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Court of Appeals
Division III
State of Washington
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No. 35381-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

EDWARD LANE HART,

Appellant.

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

The Honorable Judges T.W. Small and David Kurtz

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by disqualifying Julie Anderson from representing Mr. Hart.
2. Mr. Hart was denied his Sixth Amendment right to counsel of choice when the trial court disqualified Julie Anderson from representing him.
3. The State committed misconduct in its closing arguments that was prejudicial and incurable by making statements regarding plastic surgery.
4. The trial court erred in imposing conditions of community custody prohibiting Mr. Hart from residing in a “community protection zone” and from possessing sexually explicit materials.
5. The judgment and sentence must be corrected to reflect that Mr. Hart was sentenced under RCW 9.94A.712, rather than RCW 9.94A.507.
6. An award of costs on appeal against Mr. Hart would be improper in the event that the State is the substantially prevailing party.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Hart was denied his Sixth Amendment right to counsel of choice when the trial court erroneously disqualified Julie Anderson from representing him.

Issue 2: Whether the State committed misconduct in its closing arguments that was prejudicial and incurable by making statements regarding plastic surgery.

Issue 3: Whether the trial court erred in imposing conditions of community custody prohibiting Mr. Hart from residing in a “community protection zone” and from possessing sexually explicit materials.

Issue 4: Whether the judgment and sentence must be corrected to reflect that Mr. Hart was sentenced under RCW 9.94A.712, rather than RCW 9.94A.507.

Issue 5: Whether this Court should deny costs against Mr. Hart on appeal in the event the State is the substantially prevailing party.

C. STATEMENT OF THE CASE

Edward Hart and Cami Stewart were in a relationship, and later married. (RP¹ 236-237, 301). Ms. Stewart has a daughter from a previous relationship, A.S.C., born in 1990. (RP 235-236, 301). Mr. Hart moved in with Ms. Stewart and A.S.C. when A.S.C. was approximately five or six years old. (RP 236, 303).

The family lived at several different addresses together, including an address on 2nd Street and an address on Miller Street. (RP 236, 245-250, 282, 305-307).

When A.S.C. was a teenager, she told Ms. Stewart that Mr. Hart had sexually abused her, but Ms. Stewart did not believe her. (RP 261, 281-283, 311-312, 333-334, 337-338).

When A.S.C. was approximately 16 years old, she told attorney Julie Anderson about the alleged sexual abuse by Mr. Hart. (RP 262-268, 430, 433-434). Ms. Anderson did not believe A.S.C. and did not report the allegations to law enforcement. (RP 262-268, 433-434). A.S.C. wrote a declaration addressed to family members of Mr. Hart, when she was 16 years old, stating she never said

¹ The Report of Proceedings consists of a single volume reported by LuAnne Nelson, containing several pretrial hearings, and three consecutively paginated volumes reported by Karen E. Komoto containing additional pretrial hearings, the trial, and sentencing. The single volume reported by Ms. Nelson is referred to herein as “Nelson RP.” The three consecutively paginated volumes reported by Ms. Komoto are referred to herein as “RP.”

Mr. Hart did things to her. (RP 264-268, 283-284; Ex. 3). According to A.S.C., Ms. Anderson had her write this declaration. (RP 264-268, 283-284). Around this same time frame, Ms. Stewart wrote a letter to the same family members of Mr. Hart, contesting that Mr. Hart had sexually abused A.S.C. (RP 328-329, 334-336, 344-345).

In approximately 2013, Ms. Stewart changed her mind and believed that Mr. Hart had sexually abused A.S.C. (RP 269, 313-314, 339-340). According to A.S.C. and Ms. Stewart, in 2014, Mr. Hart admitted he had sexually abused A.S.C. (RP 269-271, 290, 314-319, 340-341).

In October 2015, after Mr. Hart moved out of Ms. Stewart's house and the couple filed for divorce, A.S.C. reported the alleged sexual abuse against her by Mr. Hart to law enforcement. (CP 4, 8; RP 272-273, 291-292, 353-354). A.S.C. alleged Mr. Hart sexually abused her at the address on 2nd Street and at the address on Miller Street. (CP 2-9). According to A.S.C., she waited to report the incidents to law enforcement until she and Ms. Stewart were safe, which she identified was when Mr. Hart moved out of Ms. Stewart's home and law enforcement confiscated guns from Mr. Hart. (RP 272-273, 279, 296-297). On October 19, 2015, law enforcement confiscated several guns from Mr. Hart. (RP 360, 399, 404-405). Ms. Stewart also did not report the alleged sexual abuse of A.S.C. until after her divorce of Mr. Hart was final. (RP 341, 360-361, 399, 404).

According to A.S.C., Mr. Hart had a distinctive oval-shaped mark on his penis. (RP 273-275, 292-293; Ex. 1). Ms. Stewart also stated that Mr. Hart had a mark on his penis. (RP 331-332, 341-344).

