

NO. 74030-0-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

RONALD GARTH PARKER,
Appellant.

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Court of Appeals
Division I
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

Ronald Parker appeals from his convictions for four counts of Rape of a Child in the First Degree, three counts of Child Molestation in the First Degree and one count of Attempted Rape of a Child in the First Degree.

Parker raises contentions about admission of a video of child hearsay statements, improper statements by potential jurors, improper prosecutor comments in opening statement and improper exclusion of defense evidence.

The trial court did not abuse its discretion in admission of a video of child hearsay statements whose admission was not contested on appeal. Contrary to the defense assertion at trial, the statements were not cumulative.

The claim that certain jurors biased the rest of the jury pool fails because Parker failed to raise the claim at trial and the venire was not tainted.

Parker also did not object to the prosecutor's description of the victim at trial, or the prosecutor's closing argument about what items of evidence must be proven. Neither was error.

Contrary to Parker's assertions, witnesses described the football Sundays and he was able to cross examine the victim's sister about her writings in a journal professing her desire to have her mother leave Parker.

Finally, since only statutorily mandatory court costs were imposed, the trial court was not required to evaluate his ability to pay.

II. ISSUES

1. Did the trial court abuse its discretion in admission of evidence of a videotape of child hearsay statements?
2. Where the videotape of the child hearsay statements includes more than what the child testified to at trial, was the videotape cumulative?
3. Where the sole objection to the admission of the videotape of the child hearsay statements was that it was cumulative, can the defendant establish prejudice meriting reversal?
4. Can the defense raise a claim for the first time on appeal, that the prosecutor improperly described the victim?
5. Was the prosecutor's description of the victim improper?
6. If the prosecutor's description of the victim was improper is reversal merited?
7. Can the defense raise a claim for the first time on appeal, a claim that certain juror's statements tainted the rest of the venire?
8. Did the potential juror's descriptions of their experience with child victims improperly taint the venire?
9. Had the juror's descriptions improperly tainted the venire, could the trial court have remedied the taint if the defendant had objected?

10. Where the jurors who Parker claims showed biased were not seated, can he establish prejudice?
11. Where defense was able to obtain descriptions of football Sundays and other occasions, was the defense improperly limited by the trial court?
12. Where the victim's older sister's statements written in the older sister's journal were admitted by the older sister, did the trial court abuse its discretion in deny admission of the journal?
13. Where there was no showing that the older sister had in fact coached the victim or that the victim had seen the journal, was admission of the older sister's journal relevant?
14. If error, does the individual error merit or cumulative error merit reversal?
15. If there was any error, was it harmless beyond a reasonable doubt?
16. Where only statutorily mandated legal financial obligations were imposed, did the trial court improperly not consider the defendant's ability to pay?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On June 27, 2014, Ronald Parker was charged with Rape of a Child in the First Degree occurring on or about and between August 17, 2012, and

June 16, 2014. CP 77. It was alleged that Parker had touched the breasts and inserted his fingers in the vagina of a seven year-old step-daughter when they were under a blanket. CP 2-4.

On October 16, 2014, the information was amended to four counts of Rape of a Child in the First Degree in separate and distinct acts and four Counts of Child Molestation in the First Degree in separate and distinct acts. CP 7-11. All the incidents were alleged to have occurred between August 17, 2012, and June 16, 2014. CP 7-11.

On August 10, 2015, the case proceeded to trial. 8/10/15 RP 2.¹ Testimony was taken over five days.

On August 17, 2015, the jury found Parker guilty of all four counts of Rape of a Child in the First Degree, three Counts of Child Molestation in the First Degree and one lesser included count of Attempted Child Molestation in the First Degree. CP 101-108.

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

6/30/14 RP	Preliminary Appearance
4/1/15 RP	Child Hearsay Hearing including Ruling
5/6/15 RP	Trial Continuance on Defense Motion
7/3/15 RP	Arrestment on Amended Information and Release Hearing
8/10/15 RP	Trial Day 1, Jury Selection
8/11/15 RP	Trial Day 2, Motions in Limine, Opening Statement, Testimony
8/12/15 RP	Trial Day 3, Testimony
8/13/15 RP	Trial Day 4, Testimony
8/14/15 RP	Trial Day 5 (In volume with 8/17/15, 9/17/15)
8/17/15 RP	Trial Day 6 Closing, Verdicts (in volume with 8/14/15, 9/17/15)
9/17/15 RP	Sentencing (in volume with 8/14/15, 8/17/15).

On September 17, 2015, Parker was sentenced to a mandatory minimum sentence within the standard range of 260 months with a maximum sentence of life on counts one through four. CP 63. Counts five, six and seven were merged with the allegations in the counts of rape of a child. CP 59, 62. On count eight, the count of Attempted Child Molestation in the First Degree, Parker was sentenced to a minimum sentence of 148.5 months, which runs concurrently with counts one through four. CP 63.

On September 21, 2015, Parker timely filed a notice of appeal, CP 88-9.

2. Summary of Trial Testimony

A.M. testified. 8/11/15 RP 63. She was eight years old and in third grade at the time of trial. 8/11/15 RP 64, 66, 8/12/15 RP 41. A.M. lived in Concrete with Parker, the defendant, beginning when she was six years old and in first grade. 8/11/15 RP 67. Parker and her mother were married at the time. 8/11/15 RP 67. They lived there with her two older sisters and two older brothers. 8/13/15 RP 64-5. The house was a three bedroom house. 8/11/15 RP 70. She lived there until she was in second grade. 8/11/15 RP 67.

After Parker married A.M.'s mother, Parker started yelling and cussing at the children and throwing things. 8/11/15 RP 69.

A.M. testified that Parker touched her on her “boobies” and on her “crotch.” 8/11/15 RP 72-3. This touching occurred more than one time and occurred on the couch at Parker’s house. 8/11/15 RP 73-4.

A.M. described that the incidents happened when Parker and A.M. were lying on the couch on their sides watching television. 8/11/15 RP 78-9. They were underneath a blanket and Parker was behind A.M. 8/11/15 RP 79. The incidents usually happened at night when A.M. was wearing pajamas but a few times A.M. was wearing pants. 8/11/15 RP 81.

The first time it occurred “it kind of freaked out” A.M. 8/11/15 RP 80. A.M. recalled Parker touching her in multiple places under her clothes on her body including in her crotch. 8/11/15 RP 80. A.M. said it hurt when he was pushing hard against her crotch. 8/11/15 RP 83. Parker was using his finger. 8/11/15 RP 84. A.M. tried to push Parker’s hand away, but was unable to. 8/11/15 RP 100

On other times Parker touched A.M. on her “boobies.” 8/11/15 RP 85. Parker touched A.M. on her crotch more than one time and it hurt every time he did that. 8/11/15 RP 85.

A.M. also testified that Parker tried to get her and was able to force her hand to touch his “wee wee.” 8/11/15 RP 86, 88. A.M. testified that only boys have a “wee wee” and they use it to go to the bathroom. 8/11/15 RP 86-

7. This touching occurred inside his underwear and happened more than one time. 8/11/15 RP 88.

All the incidents occurred when Parker and A.M. had the blanket covering them when they were watching television. 8/11/15 RP 89, 90. Some incidents occurred when A.M.'s mother and her brother who is three years older and sister who is five years older were in the room. 8/11/15 RP 64-5, 89, 90-1. No one else was ever in the room. 8/11/15 RP 89-90. The incident would happen at all times of the day. 8/11/15 RP 91.

