IV). RP 294; CP 193-95.

Mr. Lopez, who had no criminal history, received a total, minimum standard range indeterminate sentence of 162 months to life. CP 227, 232. After confirming the defendant was physically able to work (2RP 11), the

court found the defendant could pay legal financial obligations and imposed costs totaling \$3,112.44 (CP 228-29). Mr. Lopez, who was indigent at the time of sentencing and remains indigent as of the date of this brief filing (see Declaration of Continued Indigency filed with Appellant’s Opening Brief), now timely appeals. CP 246, 247-48.

D. ARGUMENT

Issue 1: Whether the prosecutor committed misconduct that denied the defendant a fair trial when she quantified the State’s burden of proof as “more than 50 percent but it’s not a 100 percent.”

The prosecutor’s impermissible quantification of the State’s burden as “more than 50 percent but it’s not a 100 percent” requires a new trial in this case.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court may consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* An appellant can argue prosecutorial misconduct for the first time on review if it creates manifest error affecting a constitutional right. RAP 2.5(a)(3). A reviewing court analyzes the prosecutor’s statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

Prosecutorial misconduct may deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. Certain misconduct directly violates constitutional rights and requires reversal unless harmless beyond a reasonable doubt. *See e.g. State v. Monday*, 171 Wn.2d 667, 685, 257 P.3d 551 (2011). *But see State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010) (reversal may be required without applying constitutional harmless error analysis to improper prosecutorial arguments involving the application or undermining of the presumption of innocence).

Generally, to determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711. Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight, "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the

American Bar Association Standards for Criminal Justice std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Due process places the burden on the state to prove each element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 22; *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The presumption of innocence makes up the “bedrock principle upon which our criminal justice system stands.” *Johnson*, 158 Wn. App. at 685-86. A prosecutor’s misstatement of the State’s burden of proof “constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.” *Id.* A prosecutor commits misconduct by attempting to “quantif[y] the level of certainty required to satisfy its burden of proof.” *State v. Fuller*, 169 Wn. App. 797, 825-26, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013).

In *State v. Johnson, supra*, the prosecutor’s argument improperly quantified the State’s burden of proof. 158 Wn. App. at 682. There, the prosecutor argued, “You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.” *Id.* (emphasis added). The court explained the prosecutor’s arguments trivialized the State’s burden and focused on the degree of certainty the jurors needed to act. *Id.*

at 685. The court reversed the conviction, holding “a misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.” *Id.* at 685-86.

Similarly, the Supreme Court reversed the conviction in *State v. Lindsay, infra*, based on a prosecutor’s improper quantification of the reasonable doubt standard. *State v. Lindsay*, 180 Wn.2d 423, 434-36, 326 P.3d 125 (2014). There, a prosecutor stated, “you put in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it’s Seattle. You could have 50 percent of those puzzle pieces missing and you know it’s Seattle.” *Id.* at 436 (emphases added). Unlike cases where prosecutors suggested jurors could be certain beyond a reasonable doubt even with some pieces of the puzzle missing, the Court reversed in *Lindsay* because there was a reference to a number or percentage for proof that could satisfy the State’s burden. *Id.* (distinguishing *State v. Curtiss*, 161 Wn. App. 673, 250 P.3d 496 (2011), and *Fuller*, 169 Wn. App. at 826-28, where prosecutors did not refer to particular percentages or numbers and simply said a juror could be convinced beyond a reasonable doubt with some pieces of the puzzle missing).

Ultimately, our Supreme Court has made it clear “that the quantifying of the standard of proof” by referring to particular numbers or percentages is improper. *Lindsay*, 180 Wn.2d at 436. That is not to say that a prosecutor errs by telling the jury it “could be convinced beyond a reasonable doubt even without 100 percent certainty...;” such argument is not improper. *Fuller*, 169 Wn. App. at 827. However, the prosecutor does err by quantifying the level of certainty necessary to satisfy the minimum threshold of the beyond a reasonable doubt standard. *Lindsay*, 180 Wn.2d at 436.

At Mr. Lopez’s trial, the prosecutor argued the State’s burden of proof in pertinent part as follows:

The State has the burden of proof... Every element of every crime beyond a reasonable doubt. It’s a burden I accept and a burden I welcome. It’s a high burden. It’s more than 50 percent but it’s not a 100 percent. The reasonable doubt doesn’t mean beyond all doubt or a shadow of a doubt but beyond a reasonable doubt...

RP 248 (emphasis added).

This closing statement improperly quantified and trivialized the State’s burden of proving its case beyond a reasonable doubt. The problem with the prosecutor’s statement is not that it tells the jury it can be convinced beyond a reasonable doubt even without 100 percent certainty, which could be proper argument. *See Fuller*, 169 Wn. App. at 827.

Rather, the problem with the closing argument is the minimum threshold

the prosecutor references, quantifying the level of certainty for a jury to convict beyond a reasonable doubt as something “more than 50 percent...” RP 248. This argument, akin to those rejected in *Lindsay* and *Johnson*, *supra*, constituted misconduct that undermined Mr. Lopez’s presumption of innocence, the “bedrock upon which [our] criminal justice system stands.” *Johnson*, 158 Wn. App. at 682.

The misconduct in this case was sufficiently prejudicial to warrant a new trial. There is a substantial likelihood the verdict was affected by the improper quantification of the State’s burden of proof. The jurors in this case may well have been convinced more than 50 percent, but less than 100 percent, and believed some lesser quantity of proof similar to a “more probably than not” standard was sufficient to convict Mr. Lopez beyond a reasonable doubt.

The prosecutor’s improper comment in this case was sufficiently flagrant and ill-intentioned to warrant a new trial, and the prejudice to Mr. Lopez would not have been curable by a jury instruction. *Accord State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (Even though the jury was correctly instructed on the State’s burden of proof and that the lawyers’ statements were not evidence, minimizing or trivializing the State’s burden of proof was sufficiently prejudicial to reverse.)

