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No. 35611-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
JONATHON A. BENSON,
Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. The trial court erred in finding Mr. Benson guilty of indecent liberties by forcible compulsion, where the evidence was insufficient.
2. The State committed misconduct in its closing argument that was prejudicial and incurable, by vouching for J.A. and by appealing to the passion and prejudice of the jury.
3. The trial court erred in imposing the several terms of community custody.
4. The trial court erred by entering findings in the felony judgment and sentence that Mr. Benson has the ability to pay costs of incarceration, costs of medical care, and legal financial obligations.
5. The trial court erred by requiring Mr. Benson to pay costs of incarceration and costs of medical care, or in the alternative, defense counsel's failure to request that the trial court strike its unsupported findings regarding legal financial obligations, costs of incarceration, and costs of medical care, constituted ineffective assistance of counsel.
6. An award of costs on appeal against Mr. Benson would be improper, in the event the State is the substantially prevailing party.

II. STATEMENT OF THE CASE

Ms. Jessica Arellano, a special education student who had played soccer in the Special Olympics, was on the campus of the Yakima Valley Community College (YVCC) charging her cell phone at a location where she had charged her phone before. RP 126, 116, 128, 188. 205. Ms. Arellano was not a student of YVCC at the time of this incident. RP 205

She was by herself when she was approached by the defendant.

There was initially conversation between them, some of that regarding whether Ms. Arellano wanted to drink some of the lemon vodka the Appellant had and was drinking. RP 113, 119, 131-32, 140

Ms. Arellano eventually went outside to get some air and at some point in time the defendant also went outside, Ms. Arellano joined him. RP 113. At this time the defendant gave her a “friendly hug.” Benson next kissed Ms. Arellano on the neck which she voiced her objection to saying “...like why are you kissing me.” She testified that it was not okay that he had kissed her. After Benson kissed her Ms. Arellano went back into check on her phone. RP 113-15. She testified “I hadn’t said anything because I got scared inside my body...” RP 115.

Ms. Arellano said that Benson called her over to an area near a tree then “he like grabbed me. And I felt his dick on me. And then he turned and gave me a big old hug and I tried to -- and I tried to move it away...so I tried to push him back away...because I, I don’t feel comfortable with that.” RP 116. When asked about the big hug she testified that she was not comfortable with it and that she once again stated that she did not say anything because she “...just got too scared.” She then testified that what she felt was “[l]ike a dick, like his hard dick...he got like a bone and like when he got drunk, you know how guys get drunk and you know how they’ve got like a burner? Like they want to have sex.... he was moving it

back and forth...[a]nd he was still hugging me...I was pushing him away and walking back away.” When asked how effective that was she stated “[n]ot good.” And when asked if it was easy to push the defendant away she stated, “No.” RP 118-19, 121. She testified about getting away from the defendant after this as “escaping.” RP 120.

Ms. Arellano was able to identify the person who had rubbed his boner on her as being the defendant. RP 121-2, 124. During later examination she also testified the defendant was grabbing and touching her butt when they were out near the tree, this occurred separately from the incident where he hugged her, kissed her and rubbed his boner on her. During this incident Ms. Arellano was also pushing Benson away because she did not feel comfortable with what he was doing. She stated she was not very successful at pushing him off, that she was scared and she didn’t know if he had a knife or a gun. RP 125-26, 134-35

Benson was a complete stranger to Ms. Arellano. She reiterated that she had been in special education and had been successful with her soccer team that was in the Special Olympics. RP 126. Ms. Arellano was wearing a tank top and basketball shorts on the day of this crime. RP 130

On cross-examination Ms. Arellano reiterated that the defendant had rubbed his dick on her and that while she may not have used the phrase “dry humping” she understood that it meant rubbing your boner up

and down. RP 135. She stated that during this contact Benson had been wearing shorts over his pants and that he had taken those shorts off. RP 135-6.

She further clarified that when the defendant was rubbing his boner on her he was rubbing her “on the girl’s uppers...[t]he pussy.” That to do this he had been bending down at the knees. RP 137. Defendant’s counsel attempted to get Ms. Arellano to stated that she had been coached to use this phrasing, but she stated that was using her own words. RP 138.

YVCC Security Officer Olson confirmed that when he spoke to Ms. Arellano that she stated that she was pressed up against the door in an alcove and that her butt was grabbed. RP 159. He further testified that Ms. Arellano stated to him that the defendant has “rubbed himself on her.” RP 161.