A.M. testified that she went and laid down with Parker because he would get mad that no one would lay with him and would yell at her. 8/11/15 RP 92-3. The other children would not go lay with Parker. 8/11/15 RP 94.

A.M. was scared to tell her mother, Shannon Dearing (Parker). 8/11/15 RP 84, 8/12/15 RP 40-1.

One night when getting ready for bed, A.M. told her sister who is five years older, what was going on. 8/11/15 RP 64-5, 96. A.M. then told her mother the next day after school. 8/11/15 RP 97. That was the last day of school. 8/11/15 RP 104. When A.M. told her mother, they left the house right away. 8/11/15 RP 97. While driving away, Parker passed by, turned around and followed them. 8/11/15 RP 98. Dearing stopped and talked to Parker. 8/11/15 RP 98. They stayed with a friend, Amber for a while.

8/11/15 RP 98. A.M. talked to the child interview specialist a few days after she left home. 8/11/15 RP 117.

On cross-examination A.M said that her sister R.M., who is five years older, did not like living with Parker because of his anger issues. 8/11/15 RP 103. A.M. testified that part of the reason she told her sister was she was afraid she was going to have to go back to school in Concrete the following year. 8/11/15 RP 104. A.M. admitted she did not want to live in Rockport any more. 8/11/15 RP 105. R.M. also told A.M. that she did not want to live there any longer either. 8/11/15 RP 105. When asked if the main reason she told was because she wanted to leave, A.M. said that she told “mostly because he was touching me.” 8/11/15 RP 105.

Also on cross-examination, A.M. testified that she had not told a child interviewer that she had never touched Parker’s penis. 8/11/15 RP 107. A.M. was also questioned about how long it was between when she told her sister and her mother and said it could have been a week before. 8/11/15 RP 115-7. A.M. recalled her older sister having a bruise on her forehead about two months before they left the house. 8/11/15 RP 107.

A.M. was not cross-examined about fabricating the incident.

On redirect examination, A.M. testified the reason she told about Parker had nothing to do with the fact she liked her other school better.

8/11/15 RP 120-1. She also testified that she believed she told her mother the day after she told her sister. 8/11/15 RP 121.

A.M.'s older sister, R.M. testified. 8/11/15 RP 143-4. R.M. was the middle child of five. 8/11/15 RP 145. A.M. is her youngest sister. 8/11/15 RP 145. R.M. was thirteen at trial and ten or eleven when her mother Shannon married Parker. 8/11/15 RP 145-6, 8/12/15 RP 41. They moved in with Parker and started going to a smaller school. 8/11/15 RP 146-7.

The second year after they moved, R.M. did not like school due to problems with a friend. 8/11/15 RP 148. R.M. did not like living in Parker's house and was bothered by the way Parker yelled. 8/11/15 RP 148-9.

R.M. shared a bedroom with her sister and they had a normal relationship. 8/11/15 RP 150-1. R.M. said A.M. did not follow directions, which frustrated R.M., and A.M. would get into R.M.'s clothes. 8/11/15 RP 150. R.M.'s younger brother J.M. had his own room. 8/11/15 RP 151. At one point when they first moved an older brother had shared the room with his friend, Riley Simmons. 8/11/15 RP 151-2. J.M. ended up with the room after they moved out. 8/11/15 RP 151-2. Parker and Dearing had the third bedroom. 8/11/15 RP 151.

R.M. testified the living room had three couches and one chair, and that Parker usually had one couch. 8/11/15 RP 153-4. From time to time

Parker and A.M. would be lying on the couch and Parker had his blanket off the bed on them. 8/11/15 RP 155.

R.M. testified that A.M. told R.M. about what Parker was doing to her. 8/11/15 RP 157. That occurred on the last day of school one year. 8/11/15 RP 157. At the time, they were lying in their separate beds chatting when A.M. told during a secrets game. 8/11/15 RP 158. A.M. told R.M. that Parker was touching her down there. 8/11/15 RP 158. R.M. couldn't remember what else A.M. had said. 8/11/15 RP 159. They decided to tell their mother the next day after their mom got home from work. 8/11/15 RP 159. The next morning, they told J.M. as they were waiting for the bus stop to go to school. 8/11/15 RP 159.

R.M. said that she had A.M. tell her mom. 8/11/15 RP 160. After that, Dearinger had them gather some clothes for them to take to their grandmothers. 8/11/15 RP 160. As they were driving away they saw Parker driving the other way and Dearinger got out and confronted Parker. 8/11/15 RP 160.

On cross-examination, R.M. admitted she did not like Parker and "kind of" hated him. 8/11/15 RP 162. R.M. admitted writing in her feelings about Parker in a journal. 8/11/15 RP 163. R.M. was questioned about what she wrote and admitted writing:

I do not like Ron, I hate him, he's so stupid, mom has made the biggest mistake, not allowed to even see my dad because of him, wants him to be -- my mom wants me to -- him to be my new dad.

8/11/15 RP 163. R.M. admitted to having a five point plan which was her scheme to have her mom leave Parker. 8/11/15 RP 163-4. R.M. admitted her plan involved telling her mother things that were not true to break them up. 8/11/15 RP 164. R.M. admitted to thinking these things before A.M. disclosed. 8/11/15 RP 164.

R.M. also admitted writing in her journal about missing her friend and that they would have been in the same class for four years. 8/11/15 RP 165.

During the questioning of R.M., the prosecutor had Parker's counsel mark the journal as an exhibit. 8/11/15 RP 165, Exhibit 5. R.M. admitted writing the journal. 8/11/15 RP 166. The defense sought to admit the journal. 8/11/15 RP 166. The State objected as hearsay. 8/11/15 RP 166. The defense claimed the journal was being admitted for impeachment. 8/11/15 RP 166. However, the trial court pointed out to defense that R.M. had not been impeached since R.M. had admitted what she wrote in the journal. 8/11/15 RP 167. The trial court invited the defense to "go through any material you wish with her." 8/11/15 RP 167.

Parker's counsel went on to examine R.M. about the five point plan. 8/11/15 RP 167. It included coming home crying and saying things were too much drama and that everyone made fun of her because they live in a dump. 8/11/15 RP 167. One point was to make Ron yell at them in a way that their mother didn't like. 8/11/15 RP 168. R.M. admitted writing about telling "Chaya about stuff that Ron does so that my mom will call my mom and talk about it." 8/11/15 RP 168. Next R.M. admitted writing "do something to make Ron yell at us in a way mom doesn't like. 8/11/15 RP 168. R.M. also admitted writing "tell mom I hate Ron and tell her that he was a huge mistake, and how she lets him yell at us." 8/11/15 RP 168. She also admitted writing "I hate Ron" in big bold [letters]. 8/11/15 RP 168. And she admitted writing the last point in the plan "was to go to Ron and tell him I hate him, and let him yell at me until mom - - and if she doesn't do anything the next day, I will not go on the bus until we move. I don't even care if we don't move to Sedro-Woolley. I just want to move, and all this stuff is true except for two and three." 8/11/15 RP 168-9, 178.

On cross-examination, R.M. said that she did see A.M. and Parker under a blanket when watching television. 8/11/15 RP 172-3. Sometimes it occurred in the nighttime after they got off work and sometimes during the day on weekends. 8/11/15 RP 173. Defense elicited from R.M. that A.M.

told R.M. that Parker tried to have A.M. touch his penis with her hand. 8/11/15 RP 175.

Defense counsel tried to get R.M. to admit to getting A.M. to make a false allegation. 8/11/15 RP 176-7. But no such admission was made.

On redirect examination, the State went back over the five points of the “plan” with R.M. 8/11/15 RP 186-8.

