Supreme Court No. 100505-9
No. 80561-4-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

ROBERT NEW,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Robert New asks this Court to grant review of the Court of Appeals' decision terminating review. The Court of Appeals issued an opinion affirming Mr. New's convictions on November 1, 2021. The Court denied Mr. New's motion to reconsider on December 1, 2021. These rulings are attached in the appendix.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether in a prosecution for rape of a child, the prosecution's loss of colposcopy photos, which the State's expert told a detective did *not* show injuries corroborating the child's claim of sexual abuse, constituted "material exculpatory evidence"?

2. Whether a delay of at least four years by the State in failing to seek extradition of a defendant violates their constitutional right to a speedy trial?

3. Whether a defendant's state or federal constitutional right to be present is violated when a court decides how to answer jury inquiries during deliberations and issues further instructions in the defendant's absence?[1]

4. Whether a prosecutor commits reversible misconduct by making an emotional appeal based on facts outside the evidence, i.e, asserting that because the jurors shifted in their seats and felt uncomfortable during the complaining witness's testimony about sexual abuse (both irrelevant matters outside the evidence), they knew her testimony was "true"?

C. STATEMENT OF THE CASE

In July 2007, 11-year-old Jessica Truman was on an extended summer visit with her mother in Canada. 8/12/19 RP 371, 389, 424. She lived primarily with her father and step-mother, Robert and Heather New. 8/12/19 RP 388-89. She

[1] This Court has a petition for review pending on this issue with en banc conference scheduled on January 6, 2022. State v. Wright, No. 100042-1.

wanted to stay and live with her mother, rather than go back to her father and step-mother. 8/12/19 RP 427, 671. Shortly before she was set to leave, she told her mother that her father had been sexually abusing her for years. 12/19 RP 426-27, 603.

Canadian authorities arrested Mr. New in Canada and Jessica was permitted to stay with her mother. 8/12/19 RP 428; 8/13/19 RP 366; CP 79. The prosecution in Canada charged Mr. New, but they dismissed the charges in early 2008, citing credibility concerns regarding Jessica and a lack of corroborating evidence. CP 142-62 (attachment to mot. to dismiss, p. 7).

The New family had previously lived in Washington. In October 2007, Detective Patty Neorr received information from a Canadian detective about Jessica's allegations, some of which concerned alleged acts in Redmond. 8/12/19 RP 462-63. Detective Neorr interviewed Jessica in March 2008. RP 463.

In October 2008, the State of Washington charged Mr. New with three counts of rape of a child. CP 1-2. When the State charged Mr. New, he was residing in Canada. CP 5.

The affidavit of probable cause recounted that a medical exam of Jessica in Canada was abnormal. The examiner believed the abnormality indicated sexual abuse. CP 4; CP 142-62 (mot. to dismiss, p. 2). Shortly before the charges were filed, Detective Neorr obtained the photos from the exam and provided them to Dr. Naomi Sugar, an expert for the State. CP 34. Dr. Sugar told the Detective she did not see the abnormality. CP 34.

Four years later, in November 2012, the prosecution amended the charging document to add a fourth count of child rape. CP 6-8. The prosecution recounted that Mr. New was in Canada, and it was "preparing to extradite the defendant to the United States." CP 11.

In 2013, Dr. Sugar died. 7/16/19 RP 811-12.

Following the State's belated extradition action,

Canadian authorities detained Mr. New in April 2015. 10/4/19 RP 966. Mr. New opposed extradition, but he lost in the Canadian courts. 10/4/19 RP 965. He arrived in Washington in April 2018. CP 90-100.

Over the next year until trial commenced in summer 2019, Mr. New repeatedly argued his right to a speedy trial had been violated. 7/17/18 RP 988; 9/21/18 RP 5; 11/9/18 RP 20-21; 1/9/19 RP 36; 1/16/19 RP 42, 46; 3/15/19 RP 59-60; CP 102-03.

Defense counsel requested copies of the photos that Dr. Sugar had viewed. CP 142-62 (mot. to dismiss, p. 2). The prosecution responded it did not have the photos. CP 24. Mr. New moved to dismiss for failure to preserve material exculpatory evidence. CP 142-62 (mot. to dismiss, p. 1-7). The Court agreed Mr. New's motion was sound, but refused to dismiss. 7/16/19 RP 830-34. Instead, the court excluded evidence of the medical exam. 7/23/19 RP 91-93; 7/24/19 (Vol. X) RP 155.