YVCC Security Officer Cornwell testified that he was notified that there was somebody in the nearby park, which is contiguous to campus, who had alcohol. Officer Cornwell began observation of this person, later identified as the defendant. This officer also observed the victim on campus charging her phone and intended to notify her that she could not do that activity. RP 188-89. As he was going to contact these individuals, he approached a small alcove and observed that the two individuals were in very close contact with the defendant’s hands on the

victim's posterior. He further testified:

A Chest to chest, face past ears, hands on the posterior, a look of surprise on the female with her hands to her sides.

Q Okay. So, she wasn't hugging him?

A Negative.

Q And what was the expression on her face?

A Surprise. RP 189

During cross-examination defendant's counsel asked Officer Cornwell if he noticed the victim's demeanor, this officer's initial response was "[t]he anxiety she felt when she came into the Deccio Building." He also testified that he observed the defendant "snuggling, nuzzling in the neck area." Trial counsel stated that the defendant's hands would have been on the victim's hip area. RP 221-22

The State on redirect asked if the question/comment by trial counsel about the hip area and this officer corrected the previous statement/question and testified that "...I would say that he put his hands – his hands were on her buttocks, not her hips...[t]he male subjects had his hands on the female's posterior." PR 229

Officer Bradley Althaus was the arresting officer. He located the defendant and took him into custody after having been contacted by the YVCC staff. RP 242-5. The victim was brought to the location where this officer had the defendant and she, Ms. Arellano, identified the defendant. RP 247. The defendant was transported to the police station

and was placed in a holding cell. It was in that location that Officer Althaus questioned the defendant. RP 247-8. This interview was recorded by the officer using an automatic system called COBAN. RP 250.

During that interview Benson stated that the victim had been putting her arms around him. That he had given her a hug and that during that hug he had “felt a little bit...”. This was later clarified by the officer to be the defendant felt the victim’s butt, however, [he] wasn’t trying to do anything.” RP 254. Benson also admitted on this tape that he had kissed the victim on the neck.¹ And agreed with the officer when he asked if the victim had told Benson “no.” Benson went on to state that he needed a hug. When asked “[d]id you hump the front of her leg – like dry hump her?” Benson stated “[m]aybe, I don’t know...maybe...no...if I did I’m sorry. I apologize to her.” RP 254-56.

III. ARGUMENT

1. **Response to Issue 1. Sufficiency of the evidence.**

The State proved that the defendant committed indecent liberties with forcible compulsion beyond a reasonable doubt. The evidence presented by the State was sufficient to support the jury’s finding of guilt.

¹ The tape recording of this portion has some sections that are “indiscernible” however it is clear what the answers given to the officer were from context. It must be noted that the recording was played to the jury and the VPR of this conversation was taken from the audio of that recording played in open court.

The Information in this case has charged the defendant with one count of Indecent Liberties, RCW 9A.44.100(1)(a), this count included the allegation by the State that this crime was "...by forcible compulsion." CP 6.

There were three primary instructions which the jury were given that address this verdict. Instruction 6 states:

A person commits the crime of indecent liberties when he or she knowingly causes another person to have sexual contact with him by forcible compulsion. CP232

The elements or to convict instruction, number 7, for this crime read as follows:

To convict the defendant of the crime of indecent liberties, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August,15, 2016 the defendant knowingly caused J.A. to have sexual contact with the defendant;
- (2) That this sexual contact occurred by forcible compulsion.
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2) and (3) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty. CP 233

Sexual contact was defined in instruction 8:

Sexual contact means any touching of the sexual or

other intimate parts of a person done for the purpose of gratifying sexual desires of either party. CP 234

And forcible compulsion is found in instruction 9:

Forcible compulsion means physical force that overcomes resistance.

Appellate courts review sufficiency of the evidence challenges to see if there was evidence from which the trier of fact could find each element of the offense proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307,319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))

Issues of witness credibility are to be determined by the trier of fact and cannot be reconsidered by an appellate court. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court will consider the evidence in a light most favorable to the prosecution. Id. It also must defer to the finder of fact in resolving conflicting evidence and credibility determinations. Camarillo, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence requires that the defendant address the evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and

circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.

A challenge to the sufficiency of evidence admits the truth of the State's evidence and all inferences that can be reasonably be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The jury, alone, has had the opportunity to view the witnesses' demeanor and to judge their veracity. Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Benson cites to RCW 9A.44.010(6) stating “[h]ere, the jury was instructed on the first definition part of the definition only...” There was no challenge to jury instruction 9 in the trial court and there has been no overt challenge of that instruction in this court:

THE COURT: With regard to Instruction Number 9,

any objection or exception?