A.M.’s older brother J.M. testified at trial. 8/11/15 RP 192. J.M., his brother, sisters and mother moved in with Parker and lived there for two years. 8/11/15 RP 193. J.M. first slept on one of three couches in the living room. 8/11/15 RP 193-5. A.M.’s older brother and his friend stayed in one bedroom the first year. 8/11/15 RP 193-4. When they left J.M. got his own bedroom. 8/11/15 RP 194-5.

J.M. recalled A.M. and Parker lying on the same couch on their sides while they watched television. 8/11/15 RP 196. He recalled that they would be covered with a blanket. 8/11/15 RP 197. When R.M. or J.M. shared the couch with Parker, the blanket was never over them. 8/11/15 RP 198. That only occurred with A.M. 8/11/15 RP 198. Sometimes Parker would ask A.M. to come over to the couch with him. 8/11/15 RP 199. While they were under the blanket, sometimes A.M. would move around shaking her upper body. 8/11/15 RP 198.

J.M. recalled being told that A.M. disclosed about incidents with Parker after school when they were doing dishes. 8/11/15 RP 201-3. They waited to tell their mother until she got home. 8/11/15 RP 203. After the girls told their mother, they packed up and left. 8/11/15 RP 203.

The State called a defense investigator to impeach J.M. 's testimony at trial. 8/12/15 RP 108-9. Contrary to what J.M. had testified to, J.M. told the investigator that he had heard A.M. crying the night before, and that when A.M. told J.M. what happened the following afternoon, A.M. was crying real bad. 8/12/15 RP 109.

Shannon Dearing testified. 8/12/15 RP 40. Dearing married Parker in 2012 and moved in with him in 2013. 8/12/15 RP 43-4. Dearing was forty-one years old at the time of trial in 2015 and Parker was five to seven years younger. 8/12/15 RP 42-3. They moved into Parker's house which is between Concrete and Rockport. 8/12/15 RP 44. Dearing's four youngest children moved in with her. 8/12/15 RP 44. Parker was nicer to A.M. than to Dearing's other children. 8/12/15 RP 101.

After Dearing and her children moved in, Parker would throw things at the walls and damaged them. 8/12/15 RP 47. Dearing and the children moved out for a while in December of 2013. 8/12/15 RP 47. They moved out because Parker had thrown J.M. against a door. 8/12/15 RP 103. Dearing and the three younger children moved back in about two to three

weeks later. 8/12/15 RP 48. When they first moved in, the children seemed to like Parker. 8/12/15 RP 50. Dearinger saw Parker yelling at the children. 8/12/15 RP 49. He made negative comments saying the kids were stupid. 8/12/15 RP 49. Toward the end of living there the children did not seem to like him so much. 8/12/15 RP 50. Prior to leaving for good, Parker had broken the door to the girl's bedroom and removed it because R.M. had locked the door on him. 8/12/15 RP 105-7. Of the three children, A.M. seemed to get along best with Parker. 8/12/15 RP 50-1.

Dearinger identified a photograph of the living room of the house showing the three couches. 8/12/15 RP 51. Parker typically was on his blue couch. 8/12/15 RP 56. Dearinger recalled at times that A.M. and Parker were on the blue couch together. 8/12/15 RP 56. They would watch television in the living room on Saturday and Sunday night and sometimes on weekdays. 8/12/15 RP 77.

At times when they were watching television, Parker would ask the girls to come over on the couch with him. 8/12/15 RP 57-8. He would ask R.M. but she would not go over very often. 8/12/15 RP 58. He would ask A.M. 8/12/15 RP 57-8. A.M. was the one usually lying on the couch with Parker. 8/12/15 RP 58. They would be covered with Parker's favorite blanket. 8/12/15 RP 59. The blanket was fuzzy leopard print type blanket

that Parker had received for his birthday and typically was kept on the couch or the bed. 8/12/15 RP8/12/15 RP 59.

Dearinger recalled shortly after having come home from work that A.M. told Dearinger that Parker touched her. 8/12/15 RP 64. Dearinger said A.M. was wringing her fingers when she said that Parker had touched her. 8/12/15 RP 64. A.M. had a serious look on her face. 8/12/15 RP 64. R.M. was standing in the room off to the side. 8/12/15 RP 64.

Dearinger asked A.M. how he had touched her. 8/12/15 RP 65. A.M. said outside her underwear and actually hurt her. 8/12/15 RP 65. The reason she hurt was because his fingers were large and he tried to press them in her. 8/12/15 RP 65.

Dearinger did not ask many more questions but had the kids get their backpacks with what they needed and left to go to Dearinger's mother's house. 8/12/15 RP 65. On the way leaving, they passed Parker's car and he turned around and followed them. 8/12/15 RP 60. Dearinger stopped to talk to him. 8/12/15 RP 66. At first Parker denied it, but then said "like, maybe I was sleeping." 8/12/15 RP 66. Dearinger gave Parker his bank card and he turned around and drove off. 8/12/15 RP 66.

The day after the disclosure, they went to talk to the police. 8/12/15 RP 67. Dearinger later returned to the house a few times to take clothes and other possessions of hers when Parker was not around. 8/12/15 RP 68-9.

Dearinger did not see the fuzzy blanket that Parker had used while on the couch. 8/12/15 RP 69-70. The second time Dearinger returned, she found a journal belonging to R.M. that was under a box of her oldest daughter's items. 8/12/15 RP 70. Dearinger turned the journal over to police. 8/12/15 RP 70-1.

Deputy Mark Sonnabend testified that he took the report from Dearinger on June 18, 2014, at the lobby at the sheriff's office at about 3:40 p.m. 8/12/15 RP 110-11. At the time Dearinger was visibly upset and trembling. 8/12/15 RP 111.

Theresa Luvera was the detective assigned and spoke with Dearinger on June 19, 2014. 8/12/15 RP 113. Luvera arranged the interview of A.M. and her two siblings to occur on June 24, 2014. 8/12/15 RP 113. On June 27, 2014, Luvera executed a search warrant on the house where the incident occurred and took pictures. 8/12/15 RP 114.

The morning before the search warrant, Luvera had collected R.M.'s journal from Dearinger. 8/12/15 RP 115-6. Luvera collected blankets at the house to examine for potential semen evidence. 8/12/15 RP 116-7. Luvera did not find the particular blanket that had been described to her as a dark blanket with a particular pattern on it. 8/12/15 RP 119. Luvera did not find the blanket. 8/12/15 RP 119.

Later at trial during rebuttal evidence, the State recalled Luvera to identify photographs she took of a Trans AM vehicle of what appeared to be bullet holes consistent with the testimony of A.M. 8/14/15 RP 49-51

Deborah Ridgeway was the interview specialist with the Skagit County Prosecutor's Office who testified at trial. 8/12/15 RP 122. Ridgeway had training as a child interview specialist through the Criminal Justice Training Commission in conjunction with Harborview Sexual Assault. 8/12/15 RP 122-3. Ridgeway followed the Washington State Interview Guidelines based off of the protocol of the National Institute of Child Health and Development. 8/12/15 RP 126. The intent of the protocol is to attempt to get reliable information. 8/12/15 RP 127. This is done by having a child friendly environment, where the roles are neutralized and the child knows they can correct the interviewer. 8/12/15 RP 127. The interview is audio and video recorded. 8/12/15 RP 128. The child agrees to tell the truth and Ridgeway lays out ground rules of the interview. 8/12/15 RP 128. Ridgeway asks questions in a manner to cause a narrative response. 8/12/15 RP 129. The main focus of the interview is to not suggest things to the child. 8/12/15 RP 51.