Law enforcement obtained a search warrant to search for and take photographs of a possible mark on Mr. Hart's penis. (RP 357-358, 407-409, 421). The photos do not show a mark on Mr. Hart's penis. (RP 358-359, 407-409, 413; Ex. 5).

The State charged Mr. Hart with two counts of first degree rape of a child (domestic violence), alleged to have occurred at an address on 2nd Street, and two counts of second degree rape of a child (domestic violence), alleged to have occurred at an address on Miller Street. (CP 15-18).

Mr. Hart retained Ms. Anderson as private counsel to represent him on the charges. (CP 73; Nelson RP 8).

The State filed a motion to disqualify Ms. Anderson from representing Mr. Hart. (CP 44-51). The State argued Ms. Anderson had a conflict of interest, because she had a personal relationship with A.S.C. and her family (Mr. Hart and Ms. Stewart), and A.S.C. made disclosures to Ms. Anderson regarding alleged acts against her by Mr. Hart. (CP 44-51). The State argued "Ms. Anderson's representation is also materially limited because she is unable to testify as to issues that could materially impact the presentation of Mr. Hart's case." (CP 48).

Mr. Hart filed a memorandum in opposition to the State's motion to disqualify Ms. Anderson. (CP 54-72). Mr. Hart also submitted a declaration of Ms. Anderson. (CP 73-77). Mr. Hart argued Ms. Anderson did not have a conflict of interest, because A.S.C. had never been a client of Ms. Anderson. (CP 54-72). Mr. Hart argued he "would be extremely prejudiced if [Ms. Anderson is] disqualified as his counsel, because of the likelihood that he will not be able to find private counsel before the trial date." (CP 55).

The trial court held a hearing on the State's motion. (Nelson RP 4-15).

The State argued:

The information that was disclosed to Ms. Anderson [by A.S.C.] is specifically about the germane issue in this case. I believe this essentially makes Ms. Anderson a potential witness in this case, potentially a material witness and perhaps in a rebuttal portion of the defense case if some of the statements that are made by the witnesses in the State's case, Ms. Anderson has personal knowledge of any potential issues that could help Mr. Hart's case if those things were to come to light during the trial.

(Nelson RP 5-6).

The State further argued:

[I]n the defense of any particular individual, determining the credibility of those witnesses is extremely important to their case. And in this particular case, Ms. Anderson has had personal conversations with both [A.S.C.] and [Ms. Stewart] about their potential motivations for potentially either fabricating or coming up with reasons to come up with these allegations against Mr. Hart. Those potential conversations could be very germane to Mr. Hart's case and I think that - - and those conversations occurred prior to these allegations being reported to law enforcement and prior to charges being filed. Therefore, it is the State's position that Ms. Anderson is

potentially a material witness for Mr. Hart and that for those reasons, we think she should be disqualified.

(Nelson RP 9-10).

The trial court asked Ms. Anderson to respond to the State's concern that she is a potential witness. (Nelson RP 6). Ms. Anderson argued that RPC 3.7 did not prohibit her from acting as an advocate in this case, because the testimony relates to an uncontested issue: "it is an uncontested issue that disclosures were made back when [A.S.C.] was 16 or 17." (Nelson RP 6-7). Ms. Anderson stated "we're not going to contest in this trial that she did make some disclosures when she was 16 or 17[.]" (Nelson RP 7, 9). Ms. Anderson stated "Mr. Hart has no intention of calling me as a witness." (Nelson RP 8-9).

Ms. Anderson also argued that her disqualification would work substantial hardship on Mr. Hart, given that she has been Mr. Hart's attorney for 20 years, and "he can't afford to hire another private attorney in this matter." (Nelson RP 8-9).

The trial court granted the State's motion to disqualify Ms. Anderson from representing Mr. Hart. (CP 78; Nelson RP 10-15). The trial court reasoned "I think that Mr. Hart would be deprived potentially of a witness that might be favorable for him in terms of you and your knowledge of the event back many years ago if you are acting as his attorney in this case." (Nelson RP 11, 14-15). The trial court did not address whether Ms. Anderson had a conflict of interest in representing Mr. Hart. (Nelson RP 6, 10-15). The trial court stated "[i]f Mr. Hart

is unable to hire another private attorney, he can ask the Court to appoint one for him.” (Nelson RP 11).

Subsequently, the trial court appointed counsel to represent Mr. Hart. (CP 79, 80-85; Nelson RP 16-20; RP 25).

The case against Mr. Hart proceeded to a jury trial. (RP 49-545).

Witnesses testified consisted with the facts stated above. (RP 234-487).

In addition, A.S.C. testified she does not remember any sort of physical relationship with Mr. Hart at the 2nd Street address. (RP 246-249). She testified that sexual acts with Mr. Hart occurred at the Miller address, and the acts stopped when she was 14 years old. (RP 249-259, 285). A.S.C. described the emotional impact these acts had on her. (RP 260-261). A.S.C. also testified that between 16 and 18 years old, she used drugs. (RP 268-269, 278, 281).

