

FILED
Court of Appeals
Division III
State of Washington
8/13/2020 11:09 AM

NO. 37206-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB COX,

Appellant.

FROM THE SUPERIOR COURT OF THE
COUNTY OF WALLA WALLA

The Honorable John W. Lohrmann, Judge

BRIEF OF RESPONDENT

James L. Nagle
Kelly A.B. Stevenson
Attorneys for Respondent
240 West Alder, Suite 201
Walla Walla WA 99362-2807

(509) 524-5445

TABLE OF CONTENTS

	Page
A. COUNTERASSIGNMENTS OF ERROR.....	1
B. ISSUES PERTAINING TO COUNTERASSIGNMENTS OF ERROR.....	2
C. STATEMENT OF THE CASE.....	5
D. ARGUMENT.....	11
1. THE TRIAL COURT PROPERLY EXCLUDED DEFENSE EVIDENCE AND PROPERLY LIMITED DEFENSE COUNSEL’S ARGUMENT.....	11
a. The trial court properly excluded testimony regarding J.R. having sat on the appellant’s lap the evening of the rape.....	11
b. The trial court properly excluded testimony about J.R. and other at the party kissing one another earlier in the evening of the rape.....	17
c. The trial court properly exercised its discretion in limiting the defense cross-examination of the State’s forensic scientist, when the forensic scientist already testified to the opposite of defense counsel’s premise.....	19
d. The trial court properly excluded testimony regarding the appellant’s reputation for sexual morality, as the defense failed to lay an adequate foundation for its proffered testimony.....	23
e. The trial court properly limited appellant’s closing argument, as the defense proposed not only to quantify, but to compare the “Beyond a Reasonable Doubt”	

	standard to other, irrelevant standards of proof at issue in civil matters.....	26
	f. The trial court’s rulings on the various motions did not deprive the appellant of his right to present a defense, when the appellant testified in his own behalf and there was corroborating evidence for the rape allegation.....	29
2.	THE TRIAL COURT PROPERLY INSTRUCTED THE JURY REGARDING THE STATE’S BURDEN USING THE “ABIDING BELIEF” LANGUAGE FROM WPIC 4.01.....	33
3.	THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN OPENING OR CLOSING.....	36
	a. The prosecution properly stated the law on the Presumption of Innocence and Proof Beyond a Reasonable Doubt.....	36
	b. The prosecutor did not shift the burden of proof.....	37
	c. The prosecutor did not impugn the defense.....	40
4.	THE TRIAL COURT’S COMMENTS ABOUT HOW THE STATE COULD ARGUE ITS EVIDENCE WERE HARMLESS.....	43
5.	THERE WAS NO CUMULATIVE ERROR.....	46
6.	INDIGENCY AND IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS.....	46
	a. Appellant’s indigency at the time of sentencing.....	46
	b. The DNA collection fee was properly imposed.....	49
E.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Page

Washington State Cases

1. *In re Glassman*,
175 Wn.2d 696, 286 P.3d 673 (2012).....27
2. *State v. Bennett*,
161 Wn.2d 303, 165 P.3d 1241 (2007).....33, 34, 35
3. *State v. Blazina*,
182 Wn.2d 827, 344 P.3d 680 (2015).....46, 47
4. *State v. Campbell*,
103 Wn.2d 1, 691 P.2d 929 (1984).....19
5. *State v. Catling*,
193 Wn.2d 252, 438 P.3d 1174 (2019).....49
6. *State v. Cheatam*,
150 Wn.2d 626, 81 P.3d 830.....37
7. *State v. Coe*,
101 Wn.2d 772, 684 P.2d 668 (1994).....33
8. *State v. Darden*,
145 Wn.2d. 612, 41 P.3d 1189 (2002).....12, 19
9. *State v. DeVincentis*,
150 Wn.2d 11, 74 P.3d 119 (2003).....24
10. *State v. Dhaliwal*,
150 Wn.2d 559, 79 P.3d 432 (2003).....37
11. *State v. Dugan*,
96 Wn.App. 346, 354, 979 P.2d 885 (1999).....44
12. *State v. Emery*,
174 Wn.2d 741, 278 P.3d 653 (2012).....42

13. <i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	37
14. <i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	36
15. <i>State v. Furman</i> , 122 Wn.2d 440, 858 P.2d 1092 (1993).....	28
16. <i>State v. Griswold</i> , 98 Wn. App. 817, 991 P.2d 657 (2000).....	24, 25, 26
17. <i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	39
18. <i>State v. Johnson</i> , 158 Wn.App. 677, 243 P.3d 936 (2010).....	36, 37
19. <i>State v. Jones</i> , 168 Wn.2d, 713, 230 P.3d 576 (2010).....	11, 12, 13, 32
20. <i>State v. Kelly</i> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	23
21. <i>State v. Magers</i> , 164 Wn.2d 174, 189 P.3d 126 (2008).....	40
22. <i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	36
23. <i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002).....	43
24. <i>State v. Negrete</i> , 72 Wn. App. 62, 863 P.2d 137 (1993).....	39
25. <i>State v. Papadopoulos</i> , 34 Wn. App. 397, 662 P.2d 59, <i>review denied</i> , 100 Wash.2d. 1003 (1983).....	37

26. <i>State v. Perez-Cervantes</i> , 141 Wn.2d 468, 6 P.3d 1160 (2000).....	27
27. <i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 265 P.3d 853 (2011).....	23, 24
28. <i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172 (1992).....	44
29. <i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	19
30. <i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	47, 48, 49
31. <i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220 (1991).....	25
32. <i>State v. Robinson</i> , 44 Wn.App. 611, 722 P.2d 1379 (1986).....	37
33. <i>State v. Smith</i> , 148 Wn.2d 122, 59 P.3d 74 (2002).....	32
34. <i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	24
35. <i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 613 (1990).....	37
36. <i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	40, 41, 42, 43

Cases from Other Jurisdictions

1. <i>Chambers v. Mississippi</i> , 410 U.S. 284, 93 S.Ct.1038, 35 L.Ed.2d. 297 (1973).....	12
2. <i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S.Ct. 1239 (1994).....	35

Statutes and Other Authorities

1. Evidence Rule 103.....	24
2. Evidence Rule 404.....	23
3. Evidence Rule 705.....	19
4. RCW 9A.44.020(2) “Rape Shield Statute”.....	14, 18
5. RCW 10.01.160(3).....	47
6. RCW 10.64.025.....	48
7. RCW 43.43.7541.....	49
8. WPIC 4.01.....	33, 34

A. COUNTERASSIGNMENTS OF ERROR

1. THE TRIAL COURT PROPERLY EXCLUDED DEFENSE WITNESSES AND LIMITED DEFENSE COUNSEL'S ARGUMENT, AS THAT ARGUMENT WAS NOT SUPPORTED BY THE EVIDENCE OR TESTIMONY.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY USING THE BRACKETED LANGUAGE FROM WPIC 4.01 DEFINING BEYOND A REASONABLE DOUBT AS AN "ABIDING BELIEF IN THE TRUTH OF THE CHARGE[.]"

3. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT IN OPENING OR CLOSING.

4. THE TRIAL COURT'S COMMENTS ABOUT HOW THE PROSECUTION COULD ARGUE ITS FORENSIC EVIDENCE WERE HARMLESS, AS THEY OCCURRED OUTSIDE THE PRESENCE OF THE JURY, AND THE STATE DID NOT FOLLOW THE COURT'S SUGGESTION.

5. THERE WAS NO CUMULATIVE ERROR.

6. INDIGENCY AND IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS

B. ISSUES PERTAINING TO COUNTERASSIGNMENTS OF ERROR

1. Did the trial court properly limit the defense's speculative arguments which were not supported by the evidence and testimony?
 - a. Did the trial court properly exclude testimony about J.R. sitting on appellant's lap earlier on the evening of the rape?
 - b. Did the trial court properly exclude testimony about J.R. and others at the party kissing one another earlier on the evening of the rape?
 - c. Did the trial court properly exercise its discretion in limiting defense cross-examination of the State's forensic scientist, when the forensic scientist had already testified to the opposite of defense counsel's premise?
 - d. Did the trial court properly exclude testimony regarding the appellant's reputation for sexual

morality, as the defense failed to lay an adequate foundation for its proffered testimony?

- e. Did the trial court properly limit appellant's closing argument, as the defense proposed to not only quantify, but to compare the "Beyond a Reasonable Doubt" standard to other, irrelevant burdens of proof at issue in civil matters?
 - f. Did the trial court's rulings on the various motions deprive the appellant of his right to present a defense, when the defendant testified in his own behalf, and there was corroborating evidence for the rape allegation?
2. Did the trial court properly instruct the jury regarding the State's burden of proof when it approved the State's proposed jury instruction, WPIC 4.01, which included an optional definition of "Beyond a Reasonable Doubt" as "an abiding belief in the truth of the charge?"

3. Does the State commit prosecutorial misconduct by commenting on what the evidence will and will not demonstrate?
 - a. Did the prosecutor properly explain the presumption of innocence and the burden of proof, as indicated in the jury instructions?
 - b. Did the prosecutor shift the burden of proof in closing argument?
 - c. Did the prosecutor impugn the defense?
4. Did the trial court improperly suggest how the State could argue its evidence to the trier of fact?
5. Did cumulative error deny appellant a fair trial?
6. Was the appellant indigent at the time of sentencing?
 - a. Was the court's imposition of discretionary legal financial obligations proper?
 - b. Was the court's imposition of the DNA collection fee proper?

C. STATEMENT OF THE CASE

J.R.'s 40th birthday, was June 14, 2016. The following Saturday night, June 18, 2016, J.R. celebrated by throwing a party at her home and inviting friends and family over for the evening. J.R. testified that she'd wanted to have the party at her home so she could drink and enjoy herself, and not have to worry about driving home afterwards. RP at 226-27. J.R. had invited the appellant and his fiancée to the party. J.R. further testified she and the appellant were friends and that that she'd known the appellant since they attended nursing school together. J.R. testified she and the appellant had a "big sister-little brother" type of relationship. RP at 230-31.

By the early morning hours of June 19, 2016, most of the guests had left the party. The only people remaining at J.R.'s home besides J.R. were the defendant, his fiancée Sydney Boyd, Cody Onthank, Melissa Joliffe, and Whitney Martin. RP 234-35.

At some point during the party, the appellant had cut his finger, causing it to bleed slightly. J.R. testified that she bandaged the appellant's finger. J.R. did not wear gloves when she bandaged the appellant's finger. RP at 236-37. J.R. testified she could not remember specifically if she

washed her hands after tending to the appellant's cut finger, though she habitually washes her hands as a Registered Nurse. RP at 263-64.

Appellant's fiancée, Sydney, at one point felt the need to lie down, and went into J.R.'s bedroom and went to sleep on J.R.'s bed. J.R. testified that later in the evening, she had thrown up and determined shortly thereafter that she should go to bed for the evening. This was around 2:00a.m. on June 19, 2016. RP at 235-36.

J.R. walked to her bedroom, assisted by Melissa Joliffe and Whitney Martin. RP at 237-38. They all saw Sydney curled up at the foot of J.R.'s bed, asleep. RP at 238. Melissa helped J.R. remove her dress, and helped her lie down in bed, and covered J.R. with a sheet. J.R. was only wearing underwear bottoms at the time. RP 439-43. Sydney was still asleep on top of the covers, on the bottom right corner of the bed. RP 238-41, 440, 489-90.

J.R. testified that once in her bed, she passed out. RP at 239. She further testified she believed she'd been having a sex dream. J.R. awoke with the defendant curled up on the bed behind her. As she awoke, J.R. recognized the appellant's voice. He was calling her by name, and had inserted his fingers "up in my vagina moving back and forth, and I could

hear him talking to me.” RP at 241. J.R. further testified she heard the appellant say “Joselyn, I’ve always wanted to be in your pussy.” RP at 241-42.

J.R. shoved the defendant away, got out of bed, quickly threw her dress back on, and ran out of her bedroom. She first encountered Melissa Joliffe, who asked what she was doing awake. J.R. replied that “Jacob is in my bed. He’s touching me. I was asleep.” RP at 246, and 446-47.

Melissa Joliffe testified that when J.R. came out of her bedroom, the dress she’d been wearing earlier was on inside out. RP at 446. Melissa Joliffe and Whitney Martin created an area in the living room for J.R. to lie down, and asked if she wanted to call the police, which J.R. at that point, declined to do. She testified she was still drunk and in a state of shock. RP at 246.

J.R. disclosed to Whitney and Melissa that the appellant had his fingers in her vagina, as Cody Onthank went toward the bedroom where appellant and his fiancée were. As J.R. sat in the living room with Whitney and Melissa, the appellant and Sydney, followed by Cody, walked out into the living room and out the front door without saying a word to anyone. RP at 247-48; 454-56. J.R. eventually went back to bed,

but testified she could not fall back asleep. She got out of bed twice to double-check that her front door was locked. RP at 248-49.

Later in the day on Sunday, June 19, 2016, J.R. got together with her family to celebrate Father's Day. After speaking with her mother about what the appellant had done to her, J.R. decided to contact the appellant to make sure he knew he'd done something wrong. RP 249-51. J.R. contacted the defendant by sending him a text message, indicating she was extraordinarily angry with him, and asking to meet with him and Sydney to clear the air. RP 251-53. J.R. did not initially want to go to the police, as the defendant was a friend. RP 254-55. When J.R. insisted that Sydney be present for J.R.'s conversation with the appellant about what had happened, the appellant made it clear he did not want his fiancée to join the conversation between he and J.R, by asking "Please Joselyn" in reference to J.R.'s insistence that Sydney be present. RP at 253-56, State's Exhibit #2.