During closing arguments, the prosecutor argued the jury should find Mr. New guilty because of the way the jurors "felt" during Jessica Truman's testimony, recounting the prosecutor's personal opinion that the jurors had felt "uncomfortable" and had "shifted in" their seats. 8/14/19 RP 737.

The jury submitted written questions asking if evidence had been excluded and inquiring about the limits of the court's jurisdiction. CP 64. In Mr. New's absence, the court formulated answers and provided additional written instructions to the jury. CP 65; 8/16/19 RP 782.

The jury convicted Mr. New of the charges. On appeal, Mr. New argued (1) his due process rights were violated by the State's failure to preserve exculpatory evidence; (2) his constitutional right to a speedy trial was violated; (3) his state and federal constitutional right to be present was violated; and (4) prosecutorial misconduct deprived him of a fair trial.

Contrary to the trial court's ruling that the lost colposcopy photos were "material exculpatory evidence," the

Court of Appeals ruled the photos were "[a]t best," merely "potentially useful" evidence, and therefore dismissal was not the remedy. Slip op. at 6-7. Although the Court agreed the State had delayed seeking Mr. New's extradition by four years, the Court refused to presume prejudice and rejected Mr. New's claim that his constitutional right to a speedy trial had been violated. Slip op. at 7-11. The Court rejected Mr. New's claim that his right to be present was violated. Slip op. at 11-13. The Court agreed with Mr. New that the prosecutor committed misconduct during closing argument, but held Mr. New was not entitled to a new trial because his attorney did not object. Slip op. at 16.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The State must preserve "material exculpatory evidence." The prosecution's expert told a detective that colposcopy photos did not show injuries consistent with sexual abuse, but the State did not preserve the photos. Review should be granted to decide whether this kind of evidence is materially exculpatory.

Criminal defendants have a right under due process to the disclosure material exculpatory evidence in the prosecution's control. U.S. Const. amend. XIV; Const. art. I, § 3; Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This right includes the preservation of material exculpatory evidence. California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994).

If evidence is materially exculpatory and the prosecution fails to preserve it, due process *requires* dismissal. Wittenbarger, 124 Wn.2d at 475; State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001). The good or bad faith of

the State in violating its duty to preserve material exculpatory evidence is irrelevant. Illinois v. Fisher, 540 U.S. 544, 549, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004); State v. Copeland, 130 Wn.2d 244, 280, 922 P.2d 1304 (1996); Burden, 104 Wn. App. at 514-15.

In contrast, if evidence is only potentially useful, then the good or bad faith of the State in failing to preserve the evidence becomes relevant. Failure to preserve potentially useful evidence violates due process only if the State acted in bad faith. Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); Wittenbarger, 124 Wn.2d at 477.

Evidence is materially exculpatory if its exculpatory value was apparent before it was lost and its nature leaves the defendant unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wn.2d at 475; Burden, 104 Wn. App. at 512.

The State possessed colposcopy photos taken of the complaining witness, Jessica Truman. Seeking an opinion from

Dr. Naomi Sugar, a highly regarded expert whom the State regularly consulted, Detective Patty Neorr brought the photos to her. Contrary to the opinion of a Canadian medical examiner, Dr. Sugar told Detective Neorr that she did not see any injuries indicating sexual abuse.

By the time of trial about a decade later, after the State delayed seeking Mr. New's extradition for at least four years, the State had lost the photos and Dr. Sugar had died.

As the trial court found, the lost photos met the test for material exculpatory evidence. 7/16/19 RP 826; 7/23/19 92-93. Once Dr. Sugar informed Detective Neorr of her opinion that the photos did not show sexual abuse, it was readily apparent to law enforcement that the photos had exculpatory value. Wittenbarger, 124 Wn.2d at 475. And because there were no other available photos from the exam, Mr. New could not "obtain comparable evidence by other reasonably available means." Id.

"It is clear that if the State has failed to preserve 'material exculpatory evidence' criminal charges must be dismissed." Id. at 475; accord Copeland, 130 Wn.2d at 279; Burden, 104 Wn. App. at 511-12. The trial court erred by refusing to dismiss.

Nevertheless, the Court of Appeals affirmed. Contrary to the trial court's ruling, the Court concluded the photos were not actually materially exculpatory. The Court reasoned the photos "would not have demonstrated [Mr. New's] innocence." Slip op. at 6.