Ms. Stewart testified that when A.S.C. “was about 13, 14[,]” she noticed some behavioral changes in A.S.C. (RP 309-310). She testified A.S.C. was in a rebellious state between the ages of 14 and 16 years old. (RP 336-337, 339). Ms. Stewart testified she did not report the alleged sexual abuse of A.S.C. by Mr. Hart when A.S.C. was 16 years old because “I wasn’t sure if it was true or not.” (RP 340). She testified A.S.C. had told her that nothing had happened. (RP 338, 340).

Wenatchee Police Department Detective Steven Evitt testified he executed the search warrant on Mr. Hart’s penis. (RP 357-358). He testified he was able to

locate a mark, but that he was not able to get a photograph of the mark. (RP 358-359, 409-411, 413, 415-417; Ex. 5).

The State called Mr. Hart's disqualified attorney Ms. Anderson as a witness. (RP 428-437). Ms. Anderson testified that when A.S.C. was 16 or 17 years old, A.S.C. spoke to her about sexual abuse allegations against Mr. Hart. (RP 430, 433-434). She testified she did not have anything to do with the declaration A.S.C. wrote to family members of Mr. Hart when she was 16 years old. (RP 430-433, 435; Ex. 3). She testified she never spoke to A.S.C. about the allegations against Mr. Hart again. (RP 433). Ms. Anderson testified A.S.C. was having behavioral problems around the time she made the allegations. (RP 435-437).

Before it rested its case, the trial court allowed the State to file an amended information, charging one count of second degree rape of a child (domestic violence) and one count of second degree child molestation (domestic violence), both alleged to have occurred at an address on Miller Street, "on or between January 1, 2002, December 31, 2004[.]" (CP 120-122; RP 457-470, 482).

Mr. Hart submitted an exhibit containing photographs of his penis that were taken on the day they were offered into evidence. (RP 473, 479, 482-487; Ex. 6). These photos do not show a mark on Mr. Hart's penis. (Ex. 6). Defense investigator Juan Miranda testified he took the photographs, and that he did not

notice any markings on Mr. Hart's penis. (RP 484). On cross-examination by the State, Mr. Miranda testified as follows:

[The State:] . . . [Y]ou were aware that there was an allegation of a mole being on Mr. Hart's penis, and photos being taken of it in April of last year.

[Mr. Miranda:] Correct.

[The State:] So it's been 13 months, since those allegations came forward; is that correct?

[Mr. Miranda:] That sounds right, correct.

[The State:] Okay. And, during that time, are you aware of any surgical procedure that Mr. Hart underwent?

[Mr. Miranda:] I'm not aware of any.

[The State:] Have you received all of Mr. Hart's medical records?

[Mr. Miranda:] I have not.

[The State:] Have you asked him whether or not he had the mole removed?

[Mr. Miranda:] I did not.

(RP 486-487).

Mr. Miranda was the only witness called by the defense. (RP 482-487).

The jury found Mr. Hart guilty as charged in the amended information.

(CP 120-122, 176-179; RP 541-545).

In its closing argument, the State argued as follows:

What wouldn't a person do, to get out of a crime? When you know what you're being accused of, you've read the reports against you, and you know that these witnesses have told you - - have told police, He has this mark, on his penis. So where is - - what's a person going to do? I'm going to get rid of the mark. When you're charged with a crime - - a serious crime - - like what Mr. Hart's charged with, I think you'd do just about anything.

(RP 510-511).

Defense counsel did not object. (RP 510-511).

In its rebuttal closing argument, the State argued as follows:

Mr. Hart is a very smart man. I will give him credit for that. Because the day of the last day of trial, he presents us with pictures of his penis, where he says that there's no mole here anymore. Mr. Hart has had 13 months to produce something like that. But today is the day that we get those photos.

That is a problem. And that should ring question into your ear, about, if you determine that there's no mole on his penis, why is there no more mole? And why are we just finding out about it, today? Why are we just getting pictures of that today?

There are some amazing advances in plastic surgery these days. Where if someone gets a nose job - - you can't tell.

(RP 533-534).

At this point in the argument, defense counsel objected. (RP 534). The trial court sustained the objection, but did not strike the argument or give a curative instruction. (RP 534). The State continued its argument:

He had ample opportunity to remove a mole, from his penis; 13 months' worth. He knew what the allegations were, he knew what the testimony was going to be against him, so what are you going to do? And when am I going to tell them about it?

The day of trial.

(RP 534).

Defense counsel did not object. (RP 534).

At sentencing, the trial court imposed the following conditions of community custody, among others:

[N]ot reside within 880 feet of the facilities and grounds of a public or private school (community protection zone).
RCW 9.94A.030.

....

14. The defendant shall not possess sexually explicit materials,* specifically material that is the depiction of sexual subject matter for the purposes of sexual excitement, including but not limited to, books, magazines, videos, drawings, photographs, etc. *as defined by statute.