Here, by the time of the trial in December 2015, the law regarding quantification of the State's burden had been made abundantly clear. While some courts hold it is not necessary "to have a published opinion holding that certain prosecutorial conduct is flagrant and ill-intentioned before such conduct warrants reversal of a conviction" (*Johnson*, 158 Wn. App. at 685), there was actually published case law prior to the trial in this case that made it clear it would be improper for the State to quantify its burden as "more than 50 percent." *See e.g. Lindsay*, 180 Wn.2d at 436; *Johnson*, 158 Wn. App. at 685-86. Given the settled law in this State, the prosecutor's improper comment can be considered nothing less than flagrant and ill-intentioned.

The prosecutor's office is associated with such an image of prestige that the jurors would have been inclined to convict Mr. Lopez beyond a reasonable doubt based on its reliance on the prosecutor's decision to prosecute in this case. *See* Commentary to the American Bar Association Standards for Criminal Justice std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706). After all, the prosecutor admitted to the jury toward the end of closing argument that one of the counts did not meet the beyond a reasonable doubt standard, while arguing that the other three counts did

meet the standard.² The dismissal of the one count by the prosecutor only exacerbated the prejudice from the prosecutor's improper quantification of the State's burden. It cast an aura of reliability over the prosecutor's office, suggesting the State would not be pursuing the three remaining counts against Mr. Lopez if there was anything less than proof beyond a reasonable doubt. This would lead to the jurors being more comfortable finding guilt beyond a reasonable doubt due to the special "fact-finding facilities presumably available to the [prosecutor's] office." *Id.*

Next, it is not necessarily clear that a constitutional harmless error analysis should be applied to improper prosecutorial arguments involving the application and undermining of the presumption of innocence.

Johnson, 158 Wn. App. at 686 (*c.f. State v. Warren*, 165 Wn.2d 17, 26n.3, 195 P.3d 940 (2008), *cert denied*, 129 S.Ct. 2007 (2009)); *Lindsay*, 180 Wn.2d at 434-36 (finding prosecutorial error by misstatement of the State's burden of proof and reversing without a harmless error analysis).

While Mr. Lopez would contend that the error in this case was sufficiently prejudicial to warrant reversal without conducting a harmless error analysis, the error in this case cannot be considered harmless if such an analysis is conducted.

² The prosecutor stated in closing: "the attempted rape happened. It didn't –strike that – the attempted rape there is not enough evidence. I will concede that attempt rape count three should be a verdict of not guilty." RP 263.

Indeed, the evidence was not so overwhelming that any jury would have convicted Mr. Lopez regardless of the State's misconduct. The initial jury was unable to reach a verdict based on the evidence presented. There was no evidence to corroborate I.G.'s accusations against Mr. Lopez. RP 47, 58, 60, 88, 98. The child's behavior never changed in the years after the alleged misconduct, and she continued to exhibit a good, familial relationship with her stepbrother over the years with no additional alleged incidences. RP 133-35, 145, 159-63, 168, 215-16. I.G. showed no signs to her family for two years that she had been offended against in any way. *Id.* Even after her "disclosures," I.G.'s sister witnessed I.G. running excitedly to see Mr. Lopez. RP 224, 226. I.G.'s description of the details of the inappropriate touching did vary between interviews, which defense counsel repeatedly pointed out to the jury. RP 43, 67, 107-08, 178, 203-12, 230-32, 271-76, 281. Mr. Lopez never admitted any inappropriate touching and still proclaimed his innocence through sentencing. CP 211. A reasonable juror could have had doubt about whether the offenses occurred.

As with most rape cases, the evidence in this case was almost entirely based on the allegations of the complaining witness, which makes errors relating to Mr. Lopez's presumption of innocence and the State's burden of proof even more significant. *See State v. Montague*, 31 Wn.

App. 688, 690-92, 644 P.2d 715 (1982) (discussing prejudicial impact of errors during testimony when the State’s case relies almost entirely on the complainant’s allegations). The prosecutor’s improper argument quantifying the State’s burden of proof constituted flagrant, ill-intentioned, and prejudicial misconduct. *Glasmann*, 175 Wn.2d at 704. Mr. Lopez’s convictions must be reversed. *Id.*

Issue 2: Whether repeated references to the child as a “victim” by the prosecutor and law enforcement witnesses, and additional commenting on the evidence by the prosecutor during closing argument, should result in a new trial.

It was arguable in this case whether I.G. was actually a “victim” of any offense, let alone an offense committed by Mr. Lopez. Therefore, the repeated references to I.G. as a “victim” by the prosecutor (including over objection during closing argument), and by law enforcement, constituted improper opinion testimony that violated Mr. Lopez’s constitutional right to a fair trial. Also, the prosecutor’s statements during closing argument when she changed her earlier argument and informed the jury there was not sufficient evidence of count III, even though she expressed that there was sufficient evidence of the other counts,³ constituted improper commenting on the evidence. The prosecutor and law enforcement

³ Portion of State’s closing argument: “Then the oral sex incident and the attempted rape happened. It didn’t – strike that – the attempted rape there is not enough evidence. I will concede that attempt rape count three should be a verdict of not guilty but considered in [I.G.’s] testimony the fact that this kid not only had to go through what she went through...” RP 263-64.

witnesses improperly invaded the fact-finding province of the jury and denied Mr. Lopez his constitutional right to a fair trial. This error was sufficiently prejudicial in this particular case to warrant a new trial.

As a threshold matter, an accused's constitutional right to a "fair trial" implies a "trial in which the attorney representing the state does not throw the prestige of his public office...and the expression of his own belief of guilt into the scales against the accused." *Monday*, 171 Wn.2d at 677 (internal citations omitted). "Although a prosecutor has wide latitude to argue reasonable inferences from the evidence..., a prosecutor must 'seek convictions based only on probative evidence and sound reason...'" *Glasmann*, 175 Wn.2d at 703-04 (internal quotations omitted). *See e.g. State v. Henderson*, 100 Wn. App. 794, 804, 998 P.2d 907 (2000) (reversible error for prosecutor to interrupt defense counsel's witness examination and state: "This was not an altercation. It was a robbery.") Where a prosecutor commits misconduct, reversal is warranted where the defendant shows "a substantial likelihood that the misconduct affected the jury verdict." *Id.*

Besides a prosecutor being limited from commenting on the evidence or offering an opinion on guilt, witnesses too are subject to similar restrictions. "Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such

testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury].” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (internal quotation marks omitted). “Opinion on the guilt of the defendant may be reversible error because it violates the defendant’s ‘constitutional right to a jury trial, which includes the independent determination of the facts by the jury.’” *State v. George*, 150 Wn. App. 110, 117n.2, 206 P.3d 697, *review denied*, 166 Wn.2d 1037 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007)).