Ridgeway interviewed J.M. 8/12/15 RP 130-2. The State offered statements of J.M. inconsistent with his trial testimony. 8/12/15 RP 133-4. Those included his statements to Ridgeway that J.M. had seen A.M. lying

with Parker on the couch and that Parker would get mad if someone did not sit down or lay with him. 8/12/15 RP 133. In the interview, J.M. said that Parker would get mad if A.M. would lay on the couch with others. 8/12/15 RP 134. J.M. also said he heard of A.M.'s disclosure at the bus stop. 8/12/15 RP 134.

The videotape of Ridgeway's interview of A.M. was played for the jury. 8/12/15 RP 141-2, Exhibit 6 (Supplemental designation of clerk's papers pending). There were no objections made by defense during the video. 8/12/15 RP 141-22.

Ridgeway was extensively cross-examined about her manner and method of doing the child interview. 8/12/15 RP 142-166, 8/13/15 RP 5-46. Difficulties arose because Ridgeway and defense had different transcripts of the interview. 8/13/15 RP 164-7. Defense specifically examined Ridgeway about particular questions asked of A.M. 8/13/15 RP 5-44.

On rebuttal, the prosecution clarified Ridgeway's use of interview techniques. 8/13/15 RP 45-60. Ridgeway also explained her use of specific questions used with A.M. 8/13/15 RP 62-75.

Defense called Adam MacCurdy, who was one of Dearing's children by another father and was nineteen at the time of trial. 8/12/15 RP 41, 8/13/15 RP 96, 130. MacCurdy testified that her mother and Parker started hanging out when they lived in Sedro Woolley and that the eventually

moved in with Parker. 8/13/15 RP 97. Riley Simmons also moved in with them. 8/13/15 RP 97-8. MacCurdy spent a lot of times riding his BMX pedal bike after school. 8/13/15 RP 100, 110.

MacCurdy recalled there were television nights. 8/13/15 RP 102. MacCurdy said he never saw Parker under a blanket with A.M. 8/13/15 RP 102, 106. MacCurdy said that Parker would walk around the house in long johns, but not briefs. 8/13/15 RP 103. MacCurdy also recalled that family friends would come over to watch football on Sunday. MacCurdy spent a lot of time riding his BMX pedal bike after school. 8/13/15 RP 112. A.M. did not like to watch football. 8/13/15 RP 112.

MacCurdy said there were not scheduled TV night weekends. 8/13/15 RP 114. MacCurdy did not recall Parker watching television with the other children. 8/13/15 RP 115-6.

MacCurdy said he found R.M.'s journal at the house while cleaning it with Riley Simmons after Dearinger had moved out with the other children. 8/13/15 RP 122. MacCurdy testified he gave it to Dearinger. 8/13/15 RP 123. MacCurdy testified his mother told him not to tell police about the journal. 8/13/15 RP 123. MacCurdy said the next time he saw the journal was at his attorney's office and by that point some pages were missing. 8/13/15 RP 124-5.

MacCurdy was cross-examined. MacCurdy said he had a bad memory due to concussions following a bicycle accident and seizures. 8/13/15 RP 131-2, 141. MacCurdy quit going to school in 2012, and did not go to school at all in 2013. 8/13/15 RP 134. MacCurdy said he was in the house most of the time because he couldn't keep a job and did not like school 8/13/15 RP 136. MacCurdy said he babysat the young children on Friday, and all weekends beside football season. 8/13/15 RP 137. MacCurdy said there was a movie night like twice a month, but told a defense investigator is maybe once a month. 8/13/15 RP 137. MacCurdy said that the children would be on one couch with Dearing. 8/13/15 RP 138-9. MacCurdy said Parker would be on his couch. 8/13/15 RP 139. MacCurdy said he never saw A.M. under a blanket with Parker. 8/13/15 RP 140. MacCurdy had made conflicting statements: one to an investigator that A.M. had laid down with Parker because she loved him and another in court that he had never seen A.M. lie down with Parker. 8/13/15 RP 141. MacCurdy said his faulty recollection was due to a bad memory. 8/13/15 RP 141.

Parker also called Riley Simmons. 8/13/15 RP 170. Simmons testified he was friends with MacCurdy and ended up living with the family including Parker. 8/13/15 RP 170-1. Simmons lived there six months beginning in June of 2012, moved out for a few weeks, and then moved back for the rest of 2013. 8/13/15 RP 171, 180. He moved out some time in 2014

about four months before the disclosure. 8/13/15 RP 180-2. Simmons testified the family would gather to watch television, depending on who was around. 8/13/15 RP 175. Simmons said it was common for the children to gather to watch television but that Parker would not be watching television with them. 8/13/15 RP 175. Simmons said it was because of the kind of shows the children were watching. 8/13/15 RP 176. Simmons also said that friends would come over to watch football. 8/13/15 RP 176. But Parker would typically sit on the couch with Dearing. 8/13/15 RP 177. Simmons said he never saw Parker under a blanket with A.M. 8/13/15 RP 177.

Simmons said he thought R.M. would manipulate A.M. because she was older, bigger and stronger. 8/13/15 RP 178. Simmons said he recalled MacCurdy locating a journal and that Dearing and MacCurdy read the journal. 8/13/15 RP 183-4.

Simmons said that R.M. got mad at Parker. 8/13/15 RP 191. But Simmons said that A.M. liked Parker and left notes for him saying that she loved him. 8/13/15 RP 192. He never saw a problem between A.M. and Parker. 8/13/15 RP 192.

Parker's mother testified that she had quitclaimed her interest to her property to her son in June of 2014. 8/13/15 RP 195. Around that time Dearing told her that R.M. hated Parker. 8/13/15 RP 196. After they

moved out, Dearinger told Parker's mother that the children took a vote and wanted to go back. 8/13/15 RP 197.

Parker's mother also testified that she was at the house on special occasions and had never seen Parker under a blanket with A.M. 8/13/15 RP 198.

Alf Vatne testified. 8/14/15 RP 10. He had known Parker since he was about thirteen and Dearinger for about four years. 8/14/15 RP 11. Vatne testified he worked on drag race cars with Parker. 8/14/15 RP 11. Vatne was over at the house watching football games on the weekends until about five or six at night. 8/14/15 RP 13. Vatne testified he never saw Parker under a blanket with A.M. 8/14/15 RP 14.

Ronald Parker testified that he lived in Rockport and worked in Sedro Woolley. 8/13/15 RP 204-5. He met Shannon Dearinger through friends while out partying. 8/13/15 RP 205. They became intimate somewhere in late 2010 or 2011. 8/13/15 RP 205. Parker liked going out partying at bars and other people's houses with Dearinger. 8/13/15 RP 206. Typically Dearinger would go to Parker's work and wait for him to get off work before going to the Old-Timer's bar in Sedro Woolley. 8/13/15 RP 206.

Dearinger and her children moved in to his house at the end of the school year of 2012. 8/13/15 RP 207. They got married in July, 2013.

8/13/15 RP 207. Parker said he got along with Dearing and her children. 8/13/15 RP 208. Parker and Dearing had a difference of opinion about the children doing their chores. 8/13/15 RP 208. Dearing had a chart listing chores for the children. 8/13/15 RP 209. Parker would “holler at” the children when they weren’t doing their chores. 8/13/15 RP 209.

Once they got married, other than going to the bars, Parker and Dearing spent time going drag racing or hiking. 8/13/15 RP 210. Those activities were generally not with the children. 8/13/15 RP 210. The children would either go to a friend’s house or the older ones would babysit the younger ones. 8/13/15 RP 210.