MR. DOLD: No.

MR. SOUKUP: Not for the State. RP 284

This court must ignore that definition as it was not the law agreed to, and unchallenged, by Benson in his trial. The law as given to the jury, agreed to by the defendant and proven by the state was that which the jury was instructed:

Instruction Number 1. It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It is also your duty to accept the law from my instructions regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way, decide the case. (Emphasis added)

...

Instruction Number 6. A person commits the crime of Indecent Liberties when he or she knowingly causes another person to have sexual contact with him by forcible compulsion. RP 331, CP 232.

...

Instruction Number 9. Forcible compulsion means physical force that overcomes resistance. RP 332, CP 235

Further, that instruction is the valid WPIC definitional instruction.

That instruction in its totality mirrors that RCW, however there was literally nothing alleged or testified to that would support the need for using the surplus language found after the word resistance. This attempt to intimate that the jury should have been tasked with finding that the acts committed by this defendant should meet that definition is incorrect.

Benson did not propose that the court instruct the jury with the entire definition of intimate body parts. RP 260-72. The Court specifically asked counsel if he had instruction and there was never an indication that he had any such instructions or that he was challenging this instruction. RP 268-69.

Trial counsel did not blithely agree to the instructions proposed. There was extensive argument by Benson's trial counsel regarding the State's request for a voluntary intoxication instruction as well of discussion regarding the definition on intimate. There are over one-hundred references to intoxication in this report of proceedings there was literally no discussion regarding instruction 9 except the statement by both trial attorneys that they did not object to the proposed instruction.

The facts set forth in Appellant's brief alone are sufficient for a jury to find the defendant guilty.

J.A. testified that Mr. Benson put his penis on her body as follows: [H]e was like grabbing me. And then I felt his dick on me. And then he turned and gave me a big old hug and I tried to - - and then I tried to move it away.

. . . .

[T]hen after that, so I tried to push him back away and then because I, I don't feel comfortable with that. And then after that, then he - - so I walk away, take my charger with me to walk away. (RP 116).

J.A. testified that Mr. Benson's penis rubbed her body on the front side, "[l]ike on the girl's uppers . . . [o]n the pussy." (RP 137). She testified she was not able to push Mr. Benson away very well. (RP 126).

J.A. further testified:

[The State:] . . . How did he grab you?

[J.A.:] Like a big old hug.

[The State:] Okay. And were you comfortable with that?

[J.A.:] No.

[The State:] Did you say or do anything?

[J.A.:] No. Like, I, like I wanted to say something, but I just got too scared.

[The State:] Okay. And you said you felt something?

[J.A.:] Yes.

[The State:] What did you feel?

[J.A.:] Like a dick, like his hard dick.

[The State:] Okay. And just to clarify, a penis?

[J.A.:] Yeah, like a penis.

[The State:] Okay. And did you notice anything about this dick?

[J.A.:] Well, he got like a boner

. . . .

[The State:] Is that the same thing as an erection?

[J.A.:] Right.

[The State:] Okay. So, and then what was he doing when you felt the boner?

[J.A.:] Like, he was moving it back and forth.

[The State:] And was he still hugging you?

[J.A.:] And he was still hugging me.

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[The State:] And what were you doing during the time he was doing that . . . what were you doing during the time that he was hugging you and he had his boner on you?

[J.A.:] I was like pushing him away and walking back away.

[The State:] Okay. You were pushing him away?

[J.A.:] Yeah.

[The State:] How did that go?

[J.A.:] Not good.

. . . .

[The State:] Right. But it sounds like you were trying to push him away. Was it easy to push him away?

[J.A.:] No.

[The State:] Okay. Were you - - did he eventually stop?

[J.A.:] Yes.

[The State:] What made him stop?

[J.A.:] Then he was stopping when, like, that I was walking away.

Because he was dropping the bottle on the ground and then that's why, that's the day - - that's the time that he - - that I walked away.

....

[The State:] Okay. So, he was hugging you and he dropped his bottle, so you walked away.

[J.A.:] Right.

(RP 117-119).

(Appellant's brief pages 6-8.)