Testimony or argument that is not a direct comment on the defendant’s guilt or the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *See e.g. City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). But, witnesses may not offer improper opinions on the defendant’s guilt, either directly or by inference. *King*, 167 Wn.2d at 331. “Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an ‘ultimate issue’ will generally depend on the specific circumstances of each case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.” *Heatley*, 70 Wn. App. at 579.

To illustrate, in *State v. Carlin*, the defendant was charged with second-degree burglary after a tracking dog followed his scent. *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn. App. 573. On appeal, the defendant argued it was improper for the dog handler officer to offer an opinion on guilt by testifying that the dog had followed a “fresh guilt scent.” *Carlin*, 40 Wn. App. at 703. The Court of Appeals agreed, noting, “Particularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *Id.*

Where such constitutional error occurs, it is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Quaale*, 182 Wn.2d 191, 201-02, 340 P.3d 213 (2014).

The first issue of improper commenting in this case pertains to the prosecutor’s and law enforcement officers’ repeated references to I.G. as a “victim” and having been “re-victimized.” RP 33, 34, 37, 39, 41, 44, 70, 290-91.

Washington State has not addressed whether the use of the word “victim” constitutes an improper opinion or comment on the evidence in these such circumstances. The only published case known to the

Appellant addressing the use of the word “victim” was in a rape case where the court had read the parties’ stipulation to the jury that happened to include the word “victim.” *See State v. Alger*, 31 Wn. App. 244, 248-49, 640 P.2d 44 (1982). The reviewing court did not decide whether an erroneous judicial comment on the evidence had occurred, and instead determined that the trial court’s single reference to the complaining witness as “the victim,” while “neither encouraged nor recommended...,” did not prejudice the defendant’s right to a fair trial. *Id.*

In an unpublished opinion, this Court acknowledged there are some circumstances where use of the word “victim” may constitute improper opinion testimony. *State v. McFarland*, No. 32873-2-III, 2016 WL 901088 at *3-4 (Wash. Ct. App. Mar. 8, 2016).⁴ This Court referenced other States that have addressed the issue and found the use of the term “victim” improper when it invaded the province of the jury on an ultimate guilt determination. *Id.*

For example, in Vermont, the Supreme Court explained, “where the commission of a crime is in dispute and the core issue is one of the complainant’s credibility, it is error for a trial court to permit a police detective to refer to the complainant as the ‘victim.’” *State v. Wigg*, 889 A.2d 233 (Vt. 2005). In Utah, the Court held it may have been error to

⁴ *See* GR 14.1, effective September 1, 2016, permitting citation to unpublished opinions filed on or after March 1, 2013, as nonbinding authorities.

deny a motion in limine prohibiting the State and witnesses from referring to the complaining witness as a “victim” when the existence of a crime was at issue. *State v. Devey*, 138 P.3d 90, 95-96 (Ut. 2006). In Connecticut, the Court held that “in a case where there is a challenge as to whether a crime occurred, the repeated use of the words victim, murder and murder weapon is improper...” *State v. Albino*, 24 A.3d 602 (Ct. 2011). In Delaware, the court held it was improper for the prosecutor to refer to the complaining witness in a rape case as the “victim” when the defendant had admitted to sexual intercourse but had claimed the intercourse was consensual. *Jackson v. State*, 600 A.2d 21, 24 (Del. 1991). The court explained:

The term “victim” is used appropriately during trial when there is no doubt that a crime was committed and simply the identity of the perpetrator is in issue. We agree with defendant that the word “victim” should not be used in a case where the commission of a crime is in dispute...

Jackson, 600 A.2d at 24. *Accord Veteto v. State*, 8 S.W.3d 805, 816-17 (Tex. App. 2000), *abrogated on other grounds by State v. Crook*, 248 S.W.3d 172 (2008) (trial court’s reference to complaining witness as “victim” rather than “alleged victim” constituted an improper comment on the weight of the evidence, because the sole issue in the defendant’s case was whether he committed the various assaults.)

Here, the prosecutor committed misconduct, and the trial court erred by allowing it, when the prosecutor referred to I.G. as the “victim” during witness examination (RP 34) and then said in closing argument over objection that I.G. was “re-victimized and re-victimized and re-victimized... And re-victimized” (RP 290-91). The prosecutor’s statements constituted a comment on the evidence that invaded the fact-finding province of the jury on the important issue of whether I.G. was, in fact, a “victim” of any offense. This was not a case where the evidence overwhelmingly proved I.G. was a “victim” of some offense so the only debatable issue before the jury was the identity of the perpetrator. *C.f.*, *McFarland*, 2016 WL 901088 at *4-5. Rather, the very issue of whether I.G. was indeed a “victim” of any crime at all was questioned by the defense and should have been left to the untainted decision of the jury.

As to the law enforcement officers’ testimonies, their improper references to I.G. as a “victim” similarly deprived Mr. Lopez of his constitutional right to a fair trial. *See* RP 33, 34, 37, 39, 41, 44, 70. Although no objection was made during the testimonies, such a manifest constitutional error may be raised for the first time on appeal pursuant to RAP 2.5(a)(3). “A constitutional error is manifest where there is prejudice, meaning a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial.” *State v.*

Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015) (citing *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

Here, the prosecutor and two law enforcement officers described I.G. as a “victim” at least eight times during witness examination. RP 33, 34, 37, 39, 41, 44, 70. These descriptions of I.G. by the law enforcement officers and the prosecutor constituted improper comments on the evidence that invaded the fact-finding province of the jury. It was for the jury to decide whether I.G. was the “victim” of any crime. Referring to the child as a “victim” invaded the province of the jury to determine whether any crime had ever occurred against I.G. Unlike cases where it is clear an offense was committed against a person, and the only question is the perpetrator’s identity, this case was not undisputed that any offense had been committed against I.G. so as to make her a “victim.” Moreover, the law enforcement officers’ and prosecutor’s description of I.G. as a “victim” was particularly prejudicial in this case given the aura of reliability these persons had before the jury. *See King*, 167 Wn.2d at 331. Their invasion into the fact-finding province of the jury violated Mr. Lopez’s constitutional right to a fair trial by an impartial jury.