About six months after they moved in tension arose about how the family was functioning and discipline of the children. 8/13/15 RP 211.

About two months before they moved out, Dearing told Parker that R.M. did not like him. 8/13/15 RP 213. That is the reason that Dearing told him why they were moving out. 8/13/15 RP 213.

Parker said he acted as the authority figure for the children because Dearing never did. 8/14/15 RP 21. He claimed other than one incident where he smacked J.M.’s head on a doorknob, he did not act aggressively with the kids. 8/14/15 RP 24, 28-9.

Parker denied touching A.M. on “her vagina or her boobs.” 8/14/15 RP 26. He said he never could have done it in his sleep. 8/14/15 RP 26.

On cross examination he again acknowledged that he acted as the authority figure and that he yelled at the kids. 8/14/15 RP 28, 31. Parker denied cussing at the children or threatening them. 8/14/15 RP 28. He testified he believed the incident where he smacked J.M.'s head on a doorknob, caused Dearinger to leave. 8/14/15 RP 29.

Parker acknowledged that Dearinger filed for divorce and he did not respond to it so it was entered. 8/14/15 RP 33-4. He believed that the acrimony in the relationship arose because Parker wanted to quit going to bars, but Dearinger kept going where Parker would meet up with her. 8/14/15 RP 37-8, 42-4

Parker also denied ever having A.M. lay on the couch with him. 8/14/15 RP 44-6. He claimed that everyone was making the incidents up to get back at him. 8/14/15 RP 46-7.,

He also acknowledged that in the few months before trial, MacCurdy had bought a vehicle that remained registered in his name that MacCurdy drove. 8/14/15 RP 34.

Parker admitted shooting at a Trans AM, claiming he was doing so for target practice because it was only scrap metal. 8/14/15 RP 53-4.

On cross-examination, Parker admitted it was a vehicle that he had talked about fixing up to give to Adam. 8/14/15 RP 54.

IV. ARGUMENT

1. The trial court properly exercised its discretion in admission of the interview with the child victim.

Contrary to the defendant's contentions, the video of the child interview conducted by a specialist was not cumulative.

i. Admission of evidence lies within the discretion of the trial court.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Id.*, at 181. See also *State v. Fedorov*, 183 Wn. App. 736, 743, 335 P.3d 971 (2014) (admission of dashboard camera video of officer's arrest within discretion of the trial court).

A trial court's decision about whether evidence was cumulative is likewise within the trial court's discretion. *State v. Martinez*, 53 Wn. App. 709, 717, 770 P.2d 646 (1989).

ii. The objection to the video was solely based upon the video being cumulative.

The video was the source of repeated discussion prior to the video being played. But in the end the only objection lodged by the defendant was that it was cumulative.

At trial, Parker's counsel indicated the video was "fraught with other hearsay and irrelevant material." 8/12/15 RP 7. The prosecutor requested defense to identify which portions of the videotape were of concern. 8/12/15 RP 7. The defense sought the opposite to require the State to show why every piece was admissible. 8/12/15 RP 7. The Court directed the parties to discuss the matters sought to be excluded and bring them to the court's attention after lunch. 8/12/15 RP 9-11.

After the lunch hour, Parker's counsel indicated he had not made a list of objectionable areas and offered to note his objection during the course of the video and seek to fast forward the video at that time. 8/12/15 RP 91. The Court reluctantly agreed to the procedure seeking defense to note in reviewing the transcript when objections would be raised. 8/12/15 RP 92-3.

Shortly before the video of the child interview specialist interview of A.M. was played, the trial court confirmed the procedure today where the defense would object throughout the video being played and the video was stopped to address the contention. 8/12/15 RP 135-6. Defense indicated that there were only about five objections to be raised. 8/12/15 RP 136. The defense objection to the admission before the jury was based upon the contention it was cumulative. 8/12/15 RP 140. Despite that contention that additional objections would be made, the record does not show that defense

actually raised the objections during the playing of the video. 8/12/15 RP 140-2, Exhibit 6.

iii. A video of child hearsay statements made a few weeks after disclosure is not cumulative of the child's statements at trial.

The objection to evidence being cumulative flows from ER 403 which provides:

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

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

ER 403. By the very nature of the objection, the objection acknowledges that the evidence is relevant, but contends that it should be excluded as “by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” When applying this standard to child hearsay statements recorded on video, the defendant cannot show an abuse of discretion.

The child's disclosure here occurred about June 17, 2014, A.M. was interviewed a week later. 8/12/15 RP 67, 110-1, 113. The interview occurred at the Child Advocate Center in a child friendly environment. 8/12/15 RP 127. There are two tables and two chairs and a one way mirror for the detective to view. 8/12/15 RP 127. So the interview occurred with the

interview specialist with the detective watching. 8/12/15 RP 127, 143. A.M.'s testimony was taken over a year later on August 11, 2015. 8/11/15 RP 63. Testimony was taken in the presence of the jurors, defendant, two counsel, the judge, court reporter, clerk and any other citizens who may have chosen to attend.

The video was played to the jury, and there are observations that jurors could make of the victim and the time of disclosure. 8/12/15 RP 139-141-2, exhibit 6. The defendant does not contest the trial court's decision to admit the child's hearsay statements. 4/1/15 RP 66-71.

Furthermore, the statements made by A.M.'s sister, brother and mother were not significant statements as to her step father's conduct. The sister only recounted A.M. saying she was being touched "down there." 8/11/15 RP 158. The sister couldn't recall other statements. 8/11/15 RP 159. A.M.'s brother did not describe any statements that A.M. made. 8/11/15 RP 200-3. And the statements to the mother consisted of A.M. saying Parker had touched her. 8/12/15 RP 64. Dearinger asked how and A.M. said outside her underwear, that he actually hurt her, and that his fingers were large and he tried to press them in her. 8/12/15 RP 65. The mother did not ask any more questions. 8/12/15 RP 65.

Thus, there were only limited hearsay statements recalled by relative and far more detail was provided by A.M. in the video. 4/1/15 RP 33-42

(description of A.M.'s statements contained on videotape discussed at child hearsay hearing), Exhibit 2 (Supplemental designation of clerk's papers pending, Excerpt of transcript of video from child hearsay hearing 4/1/15 RP 43). The interview summarized her statements on the videotape as follows.

That she described a couple incidents, the one that we spent the most time talking about was the time it happened on a blue couch, she was asked by Ron to lay on the couch with her, he got up, got a blanket, sat down with her while he was on the couch with her, he touched her, she referred to the girls have three holes, touched one of the holes and pushed on the hole and made it hurt, and that this happened all the time, that there were a lot -- I think she said all the time. And then she described another time where she -- he went from behind her booty, is how she said it, and he did it, and that he also would lay I believe on the red couch, he tried to have her touch his ding-a-ling with her hand.

4/1/15 RP 42-3.

In light of the other limited witness statements, the timing of the videotape statements and the fact that the child interview occurred in a more relaxed setting, the videotape was not cumulative, much less a needless presentation of evidence.

In making the argument that the child interview was cumulative, Parker noted that the interview video was "in a more relaxed, 'child friendly' setting than in the courtroom and Mr. Parker was not present." Appellant's Opening Brief at page 12. Parker in so arguing acknowledges that the videotape was not cumulative as it showed the child's responses to

significant questions which were done in a non-leading fashion and without the presence of the defendant, attorneys, the judge and jury.