This court must remember that this victim is small, on review this court does not have the ability to see how small this person is or how her disability affected her but clearly reading her testimony this court can ascertain that she did what she could to overcome the actions of this much bigger person and could not. Benson's attorney elicited testimony while attempting to discredit the claim that Benson was "rubbing his dick on you" that Ms. Arellano was "like 5'4'" and that the defendant was "...a lot taller than you." RP 137

The officer did not, from what can be determined from the testimony, see the "dry humping" but he did observe the victim's reaction to having her butt grabbed. He testified that when he was going to contact these individuals, he approached a small alcove and observed that the two individuals were in very close contact with the defendant's hands on the victim's posterior. He further testified:

A Chest to chest, face past ears, hands on the posterior, a look of surprise on the female with her hands to her sides.

Q Okay. So, she wasn't hugging him?

A Negative.

Q And what was the expression on her face?

A Surprise. RP 189

During cross-examination defendant's counsel asked Officer Cornwell if he noticed the victim's demeanor, this officer's initial response was "[t]he anxiety she felt when she came into the Deccio Building." He also testified that he observed the defendant "snuggling, nuzzling in the neck area." Trial counsel stated that the defendant's hands would have been on the victim's hip area. RP 221-22

The State on redirect asked if the question/comment by trial counsel about the hip area and this officer corrected the previous statement/question and testified that "...I would say that he put his hands – his hands were on her buttocks, not her hips...[t]he male subject had his hands on the female's posterior." PR 229

The State directs the court to this testimony because the defense has characterized this as more of an agreed to action and that the victim was a participant. This reaction to "just" the action of Benson grabbing her butt clearly negates that claim and further supports this victim when confronted with this much taller, larger man. Once again in this victim's own words:

Q Tell us about that. How did he grab you?

A Like a big old hug.

Q Okay. And were you comfortable with that?

A No.

Q Did you say or do anything?
A No. Like, I, like I wanted to say something, but I just got too scared.
Q Okay. And you said you felt something?
A Yes.
Q What did you feel?
A Like a dick, like his hard dick.
Q Okay. And just to clarify, a penis?
A Yeah, like a penis.
Q Okay. And did you notice anything about this dick?
A Well, he got like a boner and like when he got drunk, you know how guys get drunk and then and you know how they've got like a burner? Like they want to have sex.
Q Do you mean a boner?
A Yeah.
Q Is that the same thing as an erection?
A Right.
Q Okay. So, and then what was he doing when you felt the boner?
A Like, he was moving it back and forth.
Q And was he still hugging you?
A And he was still hugging me.
Q And what were you doing during the time that he was doing that?
A He was—
Q What were you doing during the time that he was hugging you and he had his boner on you?
A I was like pushing him away and walking back away.
Q Okay. You were pushing him away?
A Yeah.
Q How did that go?
A Not good.
Q Why do you say that?
A Because I have (indiscernible).
Q I'm sorry?
A I have (indiscernible).
Q Right. But it sounds like you were trying to push him away. Was it easy to push him away?
A No.
Q Okay. Were you -- did he eventually stop?
A Yes.

This very graphic, very detailed description coupled with the admissions of the defendant himself make this evidence overwhelming.

2. Response to Issue 2. Prosecutorial misconduct.

The Appellant has failed to meet his burden of establishing both improper conduct during the State's closing argument and the resulting prejudice which could not be cured by instruction by the court.

A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). This court will evaluate a prosecutor's challenged statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during the argument, and the court's instructions. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

In this case the prosecutor expressed reasonable inferences from the evidence, including inferences about the credibility of the victim. As was pointed out by both counsel for the State and Benson, Ms. Arellano had some characteristics which made her speech patterns, testimony and

interaction with other people outside what many would consider “normal.”

It was something that the State needed to address with this jury.

It is worth noting that trial counsel for Benson reminded the jury that they too had taken an oath:

You’ve taken an oath after that to well and truly try the case. So, I trust that we’ve prepared you sufficiently to take that oath.

RP 368

...

Those rules apply to us all. It’s what keeps us all safe. Whether or not you view that as important, it’s those rules that you took an oath, you personally took an oath to apply. And so, I’m going to ask you to do that.

RP 369

Benson argues for the first time in this appeal that the prosecutor vouched for a witness’s credibility and appealing to the passion and prejudice of the jury.

The State has wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. State v. Thompson, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). This court has ruled that a prosecutor commits misconduct by personally vouching for a witness’s credibility. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The defendant has the burden of establishing that (1) the State acted improperly, and (2) the State’s improper act prejudiced the defendant. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

Misconduct is prejudicial if there is a substantial likelihood it affected the verdict. *Id.* at 760-1.