Next, it was also an improper comment on the evidence when the prosecutor initially argued there was sufficient evidence to establish all four charged counts beyond a reasonable doubt (RP 248-263), but then

changed her mind and informed the jury she did not think there was sufficient evidence to prove count III beyond a reasonable doubt (RP 263-64). This effectively injected the prosecutor's personal belief on the strength of the evidence, positioning her as an extra juror in the case. The prosecutor's statements that one charge lacked sufficient evidence, whereas the other charges had been sufficiently proven, effectively expressed the prosecutor's subjective belief that I.G. was a "victim" and that the defendant was guilty of at least three separate sex offenses.

The prosecutor's personal opinion on the defendant's guilt certainly had a practical and identifiable consequence in this trial: it allowed the jury to return the guilty verdict that the first jury was unable to reach by trusting the prosecutor's personal representation on the strength of the evidence.

Finally, the improper commenting errors were not harmless beyond a reasonable doubt; it is not clear the jury would have reached the same decision absent the errors. Not only were I.G.'s accusations uncorroborated by any other evidence, but the jury had reason to doubt I.G.'s allegations given that her behavior (including with Mr. Lopez) never changed after the alleged incidences. The child's varying description of events; time that had lapsed between the alleged offenses, disclosures, and interviews; and I.G. behaving as she always had with her

stepbrother, all gave the jury reason to doubt Mr. Lopez's guilt in this case. Indeed, the first jury was unable to reach a verdict on markedly similar evidence.

The prosecutor and law enforcement officers provided the jury their opinions that I.G. was indeed a "victim" and that Mr. Lopez was guilty of counts I, II, and IV, impeding the jury's independent deliberation duties. The improper comments by the prosecutor and witnesses deprived Mr. Lopez of his constitutional right to a fair trial, requiring reversal and retrial. *King*, 167 Wn.2d at 329-30, 337 (setting forth this remedy).

Issue 3: Whether the court abused its discretion by admitting, over defense objection, an irrelevant and unduly prejudicial photograph of the child at eight-years-old, which was designed to merely appeal to the jury's emotions rather than capacity for reason.

The trial court abused its discretion by overruling a defense objection and admitting an irrelevant, unduly prejudicial photograph of I.G. at eight-years-old (RP 170), designed to appeal to the jury's sympathies.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). "A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. A court bases its decision on untenable grounds or

reasons when the court applies the wrong legal standard or relies on unsupported facts.” *Id.* (internal citations omitted).

Relevant evidence is generally admissible at trial. ER 402.

Relevant evidence is “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.

“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403.

“In-life” photographs have been deemed relevant and admissible when it is necessary to establish a victim’s identity. *State v. Finch*, 137 Wn.2d 792, 810-12, 975 P.2d 967 (1999); *State v. Adams*, 138 Wn. App. 36, 50, 155 P.3d 989 (2007). For example, in both *State v. Adams* and *State v. Finch*, the courts found that in-life photographs were properly admitted in order to prove the identity of the deceased victims. *Id.*

But here, there was no question as to I.G.’s identity in this matter; indeed, she testified regarding her accusations, and there was no allegation that some other person could have been the victim of the charged offenses. How I.G. looked at age eight was not relevant to prove any fact in issue. While it was relevant how old I.G. actually was at the time of the alleged

inappropriate touching (and evidence of I.G.'s date of birth was provided multiple times during trial to establish this fact, RP 112, 141, 173), it made no difference what I.G. looked like as an eight-year-old girl. If I.G. looked like a much older child when she was eight-years-old, or if she looked like a much younger child, this would not affect the decision on any element to convict, which focusses on the child's actual age rather than her appeared age. *See* RCW 9A.44.073, .083. The photograph was not relevant to prove any fact in issue, and the trial court abused its discretion by overruling defense counsel's objection to exclude it.

The contested photograph in this case was merely designed to elicit sympathy from the jury for I.G. Accordingly, the photograph should have also been excluded pursuant to ER 403, since the unduly prejudicial nature of the photograph exceeded any argued probative value. *See Finch*, 137 Wn.2d at 811 ("Once the court has determined that [in-life photograph] evidence is relevant, then the court must determine whether its probative value is substantially outweighed by unfair prejudice to the defendant.") The State must have believed the jury was more inclined to convict Mr. Lopez when viewing the photograph of an eight-year-old child, rather than simply seeing the accusing teenager on the stand (I.G. turned 13-years-old two weeks after trial, RP 173). But the jury was required to render a

verdict free of passion and prejudice based on admissible and relevant evidence, which would have been difficult after viewing the photograph.

The trial court's decision to admit the in-life photograph of I.G. conflicted with ER 401 and ER 403. Mr. Lopez acknowledges such an evidentiary error is "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wash.2d 591, 599, 637 P.2d 961 (1981). "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, there is a reasonable probability the admission of I.G.'s in-life photograph at eight-years-old materially affected the outcome of the trial. This was not a particularly strong case. Not only did the first trial end in a hung jury, but the second jury seemed to have misgivings while deliberating. *See* CP 192 (jury asking to review the video of I.G.'s initial child forensics interview). The only direct evidence to support the charges in this case was the child's testimony. Law enforcement acknowledged there was no other evidence to corroborate the child's allegations. RP 47, 58, 60, 88, 98. It had been two years since the alleged offenses before the child ever made any accusation against Mr. Lopez, and the details

described by the child changed between a series of interviews that spanned over two years. RP 43, 67, 107-08, 178, 203-12, 230-32, 271-76, 281.