The defendant cites primarily to *State v. Bedker*, 74 Wn. App. 87, 871 P.2d 673 (1994) to support his position. However in *Bedker*, the Court of Appeals held that the trial court had not erred in admitting evidence of the child hearsay statements under RCW 9A.44.120. The *Bedker* court wrote: “Admissibility under the statute is not based on mere repetition, it is based on repetition under circumstances indicating the reliability of the statements.” *State v. Bedker*, 74 Wn. App. at 93, 871 P.2d 673 (1994), citing *State v. Ryan*, 103 Wn.2d 165, 174, 691 P.2d 197 (1984). The court wrote:

Here, the trial court carefully exercised its discretion in deciding which statements would be admitted and which would be excluded. The child hearsay statements admitted over objection were made in the interview at the sexual assault center. The interview and the testimony regarding it encompassed areas not covered in the initial disclosure or in the victim's own testimony. The trial court did not abuse its discretion in admitting the statements.

State v. Bedker, 74 Wn. App. at 93-4, 871 P.2d 673 (1994).

Similar circumstances exist here, the video of the victim's interview was admissible and within the discretion of the trial court.

2. The statements of jurors who were excused did not unfairly taint the remaining jurors and the defendant did not seek relief below.

Given the defendant's failure to object or seek a remedy at the trial court and the nature of the statements, two juror's statements regarding belief of child victims did not so taint the jury as to require reversal.

i. The two jurors who showed bias did not deliberate and no relief was sought.

When asked if the jurors were biased based upon the fact the defendant was charged, juror number 22 offered that he would have difficulty being fair. 8/10/15 RP 54-5. Juror 22 stated his wife was molested, his brother-in-law was in jail for being a molester and that he worked for DSHS children's administration. 8/10/15 RP 55.

Defense counsel then asked if anyone else felt the same way. 8/10/15 RP 55. Juror 27 offered that she was an elementary teacher and had been a mandatory reporter for years. 8/10/15 RP 55. Juror 27 said she had a niece that went through something similar six years before. 8/10/15 RP 55. She expressed that from her experience, "that I just have a feeling that kids don't lie in that situation." 8/10/15 RP 55. When asked if it would be difficult for her to be a fair juror she said "It might. I don't know at this very moment if it would, but I just want to make sure that I put that out there, that kite." 8/10/15 RP 55-6.

Defense followed-up with questioning of juror 27 about the presumption of innocence. 8/10/15 RP 56. The juror explained:

A presumption of innocence, I think I would just be waiting to hear if the evidence supports the charges against the person. I think I could -- I could leave it in that realm and just look at it in that sense. But I still have that feeling that -- that kids might lie if they -- if mom says do you have a -- did you have a cookie, and they say no, but when it's something that big, that just weighs that heavy on a child, I don't know that I could separate them.

8/10/15 RP 56. Juror 27 was the subject of an additional individual questioning separate from the other jurors. 8/10/15 RP 113. She provided more detail of her experience. 8/10/15 RP 113-15. In the end she stated: "I think I could still be fair and impartial." 8/10/15 RP 115.

The State ended up moving to excusing juror 22 for cause, which was granted without objection by defense. 8/10/15 RP 75-6. Defense never sought to excuse juror 27 for cause, and she was not among the jurors who considered the case. 8/10/15 RP 157-8, ___ CP. Supp. (Supplemental designation of clerk's papers pending, Sub. No 62, Clerk's Trial Minutes filed August 10, 2015 at pages 2-4, 18-19).

The defendant did not move for relief in the trial court based upon the claim the biased jurors tainted the remaining jurors.

ii. The defendant's failure to object below precludes review.

Parker fails to explain why he should be entitled to review of this contention where there was no objection at the trial court.

RAP 2.5(a) provides in pertinent part:

(a) *Errors raised for first time on review.* Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right..

RAP 2.5.

Here the defendant did not seek any relief for the juror's alleged "taint" of the remaining jurors in the trial court. Options existed such as having the trial court disregard the other juror's opinions or seeking a new jury pool. These options were not explored. The defendant did not preserve his claim by raising the issue below. *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009).²

The defendant cites to *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997) to support his position. However, in that case, the defendant twice moved for mistrial based upon the claim that the entire panel had been tainted. *Mach v. Stewart*, 137 F.3d at 632.

² See also *In re Det. of Jaeger*, No. 72392-8-I, 2016 Wn. App. LEXIS 2131, at *13-15 (Ct. App. Sep. 6, 2016) (denying review of claim that "expert-like" opinions of jurors where no motion for mistrial was made). This case is cited pursuant to GR 14.1 which permits citations to Court of Appeals Decisions after March 1, 2013, as non-binding authority, and may be accorded such persuasive value as the court deems appropriate.

There was no claim on appeal of ineffective assistance for failure to seek relief at the trial court.³ And even had there been, the decision whether to seek relief is a matter of trial tactic. Maybe defense counsel liked the remaining panel members given those excused. Defense counsel had the choice to seek a new panel and did not.

This claim was required to be raised in the trial court and the failure to do so precludes review by this court.

iii. The juror's statements did not improperly taint the remaining jurors.

Parker cites to *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997), to argue the comments of two jurors tainted the jury pool and denied him the right to an impartial jury. *Mach* does not support his argument.⁴

In *Mach*, the government charged Mach with sexual conduct with a minor. *Mach*, 137 F.3d at 631. During jury selection, a prospective juror said she had a psychology background, currently worked for child protective

³ The defendant cannot raise a claim of ineffective assistance for the first time in a reply brief. The Supreme Court has held, “points not argued and discussed in the opening brief abandoned and not open to consideration on their merits. In addition a contention presented for the first time in the reply brief will not receive consideration on appeal.” *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967). “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992) citing *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990).

⁴ This paragraph and the rest of this argument section are a blatant paraphrasing (plagiarism) of the portion of the decision in *In re Det. of Jaeger*, No. 72392-8-I, 2016 Wn. A-pp. LEXIS 2131, at *13-15 (Ct. App. Sep. 6, 2016). GR 14.1 permits citations to Court of Appeals Decisions after March 1, 2013, as non-binding authority, and may be accorded such persuasive value as the court deems appropriate. The State adopts the reasoning that the *Jaeger* court gives of *Mach* as appropriate and applicable.

services, and had confirmed child sexual assault in every case where a client reported it. *Mach*, 137 F.3d at 631-32. The juror repeatedly stated that in her three years as a social worker, she never found a case where a child lied about sexual assault. *Mach*, 137 F.3d at 632. The court denied the motion for a mistrial. *Mach*, 137 F.3d at 632.

The Ninth Circuit reversed. *Mach*, 137 F.3d at 634. The court held the juror's statements tainted the jury. The statements were “highly inflammatory and directly connected to Mach's guilt.” *Mach*, 137 F.3d at 634. The juror's comments had an “expert-like” quality given the juror's years of experience and degree of certainty. *Mach*, 137 F.3d at 633. The court reversed because the outcome of the trial was “principally dependent on whether the jury chose to believe the child or the defendant.” *Mach*, 137 F.3d at 634. The court concluded the juror's repetition of the statements created an especially high risk they would affect the jury's verdict. *Mach*, 137 F.3d at 633. The court held:

Given the nature of [the juror]'s statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused.

Mach, 137 F.3d at 633.

Unlike in *Mach*, juror 22 did not make any repeated confident expert-like assertions.

Thus, even if this Court were to consider the claim the defendant cannot establish that the trial court would have abused its discretion in denying a motion for a mistrial.

iv. The juror's statements were not testimony.

