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Court of Appeals
Division III
State of Washington

34059-7

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN LOPEZ,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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TABLE OF CONTENTS

Page No.

I. **IDENTITY OF RESPONDENT** 1

II. **RELIEF REQUESTED** 1

III. **ISSUES** 1

IV. **STATEMENT OF THE CASE** 4

V. **ARGUMENT** 9

A. The Prosecutor Did Not Commit Reversible Error In Describing The Burden Of Proof 9

B. The Word "Victim" In The Transcript Does Not Demonstrate Improper Opinion Testimony Or Manifestly Prejudicial Error 19

C. The Court Did Not Abuse Its Discretion In Admitting A Photograph Of The Victim At The Age Of Her Assault 24

D. The Court Did Not Abuse Its Discretion In Permitting The Defendant To Thoroughly Argue The Quality Of The Investigation, While Excluding "Other Suspect" Evidence 26

E. The Court Did Not Abuse Its Discretion In Admitting Relevant, Admissible Testimony 30

F. The Court Did Not Abuse Its Discretion In Finding The Defendant Had The Ability To Pay And Imposing Legal Financial Obligations 34

G. This Court Should Impose Appellate Costs On The Defendant If The State Substantially Prevails On Appeal 37

VI. **CONCLUSION** 40

TABLE OF AUTHORITIES

State Cases

Page No.

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, 230 P.3d 583 (2010) 25
State v. Alger,
31 Wn. App. 244, 640 P.2d 44 (1982) 19
State v. Anderson,
153 Wn.App. 417, 220 P.3d 1273 (2009) 11, 12
State v. Berube,
171 Wn. App. 103, 286 P.3d 402 (2012) 15
State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 34, 35, 36, 38
State v. Brown,
132 Wn.2d 529, 940 P.2d 546 (1997) 9
State v. Cayetano-Jaimes,
190 Wn. App. 286, 359 P.3d 919 (2015) 24, 28
State v. Curtiss,
161 Wn. App. 673, 250 P.3d 496 (2011) 13, 14
State v. Evans,
163 Wn. App. 635, 260 P.3d 934 (2011) 17
State v. Fisher,
165 Wn.2d 727, 202 P.3d 937 (2009) 10
State v. Fuller,
169 Wn. App. 797, 282 P.3d 126 (2012) 11, 14, 15
State v. Huynh,
107 Wn. App. 68, 26 P.3d 290 (2001) 25
State v. Jerrels,
83 Wn. App. 503, 925 P.2d 209 (1996) 31n
State v. Johnson,
158 Wn. App. 677, 243 P.3d 936 (2010) 12, 13
State v. Kirkman,

159 Wn.2d 918, 155 P.3d 125 (2007) 20, 21, 22, 31
State v. Lindsay,
180 Wn.2d 423, 326 P.3d 125 (2014) 12, 13
State v. Mezquia,
129 Wn. App. 118, 118 P.3d 378 (2008) 28
State v. Ring,
54 Wash.2d 250, 339 P.2d 461 (1959).....22
State v. Rogers,
70 Wn. App. 626, 855 P.2d 294 (1993) 9
State v. Sundberg,
185 Wn.2d 147, 370 P.3d 1 (2016) 9
State v. Sutherby,
138 Wn. App. 609, 158 P.3d 91 (2007) 31n
State v. Thomas,
150 Wn. 2d 821, 83 P.3d 970 (2004) 28

Statutes and Court Rules

Page No.

ER 401 33
ER 403 33
ER 602 32
ER 608 32
GR 34 35-37
RAP 14.1 38
RAP 14.2 38
RCW 10.01.160 ..... 35, 38, 39
RCW 10.73.160 38
RCW 10.82.090 39
RCW 9.94A.411 19
RCW 9.94A.507 35
RCW 9.94A.729 8
RPC 3.8 19
WPIC 10.2 10
WPIC 4.01 11

Secondary Authority

ABA Criminal Justice Standard 21-2.3,
ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed. (1993) 38

Brief of Amicus Curiae Washington Association of Prosecuting Attorneys at 4, *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016), (No. 91660-8) 9n

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did the prosecutor commit reversible error by correctly describing the burden of proof?
2. Do the few, innocuous, and unchallenged instances of the word "victim" in the transcript demonstrate either impermissible opinion testimony or reversible error?
3. Did the court have tenable grounds to admit a single photograph of the child taken five years earlier at the time she was abused?
4. Does the record (RP 83-93) support the Defendant's claim that he was prevented from challenging the quality of the investigation? Did the court abuse its discretion in excluding

"other suspect" insinuations where the defense acknowledged that there was no evidence to support a claim of a third party perpetrator and claimed it had no intention of seeking to admit such evidence?

5. Did the court abuse its discretion in admitting unchallenged and admissible character testimony?

6. Did the court abuse its discretion in finding the steadily employed and unencumbered defendant, who had retained private counsel and could post appellate bond of $10,000, and who would be released in his youth has a future ability to pay $3112.44 in LFO's?

7. Given the Defendant's ability to pay, is there any basis to challenge appellate costs if the State prevails on appeal?