The child's mother and stepfather said I.G.'s behavior never changed after the alleged incidences occurred in 2011, Mr. Lopez continued his relationship with the family without incident or sign that any offense had occurred, and I.G.'s adult sister said the child remained excited to see Mr. Lopez, even after making her allegations. RP 133-35, 145, 159-63, 168, 215-16, 224, 226.

The improper admission of the in-life photograph in this case cannot be considered "of minor significance in reference to the overall, overwhelming evidence as a whole." *Bourgeois*, 133 Wn.2d at 403.

There was certainly not "overwhelming evidence" of Mr. Lopez's guilt so that the prejudicial photograph was "of minor significance." Accordingly, this matter should be remanded for a new trial.

Issue 4: Whether the court erroneously limited the defendant's constitutional right to present a defense when it refused to allow cross examination about the lack of investigation into another suspect living in the child's home.

In the first trial, evidence was elicited from the defense that no investigation of I.G.'s stepfather, Nemecio Lopez, was ever pursued, despite defense concern about Nemecio being an admitted child molester of I.G.'s older sister Andrea and even though Nemecio had lived in the same home as I.G. throughout the period of I.G.'s disclosures. After the

first trial, the jury informed the prosecutor that this evidence was critical to it being unable to reach a verdict in the first trial. CP 128-29. But the trial court refused to allow this same evidence at the second trial. Defense counsel stated the defense was not necessarily claiming Nemecio Lopez was a third party perpetrator, but counsel did seek to cross examine officers as to why and the fact that Nemecio Lopez was never investigated. RP 21, 24, 26, 94; Supp VRP 21, 23, 29. Over defense counsel's objection, the trial court refused to allow questioning regarding this lack of investigation of Nemecio Lopez at the second trial. *Id.* But the court erred by infringing upon Mr. Lopez's constitutional right to thoroughly cross examine the witnesses against him and to present a defense that would have given the jury reason to doubt Mr. Lopez's guilt. Alternatively, Mr. Lopez's constitutional right to present a defense was denied, because sufficient foundation was in fact laid to admit "other suspect evidence."

- a. The court erred by denying Mr. Lopez the right to cross examine the State's witnesses on the thoroughness of their investigation.

Both the United States and Washington State Constitutions guarantee the right to present a defense. U.S. Const. Amend. VI; Wash. Const. art. I, §22; *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) ("The right to

confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions.”) “At a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). “A defendant’s right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

A full and meaningful confrontation of the State’s witnesses “helps assure the accuracy of the fact-finding process.” *Darden*, 145 Wn.2d at 620 (internal citations omitted). The purpose of a meaningful cross-examination of adverse witnesses is to “test the perception, memory, and credibility of witnesses.” *Id.* “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.” *Id.* “As such, the right to confront must be zealously guarded.” *Id.*

Generally, as a matter of constitutional due process of law, a trial court must allow a defendant to present his defense theory of the case, including through cross examination, so long as the law and evidence support it. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005); *Darden*, 145 Wn.2d at 620-21. “However, the right to cross-examine

adverse witnesses is not absolute.” *Darden*, 145 Wn.2d at 620-21.

“Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative.” *Id.* at 621 (citing *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965)).

Ultimately, “the [defendant’s] evidence must be of at least minimal relevance.” *Darden*, 145 Wn.2d at 622 (“There is no right, constitutional or otherwise, to have irrelevant evidence admitted.”)

Relevant evidence is “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. To be relevant, the evidence need only provide “a piece of the puzzle.” *Bell v. State*, 147 Wn.2d 166, 182, 52 P.3d 503 (2002). “The threshold to admit relevant evidence is very low.” *Darden*, 145 Wn.2d at 622 (internal citations omitted). “Even minimally relevant evidence is admissible.” *Id.* On the other hand, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Darden*, 145 Wn.2d at 625 (quoting ER 403).

Claims that a constitutional right has been violated are reviewed de novo as questions of law. *Cayetano-Jaimes*, 190 Wn. App. at 295. A trial

court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Id.* "A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. A court bases its decision on untenable grounds or reasons when the court applies the wrong legal standard or relies on unsupported facts." *Id.* (internal citations omitted). "[A] court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion." *Darden*, 145 Wn.2d at 619 (internal citations omitted). "However, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Id.*

Here, the trial court erred by preventing the defense from cross examining Detective Davis about his lack of investigation of I.G.'s stepfather, Nemecio Lopez, even though similar sexual incidents had previously been alleged by I.G.'s older sister Andrea against Nemecio. CP 128-29. Nemecio Lopez had lived with I.G. from the time she was four months old through the time of trial, yet he was never questioned as a possible suspect in this case. RP 112. At the first trial, defense counsel was permitted to question Sergeant Warren about this lack of investigation of Nemecio. Supp VRP 21, 23, 29. But counsel was not permitted to

conduct similar questioning at the second trial. RP 21-22, 24, 94; CP 128-29, 136-37.

The threshold for admitting relevant evidence is relatively low and, in this case, the lack of investigation did tend to make the existence of a material fact – whether Mr. Adrian Lopez was the true perpetrator – less true than without the evidence. Indeed, the evidence that Nemecio Lopez was not investigated cast doubt in this case in the first trial, making it less probable Mr. Lopez was guilty of the alleged offenses.

Mr. Lopez had the right to put evidence before the jury that might influence its determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. at 56. Obviously, a lack of investigation into Nemecio Lopez influenced the first jury’s determination of guilt. The evidence was relevant to disprove a material fact. Given the low threshold for admitting relevant evidence, the court abused its discretion by denying Mr. Lopez a meaningful cross examination. This Court’s de novo review of the constitutional error in this case should result in a new trial. The lack of investigation into Nemecio Lopez was the missing “piece of the puzzle” that should have been put before the jury. *Bell v. State*, 147 Wn.2d at 182.

- b. Alternatively, Mr. Lopez was denied his constitutional right to present “other suspect evidence” after laying a sufficient foundation connecting Nemecio Lopez to the offenses.