(CP 203, 212; RP 573-577).

The Judgment and Sentence indicates sentence was imposed under RCW 9.94A.507. (CP 198, 202-203).

The trial court imposed the following legal financial obligations: \$500 victim assessment; \$200 criminal filing fee; and \$100 DNA collection fee. (CP 204-205; RP 577-578). The trial court declined to impose additional legal financial obligations, stating “I’m going to limit it to just the mandatory amounts[.]” (RP 577).

The Judgment and Sentence contains the following boilerplate language and finding made by the trial court:

2.5 Legal Financial Obligations/Restitution: The court has considered the total amount owing, the defendant’s present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change. (RCW 10.01.160). The court makes the following specific findings:

[X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

(CP 201).

The Judgment and Sentence also contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 205).

Mr. Hart timely appealed. (CP 219-220). The trial court entered an Order of Indigency, finding Mr. Hart “lacks sufficient funds to prosecute an appeal” and granting him a right to review at public expense. (CP 221-226).

D. ARGUMENT

Issue 1: Whether Mr. Hart was denied his Sixth Amendment right to counsel of choice when the trial court erroneously disqualified Julie Anderson from representing him.

Mr. Hart retained private counsel, Ms. Anderson, to represent him in this case. After the State argued Ms. Anderson was a potential witness, the trial court granted the State’s motion to disqualify Ms. Anderson from representing Mr. Hart. The trial court erred in disqualifying Ms. Anderson from representing Mr. Hart, because her representation of Mr. Hart was not prohibited under RPC 3.7. By disqualifying Ms. Anderson, Mr. Hart was denied his Sixth Amendment right to counsel of choice. This is structural error requiring that Mr. Hart receive a new trial.

The Sixth Amendment to the United States Constitution provides, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const., amend. VI. “The right to the assistance of counsel under the Sixth Amendment to the United States Constitution generally includes the defendant’s right to his or her choice of private counsel.” *State v. Hampton*, 184 Wn.2d 656, 662, 361 P.3d 734 (2015); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 2561, 165 L. Ed. 2d 409

(2006) (acknowledging this constitutional right); *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (holding “the right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment[.]”). This right to counsel of choice only applies to defendant with private attorneys; it does not apply to indigent defendants with appointed counsel. *Id.* at 662-663 (citing *Gonzalez-Lopez*, 548 U.S. at 151).

“Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation.” *Gonzalez-Lopez*, 548 U.S. at 148. “Deprivation of the right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.” *Id.*

In addition, a violation of the Sixth Amendment right to counsel of choice is not subject to a harmless error analysis. *Id.* at 148-150. A violation of this right is “structural error.” *Id.* at 150. “A choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied.” *Id.* (emphasis in original).

Nonetheless, “even for defendants with private attorneys, the right to counsel of choice is not absolute.” *Hampton*, 184 Wn.2d at 663 (citing *Gonzalez-Lopez*, 548 U.S. at 151). In *Gonzalez-Lopez*, where the government conceded a violation of the Sixth Amendment right to counsel of choice, the Supreme Court

acknowledged there are limits to the right, such as “insist[ing] on representation by a person who is not a member of the bar, or demand[ing] that a court honor [a] waiver of conflict-free representation[,]” and “balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar[.]” *Gonzalez-Lopez*, 548 U.S. at 151-52. The Court also stated “[t]he court has, moreover, an ‘independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.’” *Id.* at 152 (quoting *Wheat*, 486 U.S. 160).

Here, the State moved to disqualify private attorney Ms. Anderson from representing Mr. Hart on the basis that Ms. Anderson had a conflict of interest, because she had a personal relationship with A.S.C., Ms. Stewart, and Mr. Hart, and on the basis that Ms. Anderson was a potential witness for Mr. Hart. (CP 44-51, 73; Nelson RP 5-6, 8-10). Ms. Anderson argued that RPC 3.7 did not prohibit her representing Mr. Hart in this case, because the testimony relates to an uncontested issue, the disclosures of sexual abuse A.S.C. made to her. (Nelson RP 6-7, 9). Ms. Anderson argued Mr. Hart did not intend to call her as witness at trial. (Nelson RP 8-9).

The trial court granted the State’s motion to disqualify Ms. Anderson from representing Mr. Hart, reasoning that “Mr. Hart would be deprived potentially of a witness that might be favorable for him” (CP 78; Nelson RP 10-15). The

trial court did not address whether Ms. Anderson had a conflict of interest in representing Mr. Hart. (Nelson RP 10-15).

The trial court erred in disqualifying Ms. Anderson from representing Mr. Hart, because her representation of Mr. Hart was not prohibited under RPC 3.7.

Under RPC 3.7:

A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) disqualification of the lawyer would work substantial hardship on the client; or
- (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

RPC 3.7(a).