IV. STATEMENT OF THE CASE

After the first trial resulted in a mistrial, the Defendant Adrian Lopez was convicted by a second jury of two counts of child rape in the first degree and one count of child molestation in the first degree

of I.G.. CP 111, 193-95, 225; RP[1] 17.

When the Defendant was six, a blood test disclosed that a Nemecio Lopez was the Defendant's biological father. RP 115, 142. When the Defendant was 18 years old he came to live with his father and his father's family in Pasco. RP 117, 142-43. Nemecio Lopez had married, had a son N.L., and had become the stepfather to his wife's daughter I.G.. RP 111-13, 140-41. The Defendant lived with his father for several years, occasionally babysitting I.G. and N.L.. RP 119, 144. As brother and babysitter, he had "unrestricted access" to I.G.. RP 158.

In June of 2011, I.G. had her tonsils removed. RP 119, 144-45. Because both parents worked, the Defendant watched over her. RP 119-20, 144-45. In the subsequent 2-3 months, the 60-70 pound I.G. experienced a rapid weight gain of 20 pounds, or approximately one third of her body weight. RP 120-21, 145.

On July 25, 2013, a friend came to visit I.G. and told her the Grim Reaper visited at death and sent people who lied to hell. CP 203; RP 123-24, 146. I.G. became ill and nauseated, and her friend

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[1] The State adopts the citation of the Appellant. "RP" represents the verbatim report of proceedings for March 31, September 22, and the second trial on December 8-11, 2015 as transcribed by Official Court Reporter John McLaughlin.

was sent home. CP 203; RP 146. The next day I.G. tearfully disclosed to her mother that the Defendant had sexually abused her when she was eight years old, roughly from June 6, 2011 to the end of September 2011. CP 203-04; RP 40, 124, 141, 146, 160. The family reported the matter to police the very next day. RP 124, 147.

The day after the disclosure, I.G. recognized the Defendant's signature knock at their door and was demonstrably fearful. RP 125, 137-38, 148-49. The parents immediately removed I.G. and her younger brother via a side door and left in their SUV without speaking to the Defendant or allowing him entry to the house. RP 149-52, 166. The Defendant was no longer welcome in their home. RP 157.

At the first trial, in cross-examination of the detective, defense counsel, without foundation or notice to the State, suggested that Nemecio Lopez was "an admitted child molester." Supp RP[2] 21-23. After the prosecutor's objection, defense counsel informed the court that he would be presenting proof of his allegations. Supp RP 23. He does not appear to have followed up with this promise, and the jury could not reach a verdict. Supp RP 83-91; RP 17.

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[2] Consistent with the Appellant's citation, "Supp RP" represents the verbatim report of proceedings for one of the days from the first trial, September 17, 2015, as transcribed by Official Court Reporter John McLaughlin.

In motions-in-limine prior to the second trial, the prosecutor asked to exclude all evidence suggesting a third-party perpetrator. CP 128-29. The State had learned that the Defendant's older sister A.L. was accusing her father Mr. Lopez of inappropriately touching her when she was teenager. CP 128-29, 136. The allegation has never been reported to law enforcement or investigated, "making it difficult to determine the veracity of the allegations." CP 128-29. Although defense had promised to present evidence of his allegation and although A.L. testified at the first trial, she made no such allegation under oath. Supp RP 83-91. The prosecutor argued that this evidence had improperly confused and prejudiced the first jury and was inadmissible under the law. CP 128-29. In responsive briefing, the Defendant tried to parse the argument, acknowledging that there was no allegation that Mr. Lopez had abused I.G., but requesting to admit A.L.'s allegation against Mr. Lopez in order to argue that, despite the absence of any reported allegation against Mr. Lopez, the police were negligent in failing to investigate him as the responsible party for I.G.'s abuse. CP 136.

The Defendant informed the State that the defense would be general denial. Supp RP 22. "We are not arguing third-party

perpetrator. I'll make that perfectly clear." RP 21.

The court held that the defense was precluded from suggesting Mr. Lopez abused I.G. or A.L. or was a child molester, but was free to argue that someone other than the Defendant was to blame or that the investigation was inadequate. RP 21, 24-25.

At trial, I.G., her mother, her stepfather, two officers, and the forensic interviewer testified for the State. RP 30, 62, 99, 110, 140, 173. The Defendant's sister testified for the defense. RP 223.

I.G. had made several statements regarding the abuse. She first disclosed to her parents. RP 146. Then she gave a detailed recorded interview to a forensic interviewer at Kids Haven/SARC. RP 147, 152, 193-94. She had testified at a previous trial. RP 155, 196. And she gave a second recorded interview at Kids Haven/SARC to the defense attorney. RP 155, 198.

I.G. testified that she had been afraid to disclose the abuse, because she worried that the Defendant may harm her, and her parents would have been upset. RP 187-88. She guarded her behavior, afraid that acting out would reveal the abuse. RP 187-88. Instead, she gained weight. RP 188. She only disclosed after hearing that the Grim Reaper takes liars to hell. RP 192. Even

though her parents were very upset, I.G. felt relief and felt herself again. RP 193.

The Defendant's sister A.L. testified that she was visiting her father's home after the disclosure, and she observed the family's response to her brother's knock on the door. RP 224-25. A.L. thought I.G. looked excited, not afraid. RP 226. She saw the children running from the side door, avoiding the Defendant who was at the front door and leaving in an SUV with their mother. RP 227-28.