Mr. Lopez's defense attorney initially stated the defense was not seeking to admit third party perpetrator evidence. RP 21, 24, 26, 94. Defense counsel seemed to offer a compromise not to pursue a third party perpetrator defense, so long as he was permitted to question the State's witnesses about a lack of investigation into Nemecio Lopez. *Id.* Counsel then objected when such questioning was not permitted. RP 94.

Mr. Lopez now argues a manifest error affecting his constitutional right to present a defense was made when the court granted the State's motion in limine to exclude substantive evidence of Nemecio Lopez as the other suspect. Sufficient foundation was laid to admit evidence of Nemecio Lopez as the "other suspect" of the offenses against I.G.

A party may challenge a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). To meet this test, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). In order for an error to be "manifest" under RAP 2.5(a)(3), a showing of actual prejudice is required. *Id.* at 99 (internal quotations omitted). "To demonstrate actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *Id.*

A trial court's decision to exclude other suspect evidence is reviewed for abuse of discretion. *State v. Rafay*, 168 Wn. App. 734, 800, 285 P.3d 83 (2012). An erroneous evidentiary ruling that violates a defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 377n.2, 325 P.3d 159 (2014).

“A criminal defendant has a constitutional right to present a defense consisting of relevant, admissible evidence.” *State v. Mezquia*, 129 Wn. App. 118, 124, 118 P.3d 378 (2005) (citing *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)). “In order to be relevant, and therefore admissible, the evidence connecting another person with the crime charged must create a trail of facts or circumstances that clearly point to someone other than the defendant as the guilty party.” *Id.* (citing *State v. Maupin*, 128 Wn.2d 918, 928, 913 P.2d 808 (1996)). “The evidence must establish a nexus between the other suspect and the crime.” *Id.* (citing *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993)).

“Some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” *Franklin*, 180 Wn.2d at 381. “[T]his inquiry, properly conducted, ‘focuse[s] upon whether the evidence offered tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the guilt of the

third party beyond a reasonable doubt.”” *Id.* at 381 (quoting with approval *Smithart v. State*, 988 P.2d 583, 588, n.21 (Alaska 1999)) (emphasis in original). As explained by our ninth circuit federal court,

[I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.

...Accordingly, it is the role of the jury to consider the evidence and determine whether it presents ‘all kinds of fantasy possibilities,’ as the district court concluded, or whether it presents legitimate alternative theories for how the crime occurred.

United States v. Vallejo, 237 F.3d 1008, 1023 (9th Cir.), *opinion amended on denial of reh’g*, 246 F.3d 1150 (9th Cir. 2001) (quoting 1A John Henry Wigmore, *Evidence in Trials at Common Law* §139 (Tillers rev. ed.1983).

Where “the prosecution’s case against the defendant is largely circumstantial, then the defendant may neutralize or overcome such evidence by presenting sufficient evidence of the same character tending to identify some other person as the perpetrator of the crime.” *State v. Clark*, 78 Wn. App. 471, 478-79, 898 P.2d 854 (1995). Ultimately, there is no per se requirement to establish each of “motive, ability, opportunity and/or character evidence...” in order to admit other suspect evidence. *See Franklin*, 180 Wn.2d at 372, 380-81. *But see Rehak*, 67 Wn. App. at 163; 128 Wn.2d at 925 (mere evidence of motive or opportunity is not enough without showing some step taken by the third party indicating an

intention to act). Rather, some combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime. *Franklin*, 180 Wn.2d at 380-81. The general standard is whether there is evidence “tending to connect” someone other than the defendant with the crime. *Id.*

In *Franklin*, the trial court excluded evidence in a cyber stalking case that the defendant’s live-in girlfriend had the motive (jealousy), the means (access to the computer and email accounts at issue), and the prior history (of sending earlier threatening emails to the victim), to support the defense theory of the case. 180 Wn.2d at 372. The Supreme Court stated that the trial court had “excluded evidence showing that another person had the motive and opportunity to commit the crime. More than that, the excluded evidence, taken together, amounts to a chain of circumstances that tends to create reasonable doubt as to Franklin’s guilt.” *Id.* at 382. The Court held this exclusion of evidence to be constitutional error. *Id.* The Court noted, “If the jury had been allowed to consider all of the other suspect evidence, it may have reached a different verdict.” *Id.* at 383.

Here, the court erred by excluding evidence of Nemecio Lopez as the possible perpetrator of the offenses against I.G. Regardless of whether the proffered evidence would have established Nemecio Lopez’s guilt beyond a reasonable doubt, the evidence of Nemecio Lopez molesting

I.G.'s sister (CP 128-29) and not ever being questioned as a possible suspect as to I.G. (Supp VRP 21, 23, 29) at least tended to create at least a reasonable doubt as to whether Mr. Lopez had molested I.G. *Accord Franklin*, 180 Wn.2d at 381. Like Professor Wigmore suggested when analyzing this issue, a trial court should not attempt to decide for the jury whether its doubt is purely speculative; rather, the court should afford the accused every opportunity to create that doubt in the jury with evidence that someone else created the crime. *See Vallejo*, 237 F.3d at 1023.

In this case, the prosecution's case against the defendant was largely circumstantial, other than I.G.'s testimony. There was no physical evidence or any witness to corroborate any of I.G.'s allegations, and I.G.'s recounting of the details of the alleged incidences varied between interviews. RP 43, 67, 107-08, 178, 203-12, 230-32, 271-76, 281. Law enforcement acknowledged that no corroboration of the allegations was established and the "only thing we know is [I.G.] said it happened..." RP 98. Given that the case against Mr. Lopez was largely circumstantial, he should have been permitted to "neutralize or overcome such evidence by presenting sufficient evidence of the same character [of Nemecio Lopez] tending to identify [that] other person as the perpetrator of the crime." *See Clark*, 78 Wn. App. at 478-79.