When interpreting the provisions of RPC 3.7, “courts have been reluctant to disqualify an attorney absent compelling circumstances.” *Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int’l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994). “A motion for disqualification under RPC 3.7 must be supported by a showing that (1) the attorney will give evidence material to the determination of the issues being litigated, (2) the evidence is unobtainable elsewhere, and (3) the testimony is or may be prejudicial to the testifying attorney’s client.” *State v. Sanchez*, 171 Wn. App. 518, 545, 288 P.3d 351, 364 (2012).

An appellate court reviews a trial court’s ruling under RPC 3.7 for abuse of discretion. *Am. States Ins. Co. ex rel. Kommavongsa v. Nammathao*, 153 Wn.

App. 461, 466, 220 P.3d 1283 (2009). “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *Id.*

Here, the trial court erred in disqualifying Ms. Anderson from representing Mr. Hart under RPC 3.7. Ms. Anderson was not a necessary witness in this case. The State could establish its case without calling Ms. Anderson as a witness. *See Nammathao*, 153 Wn. App. at 466-68 (where this Court reversed a trial court’s disqualification of an attorney where the opposing party could establish its counterclaim without calling the attorney as a witness, and therefore, the attorney was not a necessary witness for the opposing party’s case).

Even if this Court determines that Ms. Anderson was a necessary witness in this case, RPC 3.7 permits an attorney to continue to act as an advocate if her testimony relates only to an uncontested issue. *See* RPC 3.7(a)(1). Ms. Anderson’s testimony related only to an uncontested issue: that A.S.C. had disclosed to her that Mr. Hart had sexual abused her. (Nelson RP 6-7, 9; RP 428-437); *see Pub. Util. Dist. No. 1 of Klickitat Cty.*, 124 Wn.2d at 811-812 (finding the trial court did not abuse its discretion in denying the defendants’ motion to disqualify the plaintiff’s attorney, where the defendants were unable to establish the evidence to be provided by the attorney was otherwise unobtainable). Mr. Hart informed the trial court he would not contest that information. (Nelson RP 7, 9). Ms. Anderson’s testimony is not regarding evidence that is unobtainable

elsewhere, and therefore, disqualification under RPC 3.7 was erroneous. *See Pub. Util. Dist. No. 1 of Klickitat Cty.*, 124 Wn.2d at 811-812; *see also Sanchez*, 171 Wn. App. at 545.

In addition, even if this Court determines that Ms. Anderson was a necessary witness in this case, RPC 3.7 permits an attorney to continue to act as an advocate if disqualification would work a substantial hardship on the client. *See* RPC 3.7(a)(3). Disqualification of Ms. Anderson worked a substantial hardship on Mr. Hart, where she had been Mr. Hart's attorney for 20 years and he could not afford to hire another private attorney to represent him. (Nelson RP 8-9).

The trial court abused its discretion in disqualifying Ms. Anderson from representing Mr. Hart under RPC 3.7. By disqualifying Ms. Anderson from representing Mr. Hart, he was denied his Sixth Amendment right to counsel of choice. *See Hampton*, 184 Wn.2d at 662; *Gonzalez-Lopez*, 548 U.S. at 144; *Wheat*, 486 U.S. at 159. Mr. Hart is not required to show prejudice. *See Gonzalez-Lopez*, 548 U.S. at 148. The constitutional violation that occurred here is structural error, not subject to a harmless error analysis. *See Gonzalez-Lopez*, 548 U.S. at 148-150. The case should be reversed and remanded for a new trial.

Issue 2: Whether the State committed misconduct in its closing arguments that was prejudicial and incurable by making statements regarding plastic surgery.

In its closing arguments, the State committed misconduct by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from his penis. The misconduct was prejudicial and incurable, and therefore, requires a new trial.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)); *see also State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012) (when raising prosecutorial misconduct, the appellant “must first show that the prosecutor's statements are improper.”).

If the defendant fails to properly object to the misconduct, “a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.” *State v. O’Donnell*, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction

would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). “Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762.

In closing argument, the State is allowed to draw reasonable inferences from the evidence. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). “However, a prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant.” *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

It is improper for a prosecutor to personally vouch for the credibility of a witness. *Thorgerson*, 172 Wn.2d at 443. Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness. *Id.*

Here, in its closing argument, the State argued as follows, regarding plastic surgery:

What wouldn't a person do, to get out of a crime? When you know what you're being accused of, you've read the reports against you, and you know that these witnesses have told you - - have told police, He has this mark, on his penis. So where is - - what's a person going to do? I'm going to get rid of the mark. When you're charged with a crime - - a serious crime - - like what Mr. Hart's charged with, I think you'd do just about anything.

(RP 510-511).

Defense counsel did not object. (RP 510-511).

In its rebuttal closing argument, the State again addressed plastic surgery:

In its rebuttal closing argument, the State argued as follows:

Mr. Hart is a very smart man. I will give him credit for that. Because the day of the last day of trial, he presents us with pictures of his penis, where he says that there's no mole here anymore. Mr. Hart has had 13 months to produce something like that. But today is the day that we get those photos. That is a problem. And that should ring question into your ear, about, if you determine that there's no mole on his penis, why is there no more mole? And why are we just finding out about it, today? Why are we just getting pictures of that today? There are some amazing advances in plastic surgery these days. Where if someone gets a nose job - - you can't tell.