On Monday, June 20, 2016, when J.R. texted appellant to pin down a time to meet with him and Sydney, the appellant, after some back-and-forth, declined to meet with her, stating "Sydney and I have decided we're not coming. We both believe we were roofied at your party and prefer not

to associate with you anymore.” RP at 256; State’s Exhibit #2. J.R. testified she told the appellant this was an about-face and was “dishonorable.” RP at 257; State’s Exhibit #2.

J.R. was concerned that the defendant was not taking responsibility for what he had done, and did not respond to the appellant further via text. At that point, J.R. left work and went with her father to report to the police what the appellant had done. RP at 257. J.R. reported the incident to Officer Jackie Baston (ret.), who photographed the text message exchange between J.R. and the appellant. Officer Baston went to J.R.’s home and collected her underwear from the top of the laundry basket, where J.R. had left them. J.R. testified that after she removed her underwear, she did not touch the crotch area of the underwear. RP at 264-65. Officer Baston advised J.R. to have a rape kit done, which she did. J.R. went to Providence St. Mary Medical Center and obtained a sexual assault exam from sexual assault nurse examiner (“SANE”) Lyndsey Fry. RP 257-59. J.R. was contacted the following day, Tuesday, June 21, 2016, by Detective Marlon Calton of the Walla Walla Police Department, who conducted an interview of J.R. RP at 267-68; 580.

On Wednesday, June 22, 2016, the appellant was also interviewed, along with fiancée Sydney, by Detective Marlon Calton. RP at 581. The defendant denied sexually assaulting J.R., and claimed that J.R. actually fondled him – over his clothing – on his pelvis. RP at 582-83. The defendant agreed to provide a DNA sample, which Detective Calton collected by swabbing the appellant’s inner cheeks with buccal swabs. RP 584-87.

The underwear was subsequently sent for analysis to the Washington State Patrol Crime Lab, along with the appellant’s buccal swabs, and the rape kit J.R. had undergone, where it was analyzed by Forensic Scientist William Culnane. RP at 655. Mr. Culnane found that the appellant’s DNA was on the crotch area of J.R.’s underwear, and that the sample tested positive for amylase, a protein found in saliva. RP at 678-79. Mr. Culnane testified that the DNA profiles present on J.R.’s underwear were those of J.R., and Jacob Cox. The results showed that it is 860 quadrillion times more likely that the DNA came from the appellant than any other person. RP at 670-672, 707-08. Appellant’s DNA was found on the left-hand crotch area of the underwear, toward the rear. RP at 680, 707-08. Mr. Culnane further testified that there was a trace

component, which was present in such small quantity that no comparison or identification could be made. Mr. Culnane could not identify whether the trace component was from a male or a female. RP at 670-72, 687-88.

Mr. Culnane testified on cross-examination that the concept of DNA “shedders” – that is, people who tend to shed more DNA than others – was “mystical” in his field and that there was no way to test to determine if someone was, in fact, a “shedder.” RP at 701-03. Mr. Culnane testified that for the appellant’s DNA to have gotten onto J.R.’s underwear through secondary transfer, “it would have to be a significant transfer.” RP at 708. In the sample removed from J.R.’s underwear at cutting site T1, which Mr. Culnane testified was approximately 1 centimeter by 1 centimeter, 4.47 nanograms of the appellant’s DNA were identified. RP at 709-10.

D. ARGUMENT

1. The trial court properly excluded defense evidence and properly limited defense counsel’s argument.

a. The trial court properly excluded testimony regarding J.R. having sat on the appellant’s lap the evening of the rape.

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010),

citing *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct.1038, 35 L.Ed.2d. 297 (1973). “Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *Id.* “[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones, supra*, citing *State v. Darden*, 145 Wn.2d. 612, 622, 41 P.3d 1189 (2002).

Appellant states in his opening brief that *State v. Jones, supra*, controls the issue of whether the trial court’s exclusion of appellant’s proffered testimony about J.R. having sat on his lap the evening of the rape was improper. In *Jones*, the defendant was charged with raping his niece. The defense in *Jones* was that earlier in the same evening that the alleged rape occurred, the defendant had consensual sex with his niece.

Jones was prepared to testify that K.D. consented to sex during an all-night drug-induced sex party. The trial court refused to let Jones present this testimony or cross-examine K.D. about the testimony....This is not marginally relevant evidence that a court should balance against the State’s interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones’s entire defense.

Jones, supra, at 168 Wn.2d, 713, 721(2010). *Emphasis added; internal citation omitted.*

Jones is distinguishable from the case at bar for that reason. Here, the defense was general denial – not the affirmative defense of consent. Appellant’s stated reason for seeking to introduce evidence of J.R. sitting on his lap was essentially two-fold: 1) Appellant claims he wanted to introduce that testimony to “show how extremely drunk everyone was[,]” and 2) Appellant claims the trial court erred in excluding evidence of J.R. sitting on appellant’s lap, because the lap-sitting could provide “an innocent explanation” for how appellant’s DNA got onto J.R.’s underwear.

[Appellant’s] DNA found on clippings on the edge of J.R.’s underpants crotch was a major part of the State’s evidence. J.R. wore a knee-length dress the night of the party. Thus if she sat on [appellant’s] lap it is *highly possible* her underpants came in contact with his leg or pants. Thus DNA could *easily transfer* from his lap to her underpants, offering an innocent explanation as to how it got there.

Appellant’s Brief at 25. *Emphasis added.*

With respect to appellant’s assertion that his proffered testimony regarding J.R. having sat on his lap was simply to demonstrate the respective intoxication of the partygoers, the trial court flatly rejected that argument. As the trial court ruled in response to the appellant’s Motion

for New Trial, “There was ample, replete, and repeated evidence that everyone had been drinking quite heavily.” RP at 974. The court determined that appellant was simply trying to introduce evidence that was otherwise barred by the Rape Shield Statute, RCW 9A.44.020(2), for a different purpose. Appellant continues to cite authority that turns on the issue of consent – despite claiming repeatedly at trial that consent was not his defense.

Appellant’s assertion that his DNA could have “innocently” arrived on J.R.’s underwear via lap-sitting is wholly unsupported by the evidence, and the testimony of J.R. regarding how appellant’s DNA got onto her underwear. This argument fails for a number of reasons, as it requires the trier of fact to make presumptions that are unsupported by the evidence or testimony:

First, this argument presumes that when J.R. sat on appellant’s lap, her dress came up, exposing her underwear to appellant’s clothing directly, which would theoretically explain a primary DNA transfer. RP at 667-68, 802-03. Appellant did not offer this explanation during his offer of proof. RP at 821-27. He cannot now raise it for the first time on appeal. There was not testimony from *any* witness – either the appellant

himself, or Cody Onthank (both of whom were examined by defense counsel during offers of proof on this issue) – that J.R.’s dress came up while she was sitting on appellant’s lap. RP 533-34, 821-27. The trial court rejected this argument from the defense repeatedly. RP at 362-69.