This was not a case of Mr. Lopez showing Nemecio Lopez had the mere opportunity to commit the offense. *C.f., Maupin*, 128 Wn.2d at 925. It is true Nemecio Lopez had the opportunity to molest I.G., given that he had lived in the same household with her since she was four months old. RP 112. But, more than that, the omitted evidence suggested Nemecio Lopez had the inclination for perpetrating sexual offenses. Had defense counsel been permitted to question witnesses on this issue, the evidence would have showed Nemecio Lopez had previously molested I.G.'s sister Andrea, which is a step taken that would tend to show an intention on the part of Nemecio Lopez to have also committed similar offenses against I.G. *See Franklin*, 180 Wn.2d at 380-81. Like in *Franklin, supra*, Nemecio Lopez had opportunity to offend against I.G. (lived in the same home as I.G.), he had the motive or character for the offense (an inclination toward molesting a daughter), and evidence would have showed a prior history of actually committing a similar offense. This evidence was not so speculative that it should have been kept from the jury. Ultimately, the jury was in the best position to evaluate whether the proffered evidence gave it reason to doubt Mr. Lopez's guilt.

Finally, the error of excluding other suspect evidence was prejudicial and harmful so as to warrant reversal. There can be no doubt that the exclusion of evidence had practical and identifiable consequences

at trial; and, it is not clear the jury would have reached the same decision absent the error. Indeed, the first jury informed the prosecutor it was unable to reach a verdict after considering this very evidence that was excluded in the second trial. CP 128-29. Due to the constitutional error, this matter should be reversed and remanded for a new trial.

Issue 5: Whether the court erred by admitting vouching testimony designed to bolster I.G.'s credibility, over objection.

The court erred by permitting Nemecio Lopez to testify to I.G.'s character for truthfulness, over objection. RP 122. The prejudice from this error was amplified by the indirect comments on I.G.'s veracity by Ms. Murstig and I.G.'s mother. The error was also exacerbated by the needless presentation of cumulative background testimony from the adults to whom I.G. made her disclosures. A new trial is warranted.

“Generally, no witness may offer testimony in the form of an opinion regarding a witness’s credibility; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007), *aff’d on other grounds*, 165 Wn.2d 870 (2009) (internal citations omitted). “Opinion testimony is testimony based on one’s belief or idea rather than on direct knowledge of the facts at issue.” *Id.* Moreover, a “prosecutor commits misconduct when his or her cross examination seeks to compel a witness’ opinion as to whether another witness is telling the truth.” *State*

v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (internal citations omitted). “Such questioning invades the jury’s province and is unfair and misleading.” *Id.*

“To determine whether a statement is impermissible opinion testimony or a permissible opinion pertaining to an ultimate issue, courts must consider ‘the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact.’” *State v. We*, 138 Wn. App. 716, 723, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (internal cites omitted). It is “clearly improper” for a prosecutor to inquire whether a parent believes his or her children are telling the truth about sexual allegations. *Jerrels*, 83 Wn. App. at 506-08 (explaining, “A mother’s opinion as to her children’s veracity could not easily be disregarded even if the jury had been instructed to do so.”)

In *State v. Sutherby*, a testifying mother expressed her opinion on her daughter’s credibility, stating the child had certain mannerisms when lying. 138 Wn. App. at 617. The Court held the “mother’s testimony regarding her daughter’s credibility was wholly improper.” *Id.* Further, “the error in admitting it deprived Sutherby of his right to have the jury determine [the child’s] credibility based on its knowledge and experience without regard to the mother’s practice of judging E.K.’s veracity by the

child's smile." *Id.* at 617-18. The court found the error was not harmless and reversed the convictions. *Id.* at 618.

Here, the defense objected to no avail when the prosecutor asked, "Is [I.G.] the type of child that would make up a story to get attention?" RP 122. The trial court allowed the question over objection, and I.G.'s stepfather answered, "No." *Id.* This testimony was "wholly improper." *See Sutherby*, 138 Wn. App. at 617. Nemecio Lopez's statement expressed an opinion on I.G.'s credibility, effectively telling the jury I.G. was truthful in her allegations and not the type of child who would have made up her accusations against Mr. Lopez. This testimony vouched for I.G.'s credibility and invaded the fact-finding province of the jury, thereby depriving Mr. Lopez of his constitutional right to a fair trial.

The court's error cannot be deemed harmless. First, Nemecio Lopez did not testify in the first trial where the first jury was hung. *See* CP 104-11 (trial minutes). The second jury heard Nemecio Lopez's testimony vouching for I.G.'s credibility and was then able to reach a verdict of guilty. Under these circumstances, it is not clear the second jury would have reached the same decision absent the error.

Furthermore, Mr. Lopez was prejudiced by the vouching for I.G.'s credibility, especially when considering the fact that multiple adults were called to offer cumulative testimony about I.G. making her disclosures to

them, even though they too, like Nemecio Lopez, lacked any personal knowledge of the events, thereby making I.G.'s allegations appear more credible.⁵ Indeed, numerous witnesses were called to testify about I.G. making her disclosures to them, even though none of these witnesses had any personal knowledge of the events.⁶ I.G.'s mother even testified she knew of no reason I.G. would have made up the accusations against Mr. Lopez, and Ms. Murstig assured the jury that she made I.G. promise to tell the truth about her accusations against Mr. Lopez. RP 172, 103.

Ultimately, “[a] child's allegations of sexual abuse can have a powerful emotional impact on a jury.” *State v. Jones*, 112 Wn.2d 488, 495, 772 P.2d 496 (1989). But testimony that a child repeated her allegations out of court to various persons is not a measure of accuracy or helpful to the jury. *See* Stephen J. Ceci and Richard D. Friedman, *The Suggestability of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 41 (2000). A witness' accusations are “not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily

⁵ No objection was made to the cumulative presentation of this evidence (see ER 403, excluding evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or the needless presentation of cumulative evidence). But Mr. Lopez does ask this Court to consider this cumulative evidence to the extent that it had a high prejudicial impact when considering the error that was preserved: Nemecio Lopez vouching for I.G.'s credibility.