The jury convicted the Defendant of child rape and molestation. CP 193-95. At sentencing, the court reviewed the presentence investigation and victim impact statements. CP 203-24; 2RP 2-6.[3]

The Defendant is a high school graduate with several warehouse equipment certifications or trainings under his belt. CP 209. He spends most of his time working; he works in construction and had considered joining the Carpenters Union. CP 209-10. He has no dependents, but voluntarily chose to assist in the support of someone else's children to whom he has no legal obligation. CP 209. "With his skills in construction he should be able to secure

[3] Consistent with the Appellant's citation, "2RP" represents the verbatim report of proceedings for sentencing on February 4, 2016 as transcribed by Official Court Reporter Lisa Lang.

employment upon release from prison and support himself sufficiently." *Id.* He will be able to live with family in Puyallup upon his release. CP 210. He has no substance abuse or other mental health issues. *Id.* His attorney represented that he was retained, not appointed, and that the Defendant could cover an appeal bond of $10,000. 2RP 12, 15.

The court found an ability to pay and imposed OPD fees and court costs at one third of that appeal bond, for a total of $3112.44 in legal financial obligations. CP 228-29; 2RP 12.

The Defendant was a few days from his 25th birthday. CP 225. He may be 37 years old when he is released. CP 232, 2RP 12 (minimum term of 162 months); RCW 9.94A.729(3)(a) (earned early release of 10 percent).

In his Indigency Report, the Defendant confirms his strong work history of full-time work in construction. He reports a small un-itemized debt, which likely consists of his LFO's in this case, interest in the same case (which the County will not collect), and traffic fines. CP 209.

V. ARGUMENT

A. THE PROSECUTOR DID NOT COMMIT REVERSIBLE ERROR IN DESCRIBING THE BURDEN OF PROOF.

For the first time on appeal, the Defendant objects to the prosecutor's discussion of the burden of proof in closing argument. Appellant's Opening Brief (AOB) at 8. In a claim of prosecutorial error[4], the defendant bears the burden of establishing both the impropriety of the prosecutor's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments will only be deemed prejudicial where there is "substantial likelihood" the error affected the jury's verdict. *Id.* The prosecutor's remarks are weighed in context of the entire argument, not in isolation. *State v. Brown*, 132 Wn.2d at 561.

Defense counsel's failure to object to a prosecutor's statements "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied* 123 Wn.2d 1004, 868 P.2d 872 (1994). Where the claim was unpreserved by any timely objection, as happened here, the criminal

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[4] Brief of Amicus Curiae Washington Association of Prosecuting Attorneys at 4, *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016), (No. 91660-8) (discussing preference for term "error" over "misconduct").

defendant waives the challenge unless it can be shown that the prosecutor's argument was so flagrant and ill-intentioned as to be incurable by any court instruction. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

In this case, the jury was instructed:

> You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.
> ....
> 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***.

CP 172 (emphasis added); *see* WPIC 10.2.

> The Defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A Defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind

> of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 176; *see* WPIC 4.01. The prosecutor's argument parroted this to large degree, and the Defendant did not object.

> ***The State has the burden of proof.*** I have to prove to you the case. 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. It's one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would be in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

RP 248 (emphasis added).

On appeal, the Defendant relies on a line of cases discussing jigsaw puzzle analogies of the reasonable doubt standard. These analogies are viewed "on a case-by-case basis, considering the context of the argument as a whole." *State v. Fuller*, 169 Wn. App. 797, 825, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013).

The prosecutor's remarks were found to be error in *State v.*

Anderson, 153 Wn.App. 417, 220 P.3d 1273 (2009), *review denied* 170 Wn.2d 1002 (2010), *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011), and *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014).

In *State v. Anderson*, 153 Wn.App. at 425, the prosecutor discussed the reasonable doubt standard in the context of everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, or changing lanes on the freeway. The court found this improper. *State v. Anderson*, 153 Wn.App. at 431-32. By comparing the jury's decision making to "both important decisions and relatively minor ones," the prosecutor "minimized" the importance of the standard, "trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case." *Id.*

In *State v. Johnson*, 158 Wn. App. at 682, the prosecutor described an abiding belief as the ability to identify the subject matter of a puzzle even though "only half" of the puzzle may be assembled.

> 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.

State v. Johnson, 158 Wn. App. at 682. Following *Anderson*, the *Johnson* court found that comparing a criminal offense to a partially completed puzzle "trivialized and ultimately failed to convey the gravity of the State's burden." *State v. Johnson*, 158 Wn. App. at 684-85.

The facts in *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) were "plainly analogous" to those in *Johnson*. The *Lindsay* prosecutor had stated that one can identify a subject matter even with 50 percent of the puzzle pieces missing. *State v. Lindsay*, 180 Wn.2d at 429, 434.

> ... 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.

State v. Lindsay, 180 Wn.2d at 434. "[T]he quantifying of the standard of proof by means of this jigsaw puzzle analogy is improper." *State v. Lindsay*, 180 Wn.2d at 436.