Parker also cites to *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), a case in which impermissible opinion testimony as to the defendant's guilt was given, to support his contention. Appellant's Opening Brief at page 18. This citation does not support his position

Testimony is far different from the jury selection process. The jury was instructed that the evidence they are to consider "consists of the testimony that you have heard from witnesses and the exhibits I have admitted during the trial." CP 13. The statement of jurors during jury selection is not evidence. This court cannot rely on the principal from *Kirkman* to support there was error that tainted the jury.

3. The prosecutor's description of the victim and closing argument were not error, and the arguments were not so flagrant and ill-intentioned that prejudice could not have been neutralized.

If the defendant does not object to alleged misconduct at trial, the issue of prosecutorial misconduct is usually waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could

not have been neutralized by an admonition to the jury.”
State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646, 655 (2006).

i. The description of the victim as cute as a button was not error and there was no objection.

The defendant, Ronald Parker, is charged with eight different offenses that are related to abusing a young child named [A.M.]. [A.M.] goes by [x] and, well, she's cute as a button. And you're going to see her testify this morning after opening statements.

[A.M.] is in a family that includes her mother Shannon Derringer, her older sister [R.M.], her brother [J.M.], who's about one or two years older than she is, and then above them is a half-brother, Adam MacCurdy, and a half-sister, Mercedes MacCurdy.

8/11/15 RP 46.

In context the prosecutor's statement was a descriptive comment about the child's size and demeanor. The defense cannot establish that the prosecutor's reference was intended as a term of endearment.

There was no objection and the reference was not so flagrant and ill-intentioned as to merit a reversal.

Furthermore the cases cited by the defendant do not support that the comment was prejudicial or that reversal is merited. *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) (reversal merited prosecutor argued facts outside of the evidence by presenting a fabricated and inflammatory account of the murders from the view of the victims that referred to matters which were not supported by the evidence, including that the victims pleaded

for mercy, looked into each other's eyes and the defendant told them to say their "goodbyes" before killing them), *In re Det. of Sease*, 149 Wn. App. 66, 201 P.3d 1078 (2009) (prosecutor's argument that the sexually violent predator statute does not require to show lack of volition is not misconduct); *State v. Jones*, 144 Wn. App. 284, 292-297, 183 P.3d 307 (2008) (prosecutor improperly bolstered an officer's and drug informant's credibility by arguing facts not in evidence about impact on the witnesses and reliability and reasons why the informant did not testify); *State v. Russell*, 125 Wn.2d 24, 85-88, 882 P.2d 747 (1994) (prosecutor's remark that defense had access to their own experts and evidence, although an improper reference to facts outside the evidence, was not so prejudicial to merit a new trial in the absence of an objection); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991) (alleged exchange of vulgarities between the defendant and the prosecutor outside the presence of the jury could not be shown to have affected the verdict); *United States v. Molina*, 934 F.2d 1440, 1444-6 (9th Cir. 1991) (prosecutor's assertions that nine other officers were involved was an improper reference to evidence not presented at trial, but was not plain error under the federal standard which would merit reversal in the absence of an objection).

ii. The reference to the items the State was not required to prove beyond a reasonable doubt was not error and there was no objection.

The defense contends the prosecutor made an improper argument as to reasonable doubt but only excerpts a portion of the closing argument. In full it reads:

The next instruction that I want to talk about is instruction No. 2, and it tells you what my burden of proof is. All instructions in this packet is important, but this one is particularly important, because in this country, the state, the government, I need to prove a defendant guilty beyond a reasonable doubt. It's more than he probably did it. It's more than I really think he did it, but I'm not quite sure. But it's the highest standard of proof in the law, which is beyond every reasonable doubt. Now, if you have a doubt, it needs to be based on evidence or lack of evidence per element that I need to prove.

8/17/15 RP 112. The defendant cites state as arguing ““if you have a doubt [as to Mr. Parker’s guilt], it needs to be based on evidence or lack of evidence per element that I need to prove.” Appellant’s Opening Brief at page 20. In context of the full argument listed above, there reference to “a doubt” in the last sentence was to reasonable doubt as described in the sentence above. Thus, in context the argument was not improper.

During closing argument the prosecutor asserted that whether the victim’s mother wanted to get out of the marriage was an item for which the jurors might have a reasonable doubt, but was not an element of the offense. The defendant cites to *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696,

286 P.3d 673 (2012), to support his argument. In *Glassman*, the prosecutor had presented a slide show presentation that displayed a personal opinion that the defendant was “guilty, guilty, guilty” and an altered booking photograph. The court reversed on that basis, but also addressed a contention the prosecutor improperly shifted the burden of proof by contending that in order to acquit, the jury would have to believe the defendant. This was found to be improper shifting the burden of proof, but “in and of itself, would probably not justify reversal.” *Id* at 713.

The prosecutor’s argument here did not shift the burden of proof. There was no argument requiring that in order to acquit, only highlighting certain elements must be proven beyond a reasonable doubt.

Furthermore there was no objection to either argument. The defendant has not established that either argument was so flagrant and ill-intentioned or that the resulting prejudice could not have been neutralized by an admonition to the jury.

4. The trial court properly exercised its discretion to exclude unrelated incidents.

i. The admission of evidence is within the trial court’s discretion.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). For both claims raised by defense, the defense was able to admit evidence which

they claim on appeal they were precluded from admitting and any limitation was within the trial court's discretion.

ii. The witnesses testified about football on television watching at a time that A.M. was not present and evidence of football watching was admitted.

The State objected the line of questioning of MacCurdy about television watching of football games on Sunday because "the questioning is going to a period of time where [A.M.] is not even in the room. 8/13/15 RP 113. MacCurdy had testified that A.M. did not typically like to watch football and that "her and [R.M.], were in her room coloring or playing their little video games." 8/13/15 RP 112. The trial court pointed out that the events occurring at a different time than defense claimed the victim was in the room would be irrelevant. 8/13/14 RP 114-5.

I'm not suggesting who or what is accurate; I'm just saying the objection was, okay, the girls are in their room, it's Sunday afternoon, it's football, what's the relevance to TV nights?

8/13/15 RP 115. Defense did not explain the relevance. But there was also no ruling that the prosecutor's objection was sustained. Contrary to the defense assertion on appeal, this was not an exclusion of evidence.

The defendant went on to question MacCurdy about times when he was aware that A.M. was watching television.

Q. So what did you notice about -- you don't call them TV -- these -- these times when people were watching TV

- together?
- A. I recall my mom and Ron either going out to the shop while us kids stayed in the house, and they would be out in the shop doing something with their friends.
- Q. Okay.
- A. And things.
- Q. So if I understand your testimony right, you're saying the kids would stay in and watch TV while Ron and your mom were --
- A. Outside with their friends.
- Q. Okay. And what would you be doing at this time when the kids were watching TV?
- A. I would either have to keep an eye on them, because that's what mom wanted me to do, or I would just be playing video games in my own room.
- Q. Okay. And who would be sitting in the TV -- watching TV? The three children?
- A. My friend Riley, me and him hang out a lot, me and him would just be the ones up there.
- Q. And would -- would the -- the three younger children always be there, watching TV together?
- A. No, [J.M.] liked to play video games with me, and [R.M.] and [A.M.] liked to make forts outside, but they weren't allowed to go outside during dark.

8/13/15 RP 116.

Likewise, Riley Simmons, and Alf Vatne testified about football Sundays when people gathered at the house and whether they observed the defendant under a blanket with A.M.

Simmons testified the family would gather to watch television, depending on who was around, that it was common for the children to gather to watch television but that Parker would not be watching with them due to the shows the children were watching. 8/13/15 RP 175-6. Simmons also said

that friends would come over to watch football. 8/13/15 RP 176. But that Parker would typically sit on the couch with Dearing. 8/13/15 RP 177. Simmons said he never saw Parker under a blanket with A.M. 8/13/15 RP 177.