A showing that these photos would have proved Mr. New innocent is *not* the standard. Here, the lost photos qualify as materially exculpatory because they possessed "an exculpatory value that was apparent before the evidence was destroyed," and "was of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 489. The photos do not need to prove innocence.

Material exculpatory evidence for purposes of lost evidence has the same meaning as it does for purposes of evidence the prosecution fails to disclose. Trombetta, 467 U.S. at 488-89; Wittenbarger, 124 Wn.2d at 475. The standard was set forth in Brady. Under Brady, evidence is "material when there is any reasonable likelihood it could have affected the judgment of the jury." Wearry v. Cain, 577 U.S. 385, 392, 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016) (internal quotations omitted). "*Brady* is not confined to evidence that affirmatively proves a defendant innocent." Gantt v. Roe, 389 F.3d 908, 912 (9th Cir. 2004).

The Court of Appeals created a new standard that is unsupported by precedent. It conflicts with two previous Court of Appeals' decisions.

In Burden, a prosecution for drug possession, the Court held a coat, along with sweatshirts and gloves, were materially exculpatory evidence. 104 Wn. App. 514. The drugs were found in a paper bag in the coat, which the defendant had been

wearing at the time of his arrest. Id. at 509. The defendant presented the affirmative defense of unwitting possession, contending a friend recently gave him the coat to wear and he was unaware the drugs were in the coat. Id. at 512. He argued he did not feel the drugs in the pocket because of the thickness of the gloves and sweatshirt he was wearing. Id. at 514. This clothing supported the defendant's contention that he was unaware of the drugs. But in no sense did the clothes prove him innocent. Indeed, at the trial where this evidence was presented, the jury did not reach a verdict and a mistrial was declared. Id. at 511. But because the evidence was materially exculpatory, the negligent loss of the clothing after the mistrial required dismissal and barred retrial. Id. at 511, 514.

City of Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974), a driving under the influence prosecution, is similar. The Court held that a video recording of the defendant doing field sobriety tests was material exculpatory evidence. 10 Wn. App. 774-76. The judge who adjudicated the case in municipal

court expressed his opinion that the video negated an impression of intoxication. Id. at 776. Still, the judge found the defendant guilty, likely based on breathalyzer evidence showing a blood alcohol level of .12. Id. at 773-74. The defendant elected to challenge this determination in a trial de novo in superior court before a jury. Id. at 774. By the time of the second trial, the State had negligently destroyed the recording. Id. The appellate court reversed the denial of the defendant's motion to dismiss. Id. at 774, 777. Like in Burden, the lost evidence did not prove the defendant innocent. But because Brady evidence (i.e., material exculpatory evidence) had been negligently destroyed, dismissal of the prosecution was required. Id. at 776.

Here, the Court of Appeals reasoned that any prejudice caused to Mr. New was cured by the trial court's ruling, which excluded evidence of the exam in its entirety. But Mr. New was forever deprived of the opportunity to present the lost evidence in his defense. The absence of injuries did more than rebut the

prosecution's case. They tended to show that Mr. New was not guilty. Any weight to assign to the evidence was for the jury. A reasonable jury could have acquitted Mr. New based on the lost evidence because this evidence created a reasonable doubt where one would not otherwise exist.

When the State is on notice that evidence it possesses is exculpatory (rather than possibly exculpatory), due process requires the State to preserve it. This is critical to ensuring fair trials. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady, 373 U.S. at 87. It is also critical in ensuring that innocent people are not convicted. The Court of Appeals' holding is a recipe for unfair trials and increases the likelihood of wrongful convictions. Review is warranted so this Court can ensure the State complies with the modest requirement of preserving evidence it *knows* to be exculpatory. The issue is one of substantial public interest. RAP 13.4(b)(4).

Further, what separates "material exculpatory evidence" from evidence that is merely "potentially useful" is a significant constitutional question warranting review. RAP 13.4(b)(3). Notwithstanding Burden and Fettig, both the trial court and the Court of Appeals struggled with determining where the line is. Review is warranted to bring clarity and resolve the conflict in the precedent. RAP 13.4(b)(1), (2).

2. Eleven years after the charges were filed and after at least a four-year delay by the State in seeking to extradite Mr. New, Mr. New was finally tried on accusations originally made twelve years earlier. This delay deprived Mr. New of his constitutional right to a speedy trial. Review is warranted to clarify that a delay of five years is not necessary to trigger the presumption of prejudice.