However, not every puzzle analogy is error, much less prejudicial or flagrant or ill intentioned. *State v. Curtiss*, 161 Wn. App. 673, 698, 250 P.3d 496 (2011), *review denied*, 172 Wn.2d 1012 (2011). The prosecutor in *Curtiss* remarked:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine if you will, a giant jigsaw

> puzzle of the Tacoma Dome. There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.

State v. Curtiss, 161 Wn. App. at 700. "Here, the State's comments about *identifying* the puzzle with certainty before it is complete are not analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives." *State v. Curtiss*, 161 Wn. App. at 701. The court held these arguments "did not shift the burden nor were they flagrant or ill intentioned." *State v. Curtiss*, 161 Wn. App. at 700.

In *State v. Fuller*, 169 Wn. App. 797, 828, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013), again the court found no error in the prosecutor's puzzle analogy.

> What I am going to do now is use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt.... We get a few of the pieces of the puzzle.... [W]e might think it looks like Tacoma, but we don't know—
>
> ... [W]e do not have enough pieces of enough evidence beyond a reasonable doubt that it's [a picture] of Tacoma. But let's say we get some more pieces.... But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.
>
> Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma....

> A trial is very much like a jigsaw puzzle. It's not like a mystery novel or CSI or a movie. You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

State v. Fuller, 169 Wn. App. at 827.

The puzzle analogies in both *Curtiss* and *Fuller* did not trivialize the jury's job as happened in *Anderson*. Nor did they purport to quantify the level of certainty required to satisfy the beyond a reasonable doubt standard as half a puzzle, as happened in *Johnson*. *State v. Fuller*, 169 Wn. App. at 826.

Division One addressed a puzzle analogy in *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012), *review denied*, 178 Wn.2d 1002 (2013).

> The puzzle analogy is an apt description of a trial, given that evidence is heard not in logical or chronological order but in order of witness knowledge. The problem arises when the analogy is used to trivialize the State's burden under the reasonable doubt standard.

State v. Berube, 171 Wn. App. at 122. A prosecutor does not trivialize the burden by arguing "the pieces in this puzzle are very big, and they all fit together." *Id.*

In the instant case, the prosecutor's remarks were unlike those determined to be error in *Anderson*, *Johnson*, and *Lindsay*. She did not compare the jury's job to everyday decision making. She did not compare the jury's work to a puzzle or anything else. She did not trivialize the burden. "Every element of every crime beyond a reasonable doubt." RP 248. "It's a high burden." RP 248.

Nor did the prosecutor quantify the burden of proof as being satisfied with half a puzzle's worth of information, as happened in *Johnson* and *Lindsay*. The Defendant argues that those cases which argued the burden ***was met*** at half are no different than those here where the prosecutor ***explicitly denied*** that she would have satisfied her burden at 50 percent. The remarks are opposites. Consistent with the remarks held proper in *Fuller* and *Curtiss*, she accurately explained that it was "more than 50 percent but it's not a 100 percent." This is correct. Beyond a reasonable doubt is more than a mere preponderance of the evidence (50+ percent) and less than beyond all doubt (100 percent). She then read from the court's instructions. Reasonable doubt is "such a doubt as would be in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence." RP 248; *cf.* CP 176.

In our own case, nothing the prosecutor said shifted the burden of proof or trivialized the jury's duty. There was no error.

Even where the prosecutor's remarks confuse the burden of proof, the error will not require reversal without a showing of prejudice in the context of the strength of the state's evidence. *State v. Evans*, 163 Wn. App. 635, 646-47, 260 P.3d 934 (2011). The error will be more prejudicial where the jury was presented with conflicting evidence. *State v. Evans*, 163 Wn. App. at 647.

In the instant case, the Defendant did not testify. There was no conflicting evidence. The victim identified her brother as the offender and testified that she was motivated to disclose the abuse on threat of going to hell for withholding the truth. The Defendant cannot show prejudice in this context.

The Defendant only addresses prejudice by arguing that the prosecutor's correct statement may have "convinced" jurors that the standard was "more probably than not." AOB at 13. This more-probable-than-not language is nowhere to be found in the prosecutor's remarks. The Defendant's suggestion is unsupported and unpersuasive. The jury had been instructed that "[t]he law is contained in my instructions." CP 172. Insofar as the lawyer's

statements contradict those court's instructions, "[y]ou must disregard" them. CP 172. Neither the court nor the attorneys suggested a more-probable-than-not standard.

The Defendant argues the remarks were flagrant and ill-intentioned because it was "abundantly clear" that they were error under published case law. AOB at 14. The case law does not demonstrate that the prosecutor's correct statement of law was error. The case law says that "half" a puzzle is not enough. The prosecutor agreed. It had to be "more than" 50 percent. And then she provided the WPIC definition. A correct statement of law is not flagrant or ill-intentioned error.

After the presentation of evidence, defense counsel neglected to make the standard motion to dismiss on grounds of insufficient evidence. RP 235-37. Because the evidence had not been what the prosecutor expected, she could not argue count three in good conscience and conceded that the jury must acquit on that count. RP 263. The court then dismissed the count. RP 293.

The Defendant claims that this prejudiced him by making the prosecutor appear fair-minded. AOB at 14-15 ("exacerbated the prejudice" by casting "an aura of reliability over the prosecutor's

office"). The State does not prejudice the Defendant by abiding by prosecutorial and ethical standards. RCW 9.94A.411(2)(a); RPC 3.8.