Second, this argument presumes that appellant’s DNA would have been present in large enough quantity on the outside of his pants as to render him the “minor contributor” in the mixed DNA profile (wherein J.R. was the “major contributor”). While trial defense counsel asked the State’s forensic scientist about the concept of DNA “shedders,” Mr. Culnane was clear that there is no way to test whether or not someone is more likely to “shed” DNA cells than someone else. RP at 701-02. Further, trial defense counsel offered no evidence, and therefore failed to establish, that the appellant was, in fact, a DNA “shedder.”

Appellant also tried the speculative argument that his injured finger could have been the reason his DNA was found on J.R.’s underwear via secondary transfer. This theory also relies on several assumptions, which are unsupported by the evidence and testimony, and should therefore be rejected.

First, this argument presumes that the appellant's blood got onto J.R.'s hand. Appellant stated on direct examination that J.R. came into contact with his blood. RP at 846. J.R. testified that appellant's cut was shallow and not serious enough as to have bled much. RP at 236-37. She did not specifically state his blood came into contact with her hand.

Second, this argument presumes that J.R. did not wash her hands after having bandaged the appellant's finger, despite the fact that she went to the bathroom a number of times during the course of the party, and that after she threw up and determined she should go to bed for the evening, she testified she did wash her hands. RP at 263-64. This occurred before the rape. J.R. further testified that as a Registered Nurse, she habitually washes her hands, though she had no specific recollection of having done so immediately after tending to appellant's injured finger.

Third, appellant's argument presumes that during the several trips to the bathroom the night of the party, J.R. must have touched the crotch area of her underwear, where appellant's DNA was found. J.R. specifically denied that she typically handles her underwear by the crotch area – other than when the prosecution asked her to examine it on the stand during her testimony. RP at 264-65, 313, 323-34.

Since the appellant's theories as to how his DNA arrived on J.R.'s underwear are speculative and necessarily require consideration of facts not in evidence, the trial court properly excluded these arguments.

b. The trial court properly excluded testimony about J.R. and others at the party kissing one another earlier in the evening of the rape.

The same analysis applies to appellant's argument that the trial court erred by excluding appellant's proffered testimony that J.R. had kissed some of the partygoers and encouraged others to kiss each other. Appellant repeatedly claimed he wanted to introduce this testimony to provide "context for how intoxicated J.R. was, and how that intoxication affected her." Appellant's Brief at 27. Appellant's argument in this regard is belied by his trial defense counsel's offering of a completely new argument regarding this conduct during his Motion for a New Trial.

During that motion hearing, trial defense counsel argued for the first time that evidence of J.R. kissing others and sitting on the appellant's lap, was actually to establish that J.R. was attracted to the appellant. Trial defense counsel argued that if J.R. were attracted to the appellant, it would be "more probable than not that if she was engaging in this type of behavior and it was directed toward [appellant] that it makes it more likely

than not that she could have had a dream about it and that it was really only a dream and not touching.” RP at 957. The State pointed out that this was not the stated reason trial defense counsel had previously represented he was seeking introduction of that testimony. RP at 964-65. When the appellant’s stated reason for introduction of the lap sitting and kissing was ostensibly to show J.R.’s intoxication level, he apparently changed his strategy about that testimony by the time he made his Motion for a New Trial.

The State asserts this was the true reason to request introduction of this testimony all along, as well as to paint J.R. in a negative light based on her behavior the night of her birthday party, which is explicitly prohibited by Rape Shield. Further, partygoers kissing one another is wholly irrelevant to the issue of whether the appellant raped J.R., and the trial court properly concluded the same. The court determined that raising this issue to prove intoxication was irrelevant, and that the prejudicial effect of any such testimony far outweighed the probative value. RP at 474-76.

A trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion....Abuse exists when the

trial court's exercise of discretion is 'manifestly unreasonable or based upon untenable grounds or reasons.'

State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (internal citations omitted), quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

- c. **The trial court properly exercised its discretion in limiting defense cross-examination of the State's forensic scientist, when the forensic scientist already testified to the opposite of defense counsel's premise.**

ER 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

ER 705.

"A trial court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion."

Darden, supra, citing *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

Here, the State called its forensic scientist, who tested the evidence in this case, to testify as to his findings when he compared the genetic material on J.R.'s underwear, her rape kit, and the buccal swabs obtained from the appellant during his police interview. On direct examination, the State's forensic scientist, William Culnane, testified that in the mixed DNA profile discovered on J.R.'s underwear, J.R. was the major contributor to that profile. He further testified that the appellant was the minor contributor in that mixed profile. Finally, Mr. Culnane testified that there was a trace component in the DNA profile that was present in such a small quantity that it could not be analyzed. Mr. Culnane was crystal clear that this trace component could not be identified as belonging to a male or female. RP 670-72, 687-88.

Mr. Culnane explained that in the DNA typing process, the typing software printout shows that alleles have smaller, repeatable peaks that show up right next to the actual allele's peak. Mr. Culnane described these smaller peaks as "little sister peak that is smaller compared to its actual peak." This is an artifact called "stutter." RP at 691-92. Further, different colors of dye are used in the typing process. Often, the dye from one allele's readout will bleed over into another area of the readout from

the computer software, making it appear that there is another allele present, when really the dye has simply bled over. When the forensic scientist sees this bleed-over on the readout, he then makes a visual determination as to whether the dye is representative of a true allele as opposed to dye bleed-over from a different allele peak, which is called “pullup.” Pullup is another artifact in the DNA typing process. RP 691-92.

Mr. Culnane testified on direct examination, and again on cross-examination, that he observed two such artifacts in the typing process in the instant case, stating “I believed one was a pullup artifact and one was a combination of a stutter and a pullup artifact.” RP at 693.

Following this testimony, trial defense counsel continued to ask Mr. Culnane if he would agree that these two artifacts were, in fact, not artifacts, but real alleles. Mr. Culnane replied that once those artifacts are present, the percentage for an appropriate margin of error goes out the window. He further testified that he went back and re-reviewed the data and still believed that the peaks present on the DNA typing readout were, in fact, artifacts that were not indicative of actual alleles. RP at 694.

When trial defense counsel asked Mr. Culnane to assume that they were not artifacts, but real alleles – which directly contradicted his

testimony – and whether, making that assumption, Mr. Culnane would agree that there was another male’s DNA present in the profile, the State objected. One of the bases for that objection was that defense counsel was asking the State’s expert to assume that what he had just testified to was not true, for the purpose of introducing the theory that there could have been another male’s DNA in J.R.’s underwear. This question went beyond giving the expert a hypothetical, and instead asked him to disregard his own testing results to further the defense’s theory. It was also inappropriate under Rape Shield to suggest that another male’s DNA was in J.R.’s underwear, which the State pointed out. The issue here was the *appellant’s* DNA in J.R.’s underwear – not someone else’s. The trial court agreed that the defense’s line of questioning in this regard was irrelevant and speculative.