A defendant who fails to object to the State's improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). In making that determination, the courts "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

Improper vouching occurs if the prosecutor (1) places the prestige of the government behind the witness, or (2) indicates that evidence not presented at trial supports the witness's testimony. State v. Robinson, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). However, there is a difference between the prosecutor's personal opinion, as an independent fact, and an opinion based upon or deduced from the evidence. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). Misconduct occurs only when it is clear and unmistakable that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion. *Id.* at 54.

Here Benson claims the Stated committed error when in closing the State argued;

But, you know, she did -- was able to and had the courage to take the stand, swear an oath to tell the truth in front of all these people that she's never met before with the person that she says did all this in the room and tell you that that was something that happened.
RP 343.

This was within the prosecutor's wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. The prosecutor did not make a personal comment about Ms. Arellano's credibility or indicate that other information not presented to the jury supported her credibility. He did not say or imply that he personally believed Ms. Arellano or that she must be telling the truth. As such, the prosecutor did not improperly vouch for her.

Read in context it is clear that what the State's attorney was trying to do was to make the jury fully aware that this victim was not a person who "I would argue to you that she communicates a little differently than most of us do." RP 343. That due to how she spoke and what was clearly some sort of disability that made her communicate differently that the jury should not look down on the facts that she was imparting or that those facts were supported by the observations of the officers and the video.
RP 342-45.

Not once during this portion of the State's closing did counsel for Benson object. He did not lodge any objection based on the rule against

vouching or playing to the sympathy of the jury. As such, he has waived any claim improper vouching on appeal. In order to preserve errors for appeal, a timely and specific objection must be placed on the record so that the trial judge can rule on it, and if necessary, cure any errors. In this case Benson's attorney clearly knew that this type of objection could be lodged because at one point he did just that, objection and stating the basis for that objection was "...simple prejudice or sympathy." PR 377.

Even if Benson had lodged an objection based on improper vouching or as appealing to the passion or prejudice, it would have been overruled. The prosecutor did not vouch for this witness, he did not appeal to the passion and prejudice of the jury in his closing argument. He did not comment on anybody's credibility. Just a few paragraphs before the alleged improper argument, the prosecutor told the jury they were the sole judges of witness credibility:

So, that is very corroborative of what Jessica had to say and what she testified to you. You are the sole judges of the credibility of each witness, so what Mr. Dold thinks, what I think, even what the Judge thinks, we can't even tell you our personal opinion. And I won't be expressing my personal opinion, but I am going to be arguing about her credibility because my personal opinion doesn't matter. It's your personal opinion. You are the sole judges of the credibility of the witnesses. RP 340-1.

In sum, the State never personally vouched for Ms. Arellano's credibility it did not appeal to any passion or prejudice, it merely proffered

to the jury a reminder that just because a witness is different or communicates differently that does not mean the jury should discount what she had to say as the victim of this sexual assault.

Once again, there was no objection to this alleged error during closing argument. As such, the Appellant has waived the right to assert prosecutorial misconduct unless the misconduct was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). The absence of an objection by defense counsel “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

Benson’s claim that this case “turns on whether the jury believed the testimony of J.A.” is specious. The jury was charged by the court to listen to all of the testimony and evidence and upon receipt of that information then render a verdict. There were other witnesses who corroborated the victim’s testimony. The defendant’s own statement supports the verdict even if he now qualifies that statement as “not unequivocally admit(ing) to this conduct” misses the charge to the jury once again. It was the totality of the evidence considered by the jurors

that resulted in a guilty verdict. (Appellant's brief at 23)

3. Response to Issues 3-5. Errors in imposition of community custody conditions, legal financial obligations and costs of this appeal.

Some of the challenged conditions imposed must be struck others were validly imposed. The parties have come to an agreed resolution of Appellant's allegations 3-5. They have been resolved through and agreed amended judgment and sentence which has been filed. Therefore, the State shall not address these issues.

IV. CONCLUSION

For the foregoing reasons, the State asks this court to affirm the conviction, and authorize the entry of the agreed order addressing Appellant's community custody and LFO allegations. The State shall not be requesting cost upon completion of this appeal.

Respectfully submitted this 18th day of September 2018,

s/David B. Trefry
DAVID B. TREFRY, WSBA 16050
Senior Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, David B. Trefry, state that on today's date, September 18, 2018, emailed a copy of the Brief of Respondent to Ms. Jill Reuter jill@ewalaw.com.

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

DATED this 18th day of September 2018 at Yakima, Washington.

s/ David B. Trefry

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