Vatne testified that he was over at the house watching football games on the weekends until about five or six at night. 8/14/15 RP 13. Vatne testified he never saw Parker under a blanket with A.M. 8/14/15 RP 14.

There was no exclusion of evidence that was not “perfectly aligned with the complaining witness’s description.”

iii. The victim’s older sister admitted what she wrote in the journal and the defense was permitted to show the jurors portions of the journal in closing argument.

The State was opposed to admission of the journal of the victim’s older sister. 8/11/15 RP 22. But noted that defense might cross-examine the sister about the diary. 8/11/15 RP 22. The trial court indicated it wanted to see how the testimony addressed the issue. 8/11/15 RP 22-4.

During the trial, the defense did not question A.M. about whether her sister or anyone else had coached or otherwise caused her to make the allegation. The sister did not admit to putting her younger sister up to a plan to get rid of the defendant. 8/11/15 RP 176-7.

R.M.’s journal was marked as an exhibit and she admitted writing it. 8/11/15 RP 165-6, Exhibit 5. The defense sought to admit the journal.

8/11/15 RP 166. The State objected as hearsay. 8/11/15 RP 166. The defense claimed the journal was being admitted for impeachment. 8/11/15 RP 166. However, the trial court pointed out to defense that R.M. had not been impeached since R.M. had admitted what she wrote in the journal. 8/11/15 RP 167. The trial court invited the defense to “go through any material you wish with her.” 8/11/15 RP 167.

The defendant proceeded to question R.M. about the five point plan described in the journal and R.M. never denied any portion of what she wrote. 8/11/15 RP 167-9, 178.

The defense renewed the motion to admit the older sister’s journal the following week.

MR. DUNN: Your Honor, Rylee adopted the journals, said they were her journals. We've had other witnesses say they found that journal. We looked at that journal by other witnesses, [R.M.] and Adam [MacCurdy]. It's relevant, obviously. It is -- there's no issue that those -- it's not what it is purported to. It goes to the heart of our defense.

The jury is entitled to see that, your Honor, to see what [R.M.] -- [R.M.]'s state of mind, because we've created a nexus between [R.M.] and [A.M.]. That's pretty obvious, and we would like -- strongly urge the Court to admit that.

8/17/15 RP 67-8. The State maintained the hearsay objection and there was no basis for impeachment since R.M. admitted the contents and impeachment was the purpose for it being offered. 8/17/15 RP 68. The trial court noted that the defense was able to cross-examine R.M. as to any pages

and comments in the journal, and there was no evidence admitted about the remaining parts of the journal and thus no relevancy established. 8/17/15 RP 70.

Defense then moved to be permitted to show the jury portions of the journal during closing argument. 8/17/15 RP 70-1. The trial court permitted the defense to show the pages discussed with the witness and to show the five-point plan. 8/17/15 RP 72, 87. The defense did show the portions of the journal showing the five-point plan to the jury during closing argument. 8/17/15 RP 148-50.

Thus, there was no exclusion of relevant evidence and defense has not established that any of the remaining portions of the journal contained relevant evidence that was improperly excluded.

The defendant contends on appeal that the journal was not hearsay because it contained R.M.'s "own thoughts." Appellant's Opening Brief at page 25. He goes on to contend

Because Mr. Parker would not have relied on the thoughts for their truth but to show older sister and the complaining witness's motive to fabricate and intense dislike for Mr. Parker, the journal did not contain hearsay at all. ER 801(c).

Appellant's Opening Brief at page 25-6. Apparently, this is intended to assert that writings in the journal showed R.M.'s state of mind. However, R.M.

admitted her state of mind and it does nothing to show the state of mind of A.M.

The defense has failed to establish any link between R.M.'s five-point plan or any other portion of the journal and A.M.'s disclosure. The older sister's state of mind drawn from the contents of the journal is irrelevant to any motive for A.M. to fabricate a story unless there was some showing that A.M. was influenced by the journal. No such evidence exists. The judge at the child hearsay hearing noted that deficiency.

But [R.M.] is not the victim in this case, and there were no circumstances to suggest that [R.M.] had any influence over [A.M.], or that [A.M.] had any desire to enhance or fabricate or initiate a story against Mr. Parker.

4/1/15 RP 71. No such evidence of a desire of A.M. to enhance, fabricate or initiate a story was developed at trial, only speculation of that link.

The trial court properly allowed examination of the victim's older sister about what she wrote in the journal and showing the portion of the journal to the jury. The defendant did not establish the relevance of any other portion of the journal.

5. Where there is no error there is no cumulative error.

It is axiomatic to state that if there were no individual error, there can be no cumulative error. Here, as the State demonstrates above, there were no errors in the trial proceedings, thus there cannot be cumulative error.

6. Any error was harmless beyond a reasonable doubt.

Although the State contends there was no individual error, should this Court believe otherwise, the State contends that any error here was harmless by beyond a reasonable doubt.

Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thomas*, 150 Wn.2d at 871, 83 P.3d 970.

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

The State contends that all claims here are subject to an evidentiary rule rather than a constitutional mandate. The impact of any claims was of minor significance in reference to the overwhelming evidence as a whole.

7. The trial court properly imposed only mandatory legal financial obligations.⁵

In the judgment and sentence, the trial court imposed only mandatory legal financial obligations consisting of the \$500 crime victim's assessments, the \$200 criminal filing fee and the \$100 DNA collection fee. CP 65, 9/17/15 RP 210.

⁵ Given Parker's lengthy sentence, the State will not be seeking appellate costs.

The State contends that all these assessments are mandatory for which the inquiry about the ability to pay the obligations does not apply. *See* RCW 7.68.035 (crime victim’s penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable for a fee of two hundred dollars.”); RCW 43.43.7541 ([e]very sentence for a crime specified in RCW 43.43.754 Must include a fee of one hundred dollars), *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013).

By its language, the court in *State v. Blazina* was addressing only discretionary legal financial obligations. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). The Washington Supreme Court has since recognized that *Blazina* applied to discretionary costs.

In *Blazina*, the superior court imposed **discretionary legal financial obligations** under RCW 10.01.160 consisting of the costs of appointed counsel. We held that before the superior court may impose **such costs**, it must comply with the mandate of the statute to determine whether the defendant can or will be able to pay these costs by conducting on the record an individualized inquiry into the defendant's current and future ability to pay. *Blazina*, 182 Wn.2d at 838-39; *see* RCW 10.01.160(3).

State v. Leonard, 184 Wn.2d 505, 507, 358 P.3d 1167 (2015) (bold emphasis added).

Each division of the Court of Appeals has recognized that the individualized evaluation of the ability to pay required by *Blazina* applied only to discretionary legal financial obligations. *State v. Shelton*, 194 Wn.

App. 660, 673, 378 P.3d 230 (2016) (Division I), *State v. Mathers*, 193 Wn. App. 913, 918-19, 376 P.3d 1163 (2016) (Division II), *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (Division III).

Since only mandatory fees were ordered, they were properly imposed.

V. CONCLUSION

For the foregoing reasons, Ronald Parker's convictions for four counts of Rape of a Child in the First Degree, three Counts of Child Molestation in the First Degree and one count of Attempted Child Molestation in the First Degree must be affirmed.

DATED this 20th day of October, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY



By: _____
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Marla Zink, addressed as Washington Appellate Project, 1511 Third Avenue, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 20th day of October, 2016.



KAREN R. WALLACE, DECLARANT