Trial defense counsel asked its own forensic expert – who tested none of the evidence in this case – to weigh in on the trace component. The defense expert indicated that she believed the trace component of the mixed DNA profile could have been a second male. RP at 797-800. The defense expert stated on cross-examination that she could not say how the appellant’s DNA got onto J.R.’s underwear, but agreed that the appellant’s

DNA could have been transferred to J.R.'s underwear during digital penetration, just as J.R. testified. RP at 816, 818-19. The jury heard the defense forensic scientist's testimony about another male's DNA being present in the trace component of the profile, despite the State having objected to this line of questioning, and the jury still found that the appellant raped J.R. beyond a reasonable doubt.

d. The trial court properly excluded testimony regarding the appellant's reputation for sexual morality, as the defense failed to lay an adequate foundation for its proffered testimony.

The appellant argued prior to and during the trial, that he should be permitted to introduce testimony from four witnesses, who could attest to the appellant's positive reputation for sexual morality. Character evidence is evidence of a person's general disposition and tendencies, and admissibility is governed by ER 404(a).

ER 404(a)(1) permits a defendant to introduce evidence of his character if it is pertinent to the crime charged. *State v. Kelly*, 102 Wn.2d 188, 193–95, 685 P.2d 564 (1984). A character trait is "pertinent" if it is relevant. *State v. Perez-Valdez*, 172 Wn.2d 808, 819–20, 265 P.3d 853 (2011). Thus, "a pertinent character trait is one that tends to make the

existence of any material fact more or less probable than it would be without evidence of that trait.” *Id.*

A trial court’s decisions regarding admissibility of evidence are reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Appellant relies on *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (Div. III, 2000; *abrogated on other grounds*, *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003)) for the proposition that the trial court should have permitted testimony of appellant’s reputation for sexual morality in the community. In *Griswold*, the Court held that evidence of general moral character was not admissible, but the more specific reputation for sexual morality was admissible in a child molestation prosecution. The *Griswold* opinion states that a defendant is permitted to introduce evidence of his reputation for sexual morality, because it is a pertinent character trait – *provided* a proper foundation is laid for the proffered testimony.

An offer of proof serves three purposes to meet the requirement of ER 103(a)(2)....First, it informs the court of the relevant legal theory under which evidence is offered. Second, it gives the specific nature of the evidence so that

the court can assess its admissibility. Third, it creates a record for review.

Griswold, 98 Wn. App. at 829, citing *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991).

In the instant case, the appellant in an offer of proof, presented the testimony of four individuals – Jan Torland, Betsy Hadden, Spencer Linden, and Dyani Turner – all of whom knew multiple people in the same community as the appellant. Jan Torland and Betsy Hadden both testified that they knew the appellant because he previously worked for them (Torland) or currently worked for them (Hadden) as a nurse. Spencer Linden is the appellant’s best friend and former co-worker. Dyani Turner knew the appellant through mutual friends.

Each of the appellant’s proffered witnesses provided conclusory testimony that the appellant had a positive reputation for sexual morality in his community, but not a single one of them could establish actual knowledge of the same. Instead, they each testified that they’ve never heard anything negative about the appellant’s sexual morality, but that they would have heard something negative if it existed. Further, none of

the proffered witnesses could define what “sexual morality” even means to them. RP at 736-58.

Appellant continues to conflate the *absence* of a reputation for sexual morality with the *presence* of a positive reputation for sexual morality. The trial court ruled that the appellant failed to lay a proper foundation for the proffered testimony, and that the character witnesses essentially only offered general reputation testimony, as they could not offer anything specific about the appellant’s sexual morality. RP 765-71. The trial court properly excluded this testimony based on the inadequacy of the foundation laid by the appellant, pursuant to *Griswold*.

- e. The trial court properly limited appellant’s closing argument, as the defense proposed to not only quantify, but to compare the “Beyond a Reasonable Doubt” standard to other, irrelevant burdens of proof at issue in civil matters.**

In its various *motions in limine*, the State moved the trial court to preclude any use of a physical or demonstrative tool – specifically a scales of justice model – for arguing or comparing different burdens of proof to the jury. Such use in this case was determined to be irrelevant as this case is solely a criminal matter and the jury was instructed by the court about the appropriate burden of proof for criminal cases. Use of the model

regarding scales and percentages was also determined to be misleading and confusing as to what reasonable doubt means.

In a criminal case, closing argument is properly limited to the facts in evidence and applicable law. *State v. Perez-Cervantes*, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). The Washington Supreme Court held in *Perez-Cervantes* that “counsel’s statements also must be confined to the law as set forth in the instructions to the jury.” *Id.* at 475. Using extrinsic tools not supported by the instructions to argue a burden of proof is misleading, and the trial court has authority to restrict such. Visual aids are highly influential and must be used with exceeding care. See *In re Glassman*, 175 Wn.2d 696, 286 P.3d 673 (2012). In *Glassman*, the court evaluated a PowerPoint the State used in its closing argument.

In *Glassman*, the State used a photo of the defendant and superimposed the word “guilty” over the image. 175 Wn.2d at 709-10. Where the State is the party improperly using visual aids, the analysis looks at “whether the comments deliberately appealed to the jury’s passion and prejudice and encouraged the jury to base the verdict on the improper argument rather than properly admitted evidence.” *Id.* at 710, 286 P.3d

673 (quoting *State v. Furman*, 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (internal quotation marks omitted).

By the same token, defense counsel may not use a visual aid to improperly imply that the State must prove with one hundred percent certainty that a defendant is guilty, nor may defense counsel use a visual aid to appeal to sympathy by referring to civil termination hearings. Doing so improperly states the burden of proof and encourages the jury to hold the State to the wrong standard.

The trial court determined that trial defense counsel's visual diagram was inappropriate due to the design of the scales on the board and the manner in which they had been used in previous cases. For clarification, the visual aid trial defense counsel has used includes three "scales of justice" on it: One is labeled "Civil," one is labeled "Termination," and one is labeled "Criminal." This visual aid has been disallowed in Walla Walla County Superior Court in previous criminal cases because it could cause confusion for the jury by drawing inappropriate comparisons to different types of legal cases, and the manner in which counsel had previously tipped the scales on the visual aid had been viewed as inaccurately describing what the "beyond a reasonable

doubt” burden of proof required. Specifically, counsel would tip the “Civil” scale ever so carefully so that one side appeared to weigh slightly more than the other side, implying 51%, whereas he would tip the “Criminal” scale all the way to one side, implying the evidence must prove with 100% certainty that the defendant was guilty. Trial defense counsel would only use the “Termination” scale for the argument that the burden of proof for the State to remove a child is lower than the burden of proof to convict a defendant, in essence playing to the jury’s sympathies.

In the instant case, the jury instructions properly laid out the definition of what “beyond a reasonable doubt” means, and defense counsel was permitted to properly use the jury instructions to assist him in explaining the burden of proof to the jury. The trial court properly limited trial defense counsel’s use of the proposed visual aid, which referred to irrelevant burdens of proof.