The prosecutor's brief remark was not error and not cause for reversal.

B. THE WORD "VICTIM" IN THE TRANSCRIPT DOES NOT DEMONSTRATE IMPROPER OPINION TESTIMONY OR MANIFESTLY PREJUDICIAL ERROR.

On appeal, the defense argues that any instance of the word "victim" before the jury is grounds for retrial. AOB at 17-26. Although the premise is untenable on its face, the Defendant also concedes that "the only published case known to the Appellant" on the matter does not support the Defendant's argument. AOB at 20-21 (citing *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982).). In that case, the trial court's own reading of a stipulation that the defendant "has never been married to the victim," was held not to "prejudice the defendant's right to a fair trial by constituting an impermissible comment on the evidence." *State v. Alger*, 31 Wn. App. at 248-49.

In our case, the Defendant made no motion in limine before trial to restrict the State's use of the term. CP 69-80, 138-39. And at trial, the Defendant did not complain of the few rare and innocuous

instances in which witnesses used the term in reference to I.G.. RP 34, 37, 39, 41. Absent a timely objection, the claim is not preserved for appeal. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125, 130 (2007). There is no manifest error or prejudice in these four instances. Even a preserved challenge will fail if the *Demery* factors do not determine the testimony to be significant. *State v. Kirkman*, 159 Wn.2d at 928. The testimony is manifestly insignificant.

At RP 34, the prosecutor asked the detective what he did after the case was assigned to him. He answered that he contacted the "victim's mother" to schedule an interview at Kid's Haven. The prosecutor asked for the "victim's name," and the detective responded: "Victim's name [I.G.]." It is apparent that this is the terminology used in law enforcement even before an investigation had commenced. Because the detective had not begun to investigate, he could not have formed any opinion and was not expressing an opinion on the veracity of the allegation.

At RP 37, the prosecutor asked the detective if his investigation was able to ascertain a date for the allegations. He responded: "Actually I think it occurred back in 2011 to 2013 when the victim was eight." As before, it is apparent that this is the

language use by law enforcement. The detective was describing the range of dates, not opining on the veracity of any element of the allegation.

At RP 39, the prosecutor inquired why the detective did not record an interview with I.G.'s mother. The detective explained:

> We don't record everybody all the time. In this case she was the mother of the victim. The victim didn't indicate that she was a witness to anything. I felt there was no need to do that.

And at RP 41, the prosecutor inquired why the detective had not interviewed I.G.'s little brother. The detective explained:

> He was younger. That was the main reason. And he wasn't in the room and the victim was saying he wasn't in the room so I left it at that.

Again, in neither response is there any opinion expressed on the veracity of the allegations. The detective is just using the common vernacular of criminal investigations.

"The assertion that the province of the jury has been invaded may often be simple rhetoric." *State v. Kirkman*, 159 Wn.2d at 928. Even if the testimony were uncontradicted, the jury is not bound by it. *Id.* And an expert is permitted to opine on a proper subject even though he or she thereby expresses an opinion on an ultimate fact.

State v. Kirkman, 159 Wn.2d at 929. "The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion." *Id.*, (citing *State v. Ring,* 54 Wn.2d 250, 255, 339 P.2d 461 (1959)).

These four pages are the entirety of any testimony in the record in which the word "victim" is used in reference to I.G.. The Defendant cannot show manifest error from these few instances.

Although the Defendant cites to two other pages, in those instances the term was not used in reference to I.G., but only to describe police protocol in general. AOB at 20 (citing RP 33, 70). The Defendant also cites to RP 44 where there is no instance of the word at all. There can be no colorable claim that these citations demonstrate the officer's opinion of the Defendant's guilt or of any fact in controversy in the particular case.

The Defendant argues that the prosecutor's use of the word "revictimize" in closing argument was also opinion testimony. AOB at 25. Of course the prosecutor was not *testifying* at all; she was arguing. This was the meaning of the trial court's response to defense objection at the time.

MR. JOHNSON: Objection, Your Honor. The characterization of re-victimized --

THE COURT: It's closing. Go ahead.

RP 290-91.

At the time, the prosecutor was responding to the defense argument (1) that I.G.'s statements had been inconsistent and (2) that I.G. should have been requested to submit to an invasive physical exam several years after the alleged digital penetration. RP 271-78. The prosecutor explained that this was a mischaracterization of a complicated record where there were many sexual assaults and where I.G. had been forced to interview about traumatizing details many times to many people. RP 288-91. I.G. told her story to her family, to the Kids Haven forensic interviewer, to two defense attorneys, to the defense investigator, to the prosecutor, to her advocate, to police, and at two trials to two juries as well as the sundry people present in the courtrooms. RP 290.

> That is what this child has been through. She was re-victimized and re-victimized and revictimized ... and re-victimized. She was asked time after time after time again to relive what to her was most likely the most horrible thing that had ever happened to her in her young life. And, members of the jury, do we expect or should we expect perfection? Should we expect that child, considering the nature of the incidents and the fact there were multiple incidents that occurred over a

> period of time to recall everything perfectly years later? Not only is it illogical, it is completely unreasonable.

RP 290-91.