(RP 533-534).

At this point in the argument, defense counsel objected. (RP 534). The trial court sustained the objection, but did not strike the argument or give a curative instruction. (RP 534). The State continued its argument:

He had ample opportunity to remove a mole, from his penis; 13 months' worth. He knew what the allegations were, he knew what the testimony was going to be against him, so what are you going to do? And when am I going to tell them about it? The day of trial.

(RP 534).

Defense counsel did not object. (RP 534).

The State committed misconduct in its closing arguments by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from

his penis. These arguments were not reasonable inferences from the evidence, because there was no evidence presented at trial that Mr. Hart had obtained plastic surgery. (RP 234-487). To the contrary, the only evidence presented at trial regarding plastic surgery was Mr. Miranda's testimony that he was not aware of any surgical procedure that Mr. Hart underwent. (RP 487). The prosecutor's statements were unsupported by the evidence presented at trial. *See Boehning*, 127 Wn. App. at 519.

The prosecutor's statements regarding Mr. Hart obtaining plastic surgery were also not reasonable inferences from the evidence because neither set of photographs, those taken prior to the charges in the case and those taken during trial, showed a mark on Mr. Hart's penis. (RP 358-359, 407-409, 413, 473, 479, 482-487; Exs. 5, 6).

In addition, the prosecutor's statements regarding Mr. Hart obtaining plastic surgery constituted improper vouching for the credibility of witnesses A.S.C., Ms. Stewart, and Detective Evitt, who testified to a mark on Mr. Hart's penis. *See Thorgerson*, 172 Wn.2d at 443. Improper vouching occurred here, when the prosecutor indicates that evidence not presented at trial (i.e., the insinuation that Mr. Hart had plastic surgery to remove a mark from his penis) supported the testimony of a A.S.C., Ms. Stewart, and Detective Evitt. *See Thorgerson*, 172 Wn.2d at 443.

The State's argument prejudiced Mr. Hart. *See Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). This case turned on the credibility of A.S.C., whether to believe her testimony that Mr. Hart had sexually abused her. There was evidence throughout the record to doubt her credibility. Although A.S.C. initially alleged Mr. Hart sexually abused her at the address on 2nd Street and at the address on Miller Street, A.S.C. later testified at trial that she does not remember any contact at the 2nd Street address, resulting in an amendment to the charges against Mr. Hart. (CP 2-9, 15-18, 120-122; RP 246-249, 457-470, 482). Both Ms. Stewart and Ms. Anderson did not believe A.S.C. when she disclosed the alleged abuse. (RP 261-268, 281-283, 311-312, 333-334, 337-338, 430, 433-434). A.S.C. wrote a declaration stating she never accused Mr. Hart. (RP 264-268, 283-284; Ex. 3). Neither set of photographs taken of Mr. Hart's penis showed a mark. (RP 358-359, 407-409, 413, 473, 479, 482-487; Exs. 5, 6).

Given the evidence in the record to doubt her credibility, the prosecutor's argument that Mr. Hart obtained plastic surgery to remove a mark from his penis had a substantial likelihood of affecting the jury verdict, by vouching for A.S.C. that Mr. Hart had previously had a mark on his penis, and therefore improperly vouching for and bolstering her trial testimony. The prosecutor's argument also vouched for the credibility of Ms. Stewart, which was also important testimony for the State. The State's evidence was not

overwhelming, and the prosecutor's comments had a substantial likelihood of affecting the jury verdict.

The State's misconduct "was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336); see also *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). No curative instruction would have alleviated the belief in the jurors' minds that Mr. Hart had plastic surgery to remove the mark from his penis, a fact outside of the evidence submitted for their consideration. The error was incurable, given the fact that the case hinged upon the credibility of A.S.C., there was evidence throughout the record to doubt her credibility, and the evidence of Mr. Hart's guilty was not overwhelming.

The State committed misconduct in its closing arguments that was prejudicial and incurable, by making statements regarding Mr. Hart obtaining plastic surgery to remove the mark from his penis. This Court should reverse his convictions and remand for a new trial.

Issue 3: Whether the trial court erred in imposing conditions of community custody prohibiting Mr. Hart from residing in a "community protection zone" and from possessing sexually explicit materials.

The trial court imposed a community custody condition prohibiting Mr. Hart from "resid[ing] within 880 feet of the facilities and grounds of a public or private school (community protection zone). RCW 9.94A.030." (CP 203). The

trial court lacked statutory authority to impose this condition. In addition, the trial court imposed a community custody condition prohibiting Mr. Hart from “possess[ing] sexually explicit materials,* specifically material that is the depiction of sexual subject matter for the purposes of sexual excitement, including but not limited to, books, magazines, videos, drawings, photographs, etc. *as defined by statute.” (CP 212). This condition is not related to Mr. Hart’s crimes of conviction. Therefore, both of these community custody conditions should be stricken from Mr. Hart’s Judgment and Sentence.