- f. The trial court’s rulings on the various motions did not deprive the appellant of his right to present a defense, when the appellant testified in his own behalf and there was corroborating evidence for the rape allegation.**

Appellant asserts in his opening brief that “other than DNA evidence, the State was left with the testimony of a highly intoxicated woman who did not recall many things that happened that night and who was having sex dreams.” Appellant’s Brief at 38. This statement is simply factually inaccurate. It ignores the corroborating testimony of Melissa Joliffe, Cody Onthank, and Whitney Martin regarding J.R.’s demeanor and statements immediately upon coming out of her bedroom after the rape and her disclosure that the appellant had been touching her. It also ignores Melissa Joliffe’s testimony that J.R.’s dress was on inside out when she came back out of her bedroom. RP at 446. J.R. testified that though she was drunk on the night of her birthday party, which had been her intent, she was crystal clear about being jolted awake when the appellant raped her. She was also clear that what happened was not a dream.

Appellant continues to try to paint J.R. in a negative light because of her testimony that she initially believed she’d been having a sex dream. J.R. was drunk. She’d gone to her bed specifically to pass out. It stands to reason she believed she would be safe there, with only her friends remaining in her home. It further stands to reason that she would be

initially confused about why she was being touched sexually, but that as she awoke, she was able to correctly perceive the reality of what was happening. RP at 241-42.

The State needed not present any evidence of the rape beyond J.R.'s testimony. The State did, however, have corroborating testimony of the other friends at the party, as well as the appellant's DNA on J.R.'s underwear – exactly where she stated it would be, based on the fact that the appellant digitally penetrated her from behind as she lay on her right side.

The jury also reviewed State's Exhibit # 2 – the text message exchange between the appellant and J.R. regarding J.R.'s anger at the appellant and her desire to speak with him with his fiancée present. Though J.R. did not state specifically in those text messages what she was angry with appellant about, the appellant also did not ask. A rational trier of fact could presume the defendant did not ask why J.R. was angry because he already knew. The trier of fact could further reach this decision based on the appellant's reluctance to have his fiancée present for his conversation with J.R. These are reasonable inferences to be drawn from the evidence. Appellant testified on cross-examination that

he'd been willing to meet with J.R. until she suggested that Sydney come along. RP at 861.

Taken in context, the ample corroboration for J.R.'s account of what appellant did to her makes the case at bar distinguishable from *State v. Jones, supra*.

Further, the appellant testified in his own behalf at trial. "Error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *Jones*, 168 Wn.2d at 724, quoting *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). The jury heard not only the appellant's testimony, but all of the testimony and evidence that corroborated J.R.'s account of what appellant had done. Weighing the respective credibility of the witnesses, the jury simply did not believe the appellant's version of events. Appellant asserts that "[t]here is a high probability with this evidence [of lap-sitting], the jury would have reached a different verdict." Appellant's Brief at 38. This statement is conjecture at best, and any error in excluding this testimony, was harmless, as there was overwhelming corroborating evidence that the appellant raped J.R.

2. The trial court properly instructed the jury regarding the State's burden using the "abiding belief" language from WPIC 4.01.

"Although no specific wording is required, jury instructions must define reasonable doubt and clearly communicate that the State carries the burden of proof." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007), quoting *State v. Coe*, 101 Wn.2d 772, 787-88, 684 P.2d 668 (1994).

Appellant takes issue with Jury Instruction No. 3 – specifically with the addition of the bracketed language in WPIC 4.01, which, in the quoted language below, is the final sentence. Instruction No. 3 read in relevant part as follows:

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.*

WPIC 4.01. *Emphasis added.*

The Washington Supreme Court explicitly approved WPIC 4.01 in *Bennett, supra*, ruling:

We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

Bennett, 161 Wn.2d at 318.

Trial defense counsel argued that the "abiding belief" language could invite the jury to apply a preponderance standard to its weighing of the evidence, if the jurors had simply an abiding belief that the appellant was 51% guilty. The trial court properly rejected this argument, noting that the language in WPIC 4.01 has been expressly approved by the Washington Supreme Court and pointing out that in the context of the other instructions, the jury would be properly instructed that the burden was "beyond a reasonable doubt" as opposed to preponderance. RP at 873-75.

In fact, another instruction says you take all of these instructions together. In fact, there is, the instruction up above says 'The State is the plaintiff and has the burden of proving each element of the crime charged beyond a reasonable doubt.' So it's very clear that the burden is that and not preponderance.

RP at 875.

Appellant takes issue with the prosecutor describing the word “abiding” by using commonsense synonyms:

If that belief in the truth of the charge abides with you, stays with you, sticks with you, rests with you, those are all synonyms for ‘abide,’ then the only thing you must do is return a verdict of guilty at that point.

RP at 889.

Appellant insists this argument reduces the State’s burden of proof because it does not convey “a subjective state of near certitude” but instead only conveys the duration that a belief must stay with one to be “abiding.” Appellant’s Brief at 41-42, relying on *Victor v. Nebraska*, 511 U.S. 1, 8-17, 114 S.Ct. 1239 (1994).

State v. Bennett, supra, has not been overturned. WPIC 4.01 has yet to be replaced with a better definition of “beyond a reasonable doubt” as contemplated by the *Bennett* Court. Further, the State asserts that the synonyms used to describe “abiding” to the jury conveyed both duration and certainty of the belief required to convict the appellant – particularly when taken in context with all of the other instructions.

3. The State did not commit prosecutorial misconduct in opening or closing.

a. The prosecution properly stated the law on the Presumption of Innocence and Proof Beyond a Reasonable Doubt.

Appellant here relies on the identical argument covered in the previous section to assert that the prosecutor reduced proof beyond a reasonable doubt to a matter of time as opposed to a level of certainty. Appellant relies on *State v. Johnson*, 158 Wn.App. 677, 243 P.3d 936 (2010) for the conclusory proposition that the prosecutor's comments in closing here were "flagrant and ill-intentioned" but offers no support for that conclusion. *Johnson, supra*, confirms that "A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice." *State v. Fisher*, 165 Wn.2d 727,747, 202 P.3d 937 (2009). "Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). "We review a prosecutor's statements during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions."

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). *Johnson, supra*, 158 Wn.App. at 683.

Taken in context, the State's arguments sought only to draw the jurors' attention to the fact that the appellant's testimony about what occurred on the night of the rape was not supported by the evidence, which is discussed more below.

b. The prosecutor did not shift the burden of proof.

The defendant bears the burden of establishing misconduct, and that the conduct was prejudicial. A new trial is not required unless there is a *substantial* likelihood that the improper argument affected the verdict.

State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830, citing *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). *Emphasis added*.

The Washington Supreme Court has ruled that "Prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence but is expressing a personal opinion." *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 613 (1990) citing *State v. Robinson*, 44 Wn.App. 611, 624, 722 P.2d 1379 (1986), and *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983).