When Jessica Truman made her allegations against Mr. New in 2007, she was 11. By the time of trial in 2019, she was 23. Mr. New repeatedly urged to the trial court that his right to a speedy trial was violated, but his protests were overruled. Because there was an unjustified four-year delay by the State in failing to seek Mr. New's extradition, Mr. New was

presumptive prejudiced. The State failed to rebut this presumption. The Court of Appeals should have reversed, but refused to presume prejudice because the delay was not five years. This Court should grant review and hold that a significant delay entitles a defendant to a presumption of prejudice and that there is no bright-line threshold requirement of a delay of five years.

The right of the accused to a speedy trial is a basic and fundamental right guaranteed by the state and federal constitutions. Klopfer v. North Carolina, 386 U.S. 213, 226, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967); State v. Ross, 8 Wn. App. 2d 928, 932, 441 P.3d 1254 (2019); U.S. Const. amends. VI, XIV; Const. art. I, § 22.

To determine if there has been a speedy trial violation, the court balances four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). An excessive unjustified delay

accountable to the State is presumptively prejudicial. Doggett v. United States, 505 U.S. 647, 655, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

Mr. New established a speedy trial violation under the four factors. Br. of App. at 18-30.

A successful speedy trial violation requires "a threshold showing that the time between the filing of charges and trial exceeded the ordinary interval for prosecution and crossed into presumptively prejudicial delay." Ross, 8 Wn. App. 2d at 942. A period of about one year is generally sufficient to trigger the inquiry. Id. at 942-43. Here, the interval between the charges and the trial was about 11 years.

The second factor examines the reasons for delay and examines the government's responsibility for the delay. Doggett, 505 U.S. at 652-53; Ross, 8 Wn. App. 2d at 944. Even for defendants incarcerated outside the United States, "the State has a constitutional obligation for speedy trial purposes to make a good faith, diligent effort to secure his or her return to the

United States for trial." Ross, 8 Wn. App. 2d at 946. "The State's duty to bring a defendant to trial includes the requirement that the State make a timely demand for extradition if the accused is being held in another jurisdiction." Id. at 947 (cleaned up). In Ross, the Court of Appeals determined that the State's failure to seek extradition of a defendant held in Canada was negligent where extradition was feasible. Id. at 647-48. Other courts have reached similar conclusions where the government failed to diligently seek timely extradition. People v. Romeo, 12 N.Y.3d 51, 56-57, 904 N.E.2d 802, N.Y.S.2d 666 (2009); United States v. Pomeroy, 822 F.2d 718, 721-22 (8th Cir. 1987).

In this case, the prosecution failed to *timely* seek extradition. About a year after Washington law enforcement learned of the allegations against Mr. New, and following its own investigation, the State charged Mr. New in August 2008. CP 1, 3. The affidavit of probable cause states that Mr. New is a Canadian citizen who resides in Canada. CP 5. It further

recounts that Mr. New had been convicted in Canada of "Financial Fraud in 2007" and sentenced to 15 months of house arrest. CP 5.

The prosecution, however, only began "preparing to extradite" Mr. New in late 2012. CP 11. The State did not explain its delay. CP 11. The State could not be awaiting prosecution by Canada for alleged acts in Canada because the Crown had already declined to prosecute in early 2008 based on Jessica's "credibility issues" and a lack of corroborative evidence. CP 142-62 (attachment to mot. to dismiss, p. 7).[2] And Mr. New did not try to avoid detection, which means the State was negligent in not moving to timely extradite. United States v. Velazquez, 749 F.3d 161, 180 (3d Cir. 2014).

The State dithered and did not finish its "preparations" for extradition until 2014. United States v. N. (R.), 2015 BCSC 2202, ¶ 3, 2015 CarswellBC 3476 (recounting that "[o]n

[2] United States of America v. New, 2017 BCCA 249, ¶`10, 2017 Carswell BC 1791.

November 25, 2014," a King County prosecutor certified that its evidence was available for trial and sufficient under Washington law to justify prosecution). The result was that Mr. New was not detained on the State's extradition request until 2015. 10/4/19 RP 966.

Once extradited, Mr. New objected and invoked his speedy trial rights. Br. of App. at 24-26.