Mr. Hart challenges these community custody conditions for the first time on appeal. (RP 573-577). Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”) (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Autrey*, 136 Wn. App. 460, 466, 150 P.3d 580 (2006) (citing *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)). “A trial court abuses its discretion when its decision is manifestly unreasonable or

exercised on untenable grounds or for untenable reasons[.]” *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Addressing the community protection zone community custody condition (CP 203), a trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A sentence imposed under the Sentencing Reform Act of 1981 (SRA) “shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345.

Here, Mr. Hart’s offenses were committed on or between January 1, 2002 and December 31, 2004. (CP 120-121, 176-179, 198-213; RP 541-545). The “community protection zone” community custody provision at issue was not effective until July 24, 2005, after the date of Mr. Hart’s offenses. Laws of 2005, ch. 436, § 2; *see also* RCW 9.94A.712(6)(a)(ii) (2006) (authorizing this community custody provision). Therefore, the trial court lacked statutory authority to impose this community custody provision. *See* RCW 9.94A.345.

Accordingly, this court should remand this case with an order that the trial court strike the community custody condition prohibiting Mr. Hart from “resid[ing] within 880 feet of the facilities and grounds of a public or private school (community protection zone). RCW 9.94A.030.” (CP 203); *see also State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court

lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition).

Addressing the possession of sexually explicit materials community custody condition (CP 212), as recognized above, a sentence imposed under SRA “shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. Based on the offense dates of “on or between January 1, 2002 and December 31, 2004,” the applicable sentencing statute is RCW 9.94A.712 (2004). (CP 120-121, 198-213). The following community custody conditions were authorized by that statute:

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

See RCW 9.94A.712(6)(a) (2004).

Under RCW 9.94A.700(5), a permissible community custody condition is “[t]he offender shall comply with any crime-related prohibitions.” RCW 9.94A.700(5)(e) (2004). A crime-related community custody condition may be upheld where there is some basis for the connection to the crime. *State v. Irwin*, 191 Wn. App. 644, 657, 364 P.3d 830 (2015).

In *State v. Magana*, this Court upheld a community custody condition “regarding sexually explicit materials” as crime-related, and therefore, properly imposed, “[b]ecause [the defendant] was convicted of a sex offense[.]” *State v. Magana*, 197 Wn. App. 189, 201, 389 P.3d 654 (2016). The opinion contains no additional analysis of the connection between the crime itself and sexually explicit materials. *See id.* at 201. Subsequently, Division I rejected the categorical approach of *Magana*:

To the extent *Magana* stands for either a categorical approach or the broad proposition that a sex offense conviction alone justifies imposition of a crime-related prohibition, we disagree. As previously noted, there must be some evidence supporting a nexus between the crime and the condition.

State v. Norris, 404 P.3d 83, 89 (Wash. Ct. App. 2017).

The *Norris* court upheld a condition prohibiting possession of sexually explicit materials, because the crime involved sex-related text messages and a photograph. *Id.*

Subsequent Division I cases have followed suit in rejecting the categorical approach of *Magana*. *See, e.g., State v. Bruno*, No. 74647-2-I, 2017 WL 5127781, at *9 (Wash. Ct. App. Nov. 6, 2017); *State v. Santiago*, No. 74421-6-I, 2017 WL 5569209, at *6 (Wash. Ct. App. Nov. 20, 2017); *see also* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

Mr. Hart asks this Court to decline to follow *Magana*, and instead follow the reasoning of Division I, requiring a connection between the crimes of conviction and sexually explicit materials. *See Norris*, 404 P.3d at 89; *see also Bruno*, 2017 WL 5127781, at *9; *Santiago*, 2017 WL 5569209, at *6; GR 14.1(a).

Here, there is no evidence in the record that possessing the sexually explicit materials specified in the challenged community custody was related to Mr. Hart's crimes. (CP 212). The crimes did not involve sexually explicit materials. Therefore, the trial court erred by imposing this community custody condition, because it was not crime-related. *See RCW 9.94A.700(5)(e)* (2004); *Irwin*, 191 Wn. App. at 657; *Norris*, 404 P.3d at 89; *Bruno*, 2017 WL 5127781, at *9; *Santiago*, 2017 WL 5569209, at *6; GR 14.1(a). In addition, this community custody condition does not "reasonably relate" to Mr. Hart's risk of reoffending or the safety of the community, because there is no evidence that the sexually explicit materials specified in the condition contributed to the offenses. *See RCW 9.94A.712(6)(a)* (2004).

Accordingly, this court should remand this case with an order that the trial court strike community custody condition prohibiting Mr. Hart from "possess[ing] sexually explicit materials,* specifically material that is the depiction of sexual subject matter for the purposes of sexual excitement, including but not limited to, books, magazines, videos, drawings, photographs, etc. *as defined by statute." (CP 212); *see also O'Cain*, 144 Wn. App. at 775.