Here, as in *Swan*, the prosecutor was not arguing her opinion, but rather, reasonable inferences that could be drawn from the evidence when she stated in closing argument that the appellant could not “explain away” how his DNA could have gotten onto J.R.’s underwear. The appellant testified at trial in his own behalf. Though the defense argued that J.R. could have transferred the appellant’s DNA to her own underwear after she tended to appellant’s cut finger, the prosecutor pointed out in closing that this theory was not supported by the evidence, in that it was not sufficient to explain how his DNA got there. The prosecutor argued that the appellant’s theory in this regard only invited speculation. Taken in context, there was simply insufficient evidence that J.R. had failed to wash her hands or even came into direct contact with the appellant’s blood.

The appellant was not permitted to introduce testimony of lap-sitting at the party, due to the undue prejudice that would have resulted from such an introduction, but the defendant did argue secondary DNA transfer to the jury via the cut finger scenario. The prosecutor’s statement that appellant could not explain his DNA being on J.R.’s underwear was a reference to the appellant’s unconvincing testimony as a whole. The appellant has failed to establish that the comment was improper, and even

if the statement *is* deemed to have been improper, the appellant has failed to establish that the statement – taken in context – presented a *substantial* likelihood of affecting the verdict.

State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (1993) is similar to the instant case in that Division III noted “[c]onsidering the strength of the State’s case against him and the isolated nature of the prosecutor’s remark, Mr. Negrete has not established that the remark affected the jury’s verdict.” Emphasis added. Here, as noted above, the State had overwhelming evidence – both direct and circumstantial – that led the jury to convict the appellant of Rape in the Second Degree. The isolated remark of the prosecutor in closing was in reference to the appellant’s own testimony.

Further, trial defense counsel objected during the State’s closing argument, and the Court properly instructed the jury, “The plaintiff has the burden of proof. No question about it.” RP at 944.

Given that “[t]he burden of proving reversible prejudice rests with the defendant[.]” *State v. Negrete*, 72 Wn.App. at 67, citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986), the appellant has

failed to establish here that the prosecutor's statement in closing shifted the burden and therefore amounted to prosecutorial misconduct.

c. The prosecutor did not impugn the defense.

Here, the appellant argues that in its opening statement, the prosecution impugned the defense by stating that "What I anticipate the defense presenting is that DNA doesn't mean what it says, that the reality isn't what the reality is, that things aren't the way they seem." RP at 209. In his opening Brief, the appellant equates the prosecutor's statement here with asserting "that the defense would lie to the jury[.]" Appellant's Brief at 45. This is a misstatement of fact.

"During an opening statement, a prosecutor may state what the State's evidence is expected to show." *State v. Thorgerson*, 172 Wn.2d 438, 444, 258 P.3d 43 (2011), citing *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Here, the prosecutor told the jury what testimony the State would present to prove its case. The prosecutor also commented on what the defense would likely argue regarding the DNA evidence. The prosecutor's statement turned out to be *precisely* what trial defense counsel argued. The crux of the defense in this case was that the

appellant's DNA "innocently" arrived on J.R.'s underwear and that it ended up there via the theory of secondary transfer – not by primary transfer via digital penetration, as relayed in J.R.'s testimony. The defense here argued that the presence of DNA was not because appellant raped J.R. but because J.R. *might* have touched the appellant's blood and then *might* not have washed her hands, and *might* have touched the crotch of her own underwear. The prosecutor properly stated that the defense would – because it ultimately did – argue that the DNA didn't mean what it appeared to mean, based on all of the other evidence. Here, what it *appeared* to mean – that the appellant raped J.R. – was exactly what the jury determined it *did* mean. The appellant's argument that the prosecution impugned the defense via this statement is therefore without merit.

Further, as in *Thorgerson, supra*, the jury was instructed that the attorney's statements are not evidence, and therefore, the jury is presumed to have followed this instruction. Further, "a prosecutor has wide latitude to argue reasonable inferences from the evidence." *Thorgerson*, 172 Wn.App. at 453.

In *Thorgerson*, the prosecutor referred to the defense as “sleight of hand,” which the Washington Supreme Court found improper, because it “implies wrongful deception or even dishonesty in the context of a court proceeding.” 172 Wn.2d at 452. The case at bar is distinguishable, as the prosecutor stated in opening the exact argument the defense ultimately made regarding the DNA evidence on J.R.’s underwear.

The appellant herein also failed to object to the prosecutor’s comment during opening, and has therefore effectively waived this issue on appeal.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. If he failed to object at the time the misconduct occurred, he must establish that no curative instruction would have obviated any prejudicial effect on the jury and he must establish that prejudice resulted that had a substantial likelihood of affecting the jury verdict.

Thorgerson, 172 Wn.2d at 455. See also, *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (“If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct is so flagrant and ill intentioned that an instruction could not have cured the prejudice.”)

Here, just as in *Thorgerson*, the appellant has failed to meet this burden, and his argument that the prosecution impugned the defense is erroneous.

4. The trial court's comments regarding how the State could argue its evidence were harmless.

Appellant claims his due process right was implicated when the trial court "crosse[d] the line from neutral arbiter to advocate" (Appellant's Brief at 47), citing *State v. Moreno*, 147 Wn.2d 500, 58 P.3d 265 (2002). Appellant claims the trial court "improperly excluded defense evidence, then proposed how the State could argue the remaining evidence to thwart what remained of the defense theory." Appellant's Brief at 47.

Here, prior to the defense forensic expert testifying, the State made a motion to exclude the defense forensic expert's testimony that there was the DNA of a second male in the trace component found on J.R.'s underwear. This motion occurred outside the presence of the jury, and was based on a number of reasons – namely, that the defense expert could not testify to such a fact, given that she did not test the evidence, but also that Mr. Culnane, the State's forensic expert, testified that the trace component was present in such small quantity that it could not be

identified as belonging to either a male or female. The State asserted in its motion that such testimony from the defense expert invited speculation by the jury and was irrelevant as to whether the appellant raped J.R. The trial court disagreed with the State and permitted introduction of this testimony by the defense expert, noting that the State needed to make the same arguments to the trier of fact. RP at 772-777.

“To prevail under the appearance of fairness doctrine, the claimant must provide some evidence of the judge’s or decisionmaker’s actual or potential bias.” *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999) citing *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172 (1992). “Without evidence of actual or potential bias, an appearance of fairness claim is without merit.” *Id.*

Here, the appellant has failed to demonstrate any such bias, either actual or potential. The trial court simply made the point that the State’s argument regarding the trace component needed to be made to the jury rather than the court, but the court *did* permit the appellant to introduce the testimony of Suzanna Ryan regarding her opinion of a second male’s DNA.