The prosecutor was making an appropriate rebuttal to the defense argument.

The Defendant argues that the prosecutor's concession to the jury that one of the counts could not be proven somehow makes it improper for her to argue the sufficiency of the evidence for the other counts in closing. AOB at 17. No authority supports this illogic. Arguing the merits of the case is not improper opinion; it is the purpose of closing argument.

C. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A PHOTOGRAPH OF THE VICTIM AT THE AGE OF HER ASSAULT.

The Defendant challenges the court's decision to permit the jury to view Exhibit 9. As the Defendant acknowledges, the trial court's evidentiary decisions are given deference, reviewed for abuse of discretion. AOB at 26 (citing *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015)). A court abuses its discretion when its decision is manifestly unreasonable because it adopts a view no reasonable person would take or when the decision is based on

untenable grounds because it applies the wrong legal standard or relies on unsupported facts. *Salas v. Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). The reviewing court need not rely on the rationale provided by the lower court, but may affirm on any grounds supported by the record. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290, 294 (2001).

At trial, because many years had passed between the time of the alleged rape and trial, the prosecutor wanted to show the jury photographs of I.G. taken around the time of the incident when she was 8 years old. RP 169. The defense objected to the admission of exhibits 9-11 as irrelevant ***to his cross-examination*** and therefore more prejudicial than probative. RP 169. The exhibits were certainly not irrelevant to the case generally. The court permitted the prosecutor to choose one of the three photographs to show to the jury. RP 169.

Subsequently, in closing, the defense was permitted to argue to the jury that the photograph was only paraded before the jury "to elicit sympathy." RP 267. Counsel argued that the law did not require such an exhibition and in fact the jury was specifically instructed not to render a verdict based on sympathy, prejudice, or personal

preference. CP 173; RP 267.

On appeal, the Defendant argues that the only purpose the prosecutor could have in showing the jury the photograph was "to elicit sympathy for I.G.." AOB at 28. The Defendant sees no relevance in showing the jury who the victim was five years ago at the time of the incident. AOB at 27-28. This challenge to the court's discretion is not persuasive. It is manifestly relevant for the jury to understand the substance of the allegations. The allegation was that the abuse was perpetrated on I.G. when she was 8, not 13. RP 141, 173. It was alleged that this happened to the innocent child she was before she underwent a sudden weight gain, before her body matured, and before she was interviewed repeatedly by a multitude of people. Who the victim was at the time of the offense is plainly relevant.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE DEFENDANT TO THOROUGHLY ARGUE THE QUALITY OF THE INVESTIGATION, WHILE EXCLUDING "OTHER SUSPECT" EVIDENCE.

The Defendant argues that he was prevented from cross-examining the detective on the thoroughness of his investigation. AOB at 31. This is not the record. This argument was

comprehensively and expertly made. RP 83-93.

In cross-examination, the defense suggested there was a delay in the investigation, that the detectives were untrained, that they had failed to collect all manner of statements and evidence, that these failures harmed the defense, and that belated attempts to cure these failures were only triggered by the previous mistrial "where the investigation was harshly criticized." RP 83-86. He complained that the belated investigation was performed without defense counsel's attendance even as the court case was active and ongoing. RP 87. He demonstrated that the subsequent investigation failed to disclose any more incriminating information. RP 88. He complained that allowing the child victim to review her previous recorded interview amounted to coaching. RP 91. He established that the detectives failed to request a sexual assault examination and there was no physical evidence. RP 92. The defense characterized in cross-examination that as a result of law enforcement failures: "All you have at the end of the day is somebody saying it happened, right?" RP 93. And, counsel argued, even those victim statements had not been critically examined for inconsistencies. RP 93-94. The defense was permitted and scrupulously made.

The Defendant challenges the exclusion of evidence of "another suspect living in the child's home." AOB at 30. But counsel at trial conceded that there was no evidence of a third party perpetrator and represented that he had no intention of making this argument. The trial court's evidentiary decisions are reviewed for abuse of discretion. *State v. Cayetano-Jaimes*, 190 Wn. App. at 295. The court did not abuse its discretion by granting the State's unchallenged motion, essentially agreed to by the defense. RP 21 ("We are not arguing third-party perpetrator. I'll make that perfectly clear.").

A criminal defendant has no constitutional right to present irrelevant evidence. *State v. Thomas*, 150 Wn. 2d 821, 857, 83 P.3d 970 (2004). "When there is no other evidence tending to connect another person with the crime, such as bad character, his means or opportunity to commit the crime, or even his conviction f the crime, such other evidence is irrelevant to exculpate the accused." *Id.* "Mere opportunity to commit the crime is not enough as such evidence is the most remote kind of speculation." *Id.* The evidence must "create a trail of facts or circumstances that clearly to point to someone other than the defendant as the guilty party." *State v.*

Mezquia, 129 Wn. App. 118, 118 P.3d 378 (2008).

Here there was no evidence that Mr. Lopez had abused I.G. and the defense conceded as much, expressing no intention to make this case. Accordingly, the court made the following pretrial ruling:

> THE COURT: ... I understand that Mr. Johnson is not claiming a third-party perpetrator which means ***you cannot point to any one particular person***. You can always say my client didn't do it, somebody else must have. ...
>
> ....
>
> MR. JOHNSON: ... I still can ask Sergeant Warren, you didn't inquire about the adequacy of the investigation and that he didn't inquire about the background of anyone else in the house.
>
> THE COURT: You can say that and that's fine. ***I just don't want any intimating, insinuating, or anything like that***.