⁶ Sergeant Scott Warren (RP 36-40, 46-47), Detective Jonathan Davis (RP 67), child forensic interviewer Martha Murstig (RP 107-08), I.G.'s mother Ms. Gustafson (RP 146), and I.G.'s stepfather Mr. Nemecio Lopez (RP 119).

rejected.” *Pardo v. Florida*, 596 So.2d 665, 668 (Fl. 1992) (citing 4 John H. Wigmore, *Evidence* § 1124 (Chadbourn rev. 1972)). The rationale for this rule seems axiomatic:

[Without such safeguarding rules,] a witness’s testimony could be blown up out of all proportion to its true probative force by telling the same story out of court before a group of reputable citizens, who would then parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens but was solely founded upon the integrity of the said witness. This danger would seem to us to be especially acute in criminal cases like the present where the prosecutrix is a minor whose previous out-of-court statement is repeated before the jury by adult law enforcement officers... psychologists,... specialists, ...and the like... By having the child testify and then by routing the child’s words through respected adult witnesses...there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.

Id. (internal quotations omitted) (emphases added).

Mr. Lopez was prejudiced from the improper admission of Nemecio Lopez’s vouching testimony, particularly when considering the presentation of cumulative testimony that lacked any foundation of personal knowledge of the charges and only made I.G. seem more credible given the number of times she made her disclosures out of court.

Although counsel did not object to the presentation of this cumulative evidence, the impact of bolstering I.G.’s credibility with this evidence was especially damaging when considering the error that was preserved as to Nemecio Lopez’s vouching statement.

Issue 6: Whether the court’s finding that Mr. Lopez had the ability to pay legal financial obligations, and its imposition of \$2,312.44 in discretionary costs against the defendant, was unsupported by the record and law.

The court’s finding that Mr. Lopez “is an adult and is not disabled and therefore has the ability or likely future ability to pay legal financial obligations...” (CP 228) is not supported by substantial evidence in the record, does not complete the required inquiry into whether costs should have been imposed, and is inconsistent with Mr. Lopez’s indigent status. The court’s erroneous finding, along with the \$2,362.44 in discretionary court costs, should be set aside. (CP 228-29)

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). “Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original).

The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant's current or future ability to pay based on the particular facts of the defendant's case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The record must reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant's other debts, including any restitution. *Id.* at 838-39.

“[T]he court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)) (emphasis added). “[T]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful

recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants' inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants' lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, however, it “is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, Mr. Lopez faces a minimum indeterminate sentence of 162 months to life. CP 232. Although the trial court did learn Mr. Lopez was physically capable of working (2RP 11), this information was no substitute for the required inquiry the court should have made before finding Mr. Lopez had the ability to pay LFOs. Indeed, the trial court was required to consider other important factors besides Mr. Lopez's physical capability, such as the incarceration Mr. Lopez faced, his debts, his financial resources, and the nature of the burden that LFOs would impose on Mr. Lopez when he attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant's indigent status, the trial court should have "seriously question[ed]" Mr. Lopez's ability to pay LFOs. *Id.* The cursory questioning done at sentencing in this case did not satisfy the inquiry that is supposed to precede a finding on Mr. Lopez's ability to pay LFOs.

The court's finding of Mr. Lopez's ability to pay LFOs is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343. Because Mr. Lopez is indigent, the court should have "seriously question[ed Mr. Lopez's] ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. The court entered a finding on Mr. Lopez's ability to pay that was not supported by a sufficient, individualized review of the defendant's circumstances and was not supported by substantial

evidence in the record. The finding on Mr. Lopez's ability to pay LFOs should be set aside, and the discretionary court costs should be stricken from Mr. Lopez's judgment and sentence.

Issue 7: Whether this Court should deny the imposition of any costs against Mr. Lopez on appeal.

Mr. Lopez preemptively objects to any appellate costs should the State prevail on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Lopez was found indigent by the trial court. CP 247-48. According to his Report as to Continued Indigency, contemporaneously filed with this opening brief, Mr. Lopez remains indigent and unable to pay costs that may be imposed on appeal. He owns no real property, owns no personal belongings, has no income from any source, owes \$6,000 in debt, and is unable to contribute any amount toward costs if awarded to the State. *See* Appellant's Declaration on Continued Indigency. The imposition of costs under these circumstances would be inconsistent with those principles enumerated in *Blazina*. *See Blazina*, 182 Wn.2d at 835.

In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: "The trial court must

decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to move on with their lives in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary

obligations. This is particularly true where, as here, Mr. Lopez has demonstrated his indigency and inability to pay costs.

In addition, the prior rationale in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of *Blazina*. The *Blank* court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed, because ability to pay would be considered at the time the State attempted to collect the costs. *Blank*, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for *Blazina*'s recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

The *Blazina* Court also expressly rejected the State’s ripeness claim that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e). “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this Court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This Court has discretion to deny appellate costs. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay

appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Lopez does not have the ability to pay costs on appeal. He was found indigent by the trial court and remains indigent. Although the trial court asked Mr. Lopez if he was physically able to work, which Mr. Lopez affirmatively acknowledged (2RP 11), the examination into Mr. Lopez’s physical status does not complete or end the pertinent inquiry. The concerns cited by the *Blazina* court are not limited to a person’s mere physicality or future ability to work after release. Instead, the concerns with imposing LFOs on indigent defendants and appellants includes impeding their successful reentry into society.

Given Mr. Lopez’s ongoing indigency, he respectfully requests this Court exercise its discretion to deny an award of appellate costs in this case, in the event the State substantially prevails on appeal.

E. CONCLUSION

Based on the foregoing, Mr. Lopez respectfully requests his convictions be reversed and the matter remanded for a new trial.

Respectfully submitted this 21st day of November, 2016.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34059-7-III
vs.) Franklin County No. 13-1-50512-5
)
ADRIAN RAY LOPEZ) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on November 21, 2016, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Adrian Ray Lopez
c/o Shawna Garcia
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Kennewick, WA 99336

Having obtained prior permission from Franklin County Prosecutor's Office, I also served the same document on the Respondent at appeals@co.franklin.wa.us by e-mail.

Dated this 21st day of November, 2016.

/s/ Kristina M. Nichols
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