The delay of at least four years was both presumptively and actually prejudicial to Mr. New. The delay of four years was particular egregious in that there was a delay of close to a year between the State's investigation (following Canada's investigation) and the charges. See United States v. Ingram, 446 F.3d 1332, 1339 (11th Cir. 2006) (in analyzing prejudice, "it is appropriate to consider inordinate pre-indictment delay in determining how heavily post-indictment delay weighs against the Government").

"[N]egligence [is not] automatically tolerable simply because the accused cannot demonstrate exactly how it has

prejudiced him." Doggett, 505 U.S. at 657. "[E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. at 655. Thus "the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows." Id. In Doggett, the Supreme Court held that the inexcusable delay of six years attributable to the government was presumptively prejudicial and the government failed to rebut the presumption. Id. at 657-58.

In analyzing Mr. New's claim, the Court of Appeals agreed there was at least a four-year delay attributable to the prosecution in failing to seek Mr. New's extradition after charging him. Slip op. at 8. The Court, however, concluded that this did not create a presumption of prejudice because the delay was less than five years. Slip op. at 10.

But there is no bright-line period for presuming prejudice for speedy trial claims. United States v. Erenas-Luna, 560 F.3d

772, 779 (8th Cir. 2009); State v. Inzunza, 135 Nev. 513, 519, 454 P.3d 727 (2019). Indeed, the United States Supreme Court recognized there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months." Barker, 407 U.S. at 521. Delays of about three years, shorter than the four-year delay attributable to the prosecution in this case, have been held to give rise to a presumption of prejudice. United States v. Ferreira, 665 F.3d 701, 707-08 (6th Cir. 2011); Erenas-Luna, 560 F.3d at 779-80; United States v. Heshelman, 521 Fed. Appx. 501, 510 (6th Cir. 2013) (unpublished).

State v. Ollivier, 178 Wn.2d 813, 312 P.3d 1 (2013), cited by the Court of Appeals, does not hold there is a bright-line period of five years. That case involved a period of a little less than two years between charging and trial. Ollivier, 178 Wn.2d at 821. Any delay in Ollivier was not extraordinary. Thus, any language about a five-year-period being *generally* necessary was dicta.

Regardless, the record shows prejudice. Dr. Sugar, a respected expert who often testified for the State in child sexual abuse cases, provided an exculpatory opinion. But she died in 2013. RP 811-12. The prosecution also lost the photographs that were the foundation for Dr. Sugar's exculpatory opinion. Further, by 2018, Ms. New's parents had passed away. They were witnesses that would have supported Mr. New's defense. CP 103. The death of these witnesses and the loss of documentary evidence constitutes actual prejudice to Mr. New. Dickey v. Florida, 398 U.S. 30, 38, 90 S. Ct. 1564, 26 L. Ed. 2d 26 (1970).

Whether a significant delay by the prosecution in seeking extradition constitutes a violation of a defendant's right to a speedy trial is a significant constitutional question. And whether a five-year delay is necessary to trigger a presumption of prejudice is an issue that should be addressed by this Court. The Court of Appeals' decision conflicts with precedent. Review is warranted. RAP 13.4(b)(1)-(4).

3. Mr. New's state and federal constitutional right to be present was violated when the court answered questions from the jury in his absence. Contrary to this Court's precedent, the Court held Mr. New had no right to be present. Review should be granted.

Mr. New had a state and federal constitutional right to be personally present when the court decided to answer questions from the deliberating jury and provide further instructions. State v. Irby, 170 Wn.2d 874, 808-81, 884-85, 246 P.3d 796 (2011); State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914). This right under the state constitution is independent from the federal provision and applies not merely to "critical stages," but to any stage where the defendant's "substantial rights may be affected." Irby, 170 Wn.2d at 885 (quoting Shutzler, 82 Wash. at 367).

This right was violated when the trial court formulated answers to jury inquiries and sent the answers to the jury without Mr. New being personally present. Br. of App. at 30-38; Reply Br. at 14-19. Mr. New's right under the state constitution is independent from the federal guarantee and

applies not merely to "critical stages," but to *any* stage where the defendant's "substantial rights may be affected." Irby, 170 Wn.2d at 885 (quoting Shutzler, 82 Wash. at 367). Over a century ago in Shutzler, this Court held it was a violation of article I, section 22 for the trial court to instruct the jury in the defendant's absence. 82 Wash. at 367. It "is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983) (citing Shutzler, 82 Wash. at 367-68).