RP 24-25 (emphasis added). When the defense began to insinuate a third party perpetrator in the household had gone uninvestigated, the State objected, and the parties approached the bench for a sidebar. RP 94.

> MR. JOHNSON: I specifically asked the Court if I could ask the question because I didn't want this to happen, has anyone else in the house been

	investigated in this case and the Court said, yes, that's as far as you can go.
MS. ASTLEY:	It's putting in the jury's mind that somebody in the house could have committed this. That is exactly what the motion --
THE COURT:	If I said that then I reverse myself. I could have very well said it. I think it's inappropriate. Let's move on.

RP 94 (emphasis added). Because the only males in the house were Mr. Lopez and the five year old N.L., the obvious insinuation was that Mr. Lopez should have been investigated. Because there was no evidence of a third party perpetrator, and defense counsel conceded this, the insinuation was improper.

The Defendant frames this decision as denying him a right to present a defense. AOB at 30. This is inconsistent with the record. "The defense in this case was general denial." Supp RP 22. Defense counsel advised the court that he had no intention of claiming that Mr. Lopez was the true perpetrator. Because this was not the defense, the court did not deny the Defendant his right to make the defense of his choosing.

E. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING RELEVANT, ADMISSIBLE TESTIMONY.

The Defendant claims the court abused its discretion and permitted opinion testimony by permitting Mr. Lopez to answer whether his daughter I.G. was "the type of child that would make up a story to get attention." AOB at 42; RP 122.

The question arose in the context of family dynamics. Family relations were peaceful. Mr. Lopez had reasonable expectations of his son. RP 122. Neither parent had any motivation to coach I.Z. to make up these very serious allegations. RP 123. Mr. Lopez did not observe any difficulties between the Defendant and I.G. or I.G.'s mother. RP 122. I.G. was easily influenced, but not at risk of making up terrible stories for attention. RP 122. She was similarly unmotivated to invent the allegations.

The question does not ask for the witness' opinion on the ultimate issue of guilt[5] or even the victim's credibility in her specific accusation. *State v. Kirkman*, 159 Wn.2d at 927-28 (opinion testimony opines on the defendant's guilt). Therefore, it cannot be

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[5] The Defendant cites to *State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007) and *State v. Jerrels*, 83 Wn. App. 503, 925 P.2d 209 (1996) in support of his argument. Both cases are distinguishable, discussing opinions on the whether the alleged offense occurred, and not a general character for manipulation.

characterized as opinion testimony.

The court had tenable reason to admit the response as relevant to the issue of the existence or nonexistence of a motivation to lie. Although the victim's credibility had not yet been assailed, the response was also tenably admitted as character evidence where the court knew that the defense was to deny the truthfulness of the victim's story. Evidence of a witness' truthful character is admissible when her credibility is put at issue. ER 608. Mr. Lopez had raised I.G. since she was four months old. RP 112. He had personal knowledge of her character. ER 602. He was a proper source of this testimony.

The Defendant argues that because Mr. Lopez did not testify at the trial that resulted in a hung jury, his testimony in this case was necessarily the cause of the verdict and therefore prejudicial. AOB at 44. This is not plausible. Mr. Lopez's testimony was certainly not the only difference between trials. Because the Defendant has not requested a transcription of the entire first trial, a proper comparison is not possible. However, for starters, the Defendant testified at the first trial, but not at the second. RP 236; Supp RP 77-83. There was additional investigation between trials. RP 86. Possibly the most

significant difference between the trials was that in the second trial the defense was prevented from ambushing the State with false insinuations that Mr. Lopez was the true perpetrator. CP 128 ("In speaking with the jury after the first trial, this mere insinuation alone was enough to make it impossible to render a verdict.")

For the first time on appeal, the Defendant complains that the State should not have been able to demonstrate that I.G. disclosed consistently to her mother, law enforcement, and the forensic child interviewer. AOB at 44-45. The fact that evidence tends to make the existence of any fact of consequence more or less probable is the definition of relevance (ER 401), not vouching.

The Defendant notes that error was not preserved, but claims that defense counsel should have objected that the evidence of consistent disclosures was merely cumulative. AOB at 45, n.5. The objection would have been overruled. It is only the "needless" presentation of cumulative evidence that is objectionable under ER 403. The evidence was necessary for both the State's and defense's purposes. The State used the evidence to show the general consistency of the accusation and to respond to the defense challenge to the thoroughness of the investigation. The defense used

the same evidence to claim the accusation was inconsistent as to minor details and that the investigation had resulted in coaching.

The court did not abuse its discretion in admitting the relevant, admissible testimony. The Defendant has not shown that the testimony was either improper or so prejudicial as to justify reversal.

F. THE COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE DEFENDANT HAD THE ABILITY TO PAY AND IMPOSING LEGAL FINANCIAL OBLIGATIONS.