Issue 4: Whether the judgment and sentence must be corrected to reflect that Mr. Hart was sentenced under RCW 9.94A.712, rather than RCW 9.94A.507.

The Judgment and Sentence indicates sentence was imposed under RCW 9.94A.507. (CP 198, 202-203). As recognized above, a sentence imposed under SRA “shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. RCW 9.94A.507, governing sentencing for specified sex offenses, was not effective until August 1, 2009, which was after the date when the sex offenses at issue here were committed. *See* Laws of 2008, ch. 231, § 56; *see also* CP 120-121, 176-179, 198-213; RP 541-545. The applicable statute was RCW 9.94A.712. *See* RCW 9.94A.712 (2004) (governing sentencing of non-persistent offenders, including those convicted of second degree rape of a child); *see also* Laws of 2008, ch. 231, § 56 (effective August 1, 2009, RCW 9.94A.712 was recodified as RCW 9.94A.507).

Because RCW 9.94A.712 was the law in effect when the sex offenses at issue here were committed, this court should remand this case to the trial court for correction of the Judgment and Sentence to reflect that Mr. Hart was sentence under RCW 9.94A.712, rather than RCW 9.94A.507. *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener’s error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280

(2010) (remand appropriate to correct scrivener’s error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence).

Issue 5: Whether this Court should deny costs against Mr. Hart on appeal in the event the State is the substantially prevailing party.

Mr. Hart preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court’s General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

An order finding Mr. Hart indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 221-226). To the contrary, Mr. Hart’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hart remains indigent. The report shows that Mr. Hart’s financial circumstances have not improved since the date he was sentenced in this case.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). 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, the 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 successfully rehabilitate 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. Hart has demonstrated his indigency and current and future inability to pay costs beyond the mandatory costs imposed by the trial court at sentencing. (CP 201,

204-205; RP 577-578). In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Hart would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); 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) (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

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. Mr. Hart met this standard for indigency. (CP 221-226).

In addition, Mr. Hart’s report as to continued indigency states that he receives SSI. *See City of Richland v. Wakefield*, 186 Wn.2d 596, 603, 380 P.3d 459 (2016) (defining SSI as “social security income.”).

In *Blazina*, our Supreme Court stated:

[W]hen determining a defendant's ability to pay . . . Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, *such as Social Security or food stamps* . . . Although the ways to establish indigent status remain nonexhaustive . . . *if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.*

Blazina, 182 Wn.2d at 838-39 (internal citations omitted) (emphasis added).

Because Mr. Hart currently receives SSI, the record demonstrates he is indigent and does not have the ability to pay costs on appeal. *See id.*

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 221-226. “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) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Hart to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Hart's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Hart remains indigent.

This Court is asked to deny appellate costs at this time. 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. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Hart's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Hart remains indigent.

Appellate costs should not be imposed in this case.

E. CONCLUSION

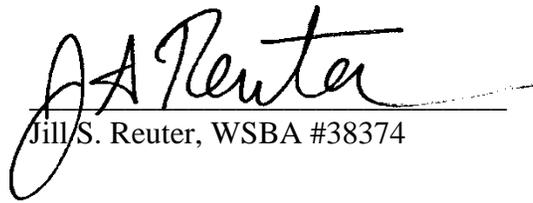
This case should be reversed and remanded for a new trial because Mr. Hart was denied his Sixth Amendment right to counsel of choice when the trial court erroneously disqualified Julie Anderson from representing him.

This case should also be reversed and remanded for a new trial because the State committed misconduct in its closing arguments that was prejudicial and incurable by making statements regarding plastic surgery.

At a minimum, this case should be reversed and remanded for the trial court to take the following action: (1) strike the community custody conditions prohibiting Mr. Hart from residing in a "community protection zone" and from possessing sexually explicit materials; and (2) correct the Judgment and Sentence to reflect that Mr. Hart was sentence under RCW 9.94A.712, rather than RCW 9.94A.507.

Mr. Hart also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 22nd day of December, 2017.


Jill S. Reuter, WSBA #38374

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

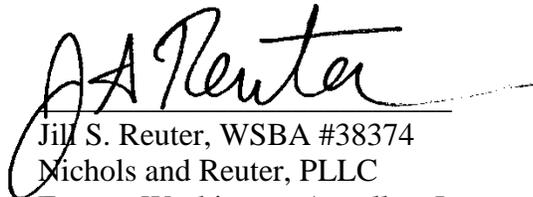
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35381-8-III
vs.) Chelan Co. No. 16-1-00224-3
)
EDWARD LANE HART) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on December 22, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Edward Lane Hart, DOC #399600
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Having obtained prior permission from the Chelan County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting.attorney@co.chelan.wa.us using the Washington State Appellate Courts' Portal.

Dated this 22nd day of December, 2017.



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