The State argued in closing that the trace component simply could not be interpreted, based on Mr. Culnane's testimony. The defense argued that with everyone hugging, etc. at the birthday party, that could explain, via secondary transfer, how DNA could have gotten onto J.R.'s underwear. Appellant incorrectly states that the trial court "literally suggested that without evidence that J.R. sat on [appellant's] lap, the State needed to make the points that DNA transfer was *equally likely from anyone at the party.*" Appellant's Brief at 47. (*Emphasis added*). This is simply an inaccurate recitation of what the trial court stated in its ruling. RP at 777.

The jury heard the appellant's secondary transfer theory repeatedly and rejected it. Here, the trial court's comments regarding what the State needed to argue were less about the content of the State's arguments, and more about the proper audience for those arguments – namely, the jury. The trial court ruled against the State with regard to this motion. Any error in the trial court's comments were therefore harmless.

5. There was no cumulative error.

Appellant contends that the “multiple errors” made by the trial court “overlap, increasing the prejudice of each.” Appellant’s Brief at 48. As discussed above, the trial court’s rulings to exclude testimony about lap-sitting at the birthday party, and to limit trial defense counsel’s cross-examination of the State’s forensic scientist were proper for the reasons explained herein. The appellant further contends that prosecutorial burden-shifting added to the alleged cumulative error. Again, the prosecution did not shift the burden to the appellant, but instead, pointed out to the jury that the defendant’s own testimony was not believable. The jury agreed. Cumulative error did not occur, and the appellant has failed to establish that he is entitled to a new trial.

6. Indigency and Imposition of Discretionary Legal Financial Obligations

a. Appellant’s Indigency at the Time of Sentencing

Appellant assigns error to the trial court’s imposition of non-mandatory Legal Financial Obligations (hereafter “LFOs”), because he was indigent at the time of sentencing. In *State v. Blazina*, 182 Wn.2d

827, 344 P.3d 680 (2015), the Washington Supreme Court ruled as follows regarding imposition of discretionary LFOs on indigent defendants:

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors such as incarceration, and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 839.

RCW 10.01.160(3) was amended in 2018 to remove the "future ability to pay" section and now reads in relevant part as follows:

(3) The court shall not order a defendant to pay costs if the defendant *at the time of sentencing* is indigent as defined in RCW 10.101.010(3)(a) through (c).

RCW 10.01.160(3). *Emphasis added.*

Our State Supreme Court in *State v. Ramirez*, 191 Wn.2d 732, at 744, 426 P.3d 714 (2018) held that:

To satisfy *Blazina, supra*, and RCW 10.01.160(3)'s mandate that the State cannot collect costs from defendants who are unable to pay, *the record must reflect that the trial court inquired into all five of these categories* before deciding to impose discretionary costs.

Ramirez, 191 Wn.2d at 744. (*Emphasis added*). The five categories into which the court must inquire are: “(1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts.” *Id.*

In the instant case, the appellant was convicted on September 11, 2019. He was immediately taken into custody following the jury’s verdict, pursuant to RCW 10.64.025, where he remained until the sentencing hearing on November 14, 2019. It is undisputed that during his incarceration, the appellant did not have any source of income.

Though the appellant had been incarcerated in the Walla Walla County Jail for just over two months by the time the sentencing hearing occurred, the trial court only inquired as to the appellant’s employment history. The trial court did not make inquiry as to the appellant’s current income, assets and other financial resources, monthly living expenses, or other debts.

Though the appellant signed the financial certification attached to his Motion for Order of Indigency on November 14, 2019 – the same date as the sentencing hearing – that Motion was not filed with the court until November 18, 2019. The Court entered the Order of Indigency on

November 19, 2020. Nonetheless, the State concedes that the record in the instant case was not specific enough as to cover all of the factors outlined in *Ramirez, supra*, so the defendant is entitled to a resentencing as to imposition of discretionary LFOs only.

b. The DNA Collection Fee was Properly Imposed.

Appellant relies on *State v. Catling*, 193 Wn.2d 252, 438 P.3d 1174 (2019) for the proposition that the trial court erred in imposing the \$100 fee for DNA collection. Appellant claims that because the State already had the appellant's DNA sample, as it was used to convict him, the appellant should not have to pay this fee to have it collected again.

The *Catling* opinion reads in relevant part: “[T]he DNA collection fee is no longer mandatory if a DNA sample has been previously collected from a defendant *based on a prior conviction*.” 193, Wn.2d at 259, citing to RCW 43.43.7541 (*Emphasis added*). RCW 43.43.7541 is dispositive and clear that the DNA must have been collected as a result of a prior conviction. It is undisputed here that the appellant had not previously been convicted of a felony. In fact, he had no criminal history prior to this rape conviction. As such, the trial court properly imposed the \$100 DNA collection fee in the Judgment and Sentence.

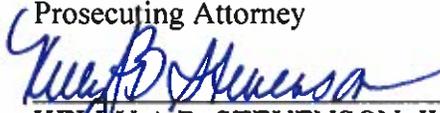
E. CONCLUSION

For the foregoing reasons, the appellant's conviction for Rape in the Second Degree should be affirmed.

DATED this 13th day of August, 2020.

Respectfully Submitted,

JAMES L. NAGLE
Prosecuting Attorney



KELLY A.B. STEVENSON WSBA# 38895
Deputy Prosecuting Attorney

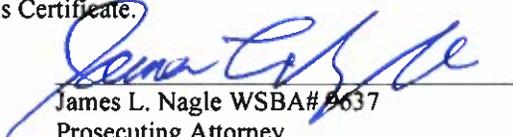
Certificate of e-mailing and Mailing

I CERTIFY that on this 13th day of August, 2020, I
 e-mailed

deposited in the mail of the United States of America properly stamped and addressed envelope, Postage Prepaid, directed to the following:

Lenell Rae Nussbaum
Law Office of Lenell Rae Nussbaum, PLLC
2125 Western Ave Ste 330
Seattle, WA 98121-3573
lenell@nussbaumdefense.com

a copy of the foregoing and this Certificate.



James L. Nagle WSBA# 5637
Prosecuting Attorney
240 W. Alder, Suite 201
Walla Walla WA 99362-2807

WALLA WALLA COUNTY PROSECUTING ATTORNEY

August 13, 2020 - 11:09 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37206-5
Appellate Court Case Title: State of Washington v. Jacob Nathaniel Cox
Superior Court Case Number: 17-1-00166-7

The following documents have been uploaded:

- 372065_Briefs_20200813110651D3044498_3763.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief of Respondent.pdf

A copy of the uploaded files will be sent to:

- kstevenson@co.walla-walla.wa.us
- lenell@nussbaumdefense.com

Comments:

Brief of Respondent

Sender Name: James Nagle - Email: jnagle@co.walla-walla.wa.us

Filing on Behalf of: Kelly A.B. Stevenson - Email: kstevenson@co.walla-walla.wa.us (Alternate Email:)

Address:

240 W ALDER ST STE 201
WALLA WALLA, WA, 99362-2807
Phone: 509-524-5445

Note: The Filing Id is 20200813110651D3044498