For the first time on appeal, the Defendant challenges the finding of his ability to pay. The Court is not obliged to review the unpreserved challenge. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). This challenge is also unsupported in the record which demonstrates a very thorough investigation of the Defendant's readily apparent ability to pay.

The sentencing court ordered a presentencing investigation. That investigation gathered individualized records and statements in order to inquire into, among other things, his ability to pay. The court reviewed that report. The report demonstrates the Defendant's youth, good health, adequate education, vocational training, lack of debt or other financial obligation, and very strong employment history. *Supra* at 7-8. The record abundantly demonstrates the Defendant's ability to

pay.

The Defendant appears to believe that the courts cannot impose LFO's on a sex offender. AOB at 50. Anyone sentenced under RCW 9.94A.507 will receive an indeterminate sentence. Anyone sentenced to a period of years will have to attempt successful reentry. What the Defendant argues is not for an individualized inquiry, but a general prohibition on LFO's for serious offenders. No legal authority supports this argument.

The Defendant retained his trial attorney, but, now that he is incarcerated, requested appointment of counsel on appeal. The Defendant argues his indigency, for purposes of appellate attorney appointment, demonstrates his future inability to pay. AOB at 50. It does not. It only indicates his current incarceration.

The Defendant conflates indigency under GR 34 with indigency for purposes of appointment of counsel on appeal. AOB at 50, 54. This latter indigency is not the type discussed in *State v. Blazina*, 182 Wn.2d 827, 838-39, 344 P.3d 680, 685 (2015). There the Washington Supreme Court recommended that, when determining ability to pay under RCW 10.01.160(3), superior courts should "look to the comment in court rule GR 34 for guidance." **GR 34 does not**

address indigency for the purposes of hiring a criminal defense attorney. It does not regard the paying of LFO's or appellate costs. GR 34[6] explains, when determining a civil litigant's indigency for the purpose of waiving a civil filing fee, courts should consider the applicant's use of needs-based, means tested assistance programs like food stamps. The *Blazina* court suggested that if a person were currently receiving this kind of public assistance, "courts should serious question that person's ability to pay LFO's." *State v. Blazina*, 182 Wn.2d at 839.

But there is no record that the Defendant used public assistance or would otherwise be found indigent for GR 34 purposes. The Defendant supported himself. He also supported others to whom he has no obligation. Even if there were such a record, this would not be dispositive of his ability to pay. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680, 685 (2015) (instructing sentencing courts to look to the comment to GR 34 "for guidance" only). It would only indicate that the court should further inquire, as it did, by ordering the presentence investigation (PSI).

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[6] GR 34(a)(3) indicates that a person is indigent for civil filing fee purposes if receiving assistance under a needs-based, means-tested program like TANF, GAU, SSI, or FSP or their income is below 125 percent of the federal poverty guideline.

The Defendant disregards the thoroughness of the PSI, apparently requiring the court to repeat what the CCO had already accomplished at the court's direction. AOB at 50 (falsely suggesting the "cursory questioning" at sentencing was the totality of the court's inquiry). But no authority requires a court to conduct its individualized inquiry orally as opposed to in writing for review at the time of sentencing.

The court's finding is well supported in the record. The Defendant is more than able to pay the small amount of LFO's imposed, which are significantly less than the appeal bond he requested.

G. THIS COURT SHOULD IMPOSE APPELLATE COSTS ON THE DEFENDANT IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL.

The State objects to the Defendant's request to waive costs. The only argument the Defendant makes in support of his argument that this Court should "deny any appellate costs requested" is that he was determined to be "indigent for purposes of this appeal." AOB at 13. Defendant's counsel would have this Court presume that, because he is currently incarcerated, he will always be indigent. AOB at 13. No such presumption can be made. The Defendant is not

indigent by GR 34 standards. He is only incarcerated. When he is released, there is no reason to believe he will not resume his full time work life.

Criminal defendants are and will be motivated to file frivolous appeals at great expense to the public when there is neither cost nor risk of cost to them. Accordingly, the rules of appellate procedure discourage frivolous appeals by presuming costs will be paid to the substantially prevailing party. RAP 14.1(c) ("In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a)"); RAP 14.2 (court "will" award costs to substantially prevailing party). RCW 10.73.160 is the relevant statute. Unlike RCW 10.01.160 which was construed in *State v. Blazina*, RCW 10.73.160 does not require an appellate court to consider financial resources and the nature of the burden before imposing costs.

In this case and in all challenges to costs premised on a criminal defendant's ability to pay, this Court should consider the ABA Criminal Justice Standard 21-2.3.[7] *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993). These

black letter standards explain that the criminal justice system unacceptably induces an appeal when there is no risk of costs for frivolous appeals.

In some cases, a nominal imposition of costs may avoid this impropriety. In the instant case, if the State substantially prevails and absent new information, the Court should impose the full appellate costs on the Defendant. Such imposition is appropriate because,

- the Defendant has the ability to earn and to pay;
- the clerks will collect the LFO's under a reasonable and always negotiable payment plan without interest and under RCW 10.82.090; and
- if his circumstances change, the Defendant can always and repeatedly seek remission under RCW 10.01.160(4).

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[7] Also available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_tocold.html

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 8, 2017.

Respectfully submitted:

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Kristina M. Nichols Wa.appeals@gmail.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 8, 2017, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**