Nonetheless, the Court of Appeals held Mr. New had no right to be present and that his claim was waived because he did not personally object after it was too late to do so. Slip op. at 11-13. This conflicts with this Court's precedents interpreting article I, section 22 of the Washington Constitution, as Judge Coburn recognized in her dissent in State v. Wright, 18 Wn. App. 2d 725, 743, 492 P.3d 224 (2021) (Coburn, J., dissenting) (pet. for review filed, No. 100042-1). Review is warranted to

address the conflict. RAP 13.4(b)(1), (2). This is also a significant constitutional issue that should be decided by this Court and an issue of substantial public interest. RAP 13.4(b)(3), (4).

4. The prosecution committed serious misconduct during closing argument by arguing the jury should convict based on the jurors' "feelings" and "movements" during the alleged victim's testimony, both irrelevant matters outside the evidence. Review should be granted.

When a prosecutor makes improper arguments, this misconduct may deprive defendants of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). The right to a fair trial is a fundamental liberty secured by the state and federal constitutions. Id. at 703-04; U.S. Const. amend. XIV; Const. art. I, § 3.

A prosecutor commits misconduct by making arguments outside the admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Prosecutorial appeals to

the passions and prejudices of the jury similarly constitute misconduct. Belgarde, 110 Wn.2d at 507-08. It is also misconduct for a prosecutor to express a personal opinion or vouch for the credibility of witness. State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

During closing argument the prosecutor argued the jury should find Mr. New guilty because of the way the jurors "felt" during the alleged victim's testimony, recounting her own opinion that the jurors had been "uncomfortable" and had "shifted in" their seats:

> And you know what else is credible? Do you remember how you shifted in your seats when she told you about those smells in the shower, the pain she felt when her father pushed another finger inside of her into that office chair? Do you remember how you felt when [J.T.] told you she couldn't smell Pantene anymore because it always brought those memories back to her? You felt those feelings because what you heard had a ring of truth to it. They rang true. You were uncomfortable hearing a woman describe her abuse when she was a child because you knew that

> what she was saying was true. You know she was not making this up.

8/14/19 RP 737 (emphases added).

The Court of Appeals rightfully held this was misconduct. Slip op. at 15-16 (citing State v. Craven, 15 Wn. App.2d 380, 475 P.3d 1038 (2020)). In the guise of making an argument that the complaining witness was credible, the prosecutor made a blatant emotional in seeking to convict Mr. New. But more than an emotional appeal, the argument was based on matters outside the evidence, also long recognized to be misconduct. The jurors' shifting in their seats was not evidence; neither were the jurors' feelings. State v. Barry, 183 Wn.2d 297, 300, 305, 352 P.3d 161 (2015) (accepting State's concession that it was error to instruction the jury that "[t]he evidence includes what they witness in the courtroom"). "A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." Belgarde, 110 Wn.2d at 508. Being outside the

evidence, the prosecutor's appeal to the jurors' physical reactions or feelings was improper. Id. at 507-08.

The Court, however, held Mr. New is not entitled to relief because the remarks were not so prejudicial that a curative instruction would have been ineffective. This is inconsistent with precedent where similarly outrageous misconduct by prosecutors warranted reversal because not instruction would have cured the resulting prejudice. State v. Loughbom, 196 Wn.2d 64, 75, 470 P.3d 499 (2020); State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984).

Prosecutors cannot be permitted to secure convictions, and resulting life sentences, on this type of foul play. Review is warranted to stamp it out. RAP 13.4(b)(1)-(4).

E. CONCLUSION

For the foregoing reasons, Mr. New respectfully asks this Court to grant review.

This document contains 4,973 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 23rd day of December, 2021.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ROBERT NEW, Appellant.	)	No. 80561-4-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — Robert New was convicted by jury of four counts of rape of a child in the first degree. New appeals his judgment and sentence arguing that: (1) the trial court erred in denying his motion to dismiss after the State failed to preserve material exculpatory evidence, (2) the trial court erred by not dismissing the prosecution following deprivation of his constitutional right to a speedy trial, (3) the trial court violated his constitutional right to be present by addressing written jury questions in his absence; (4) the prosecution committed misconduct during its closing argument, (5) cumulative error deprived him of a fair trial, and (6) the trial court erred by imposing community custody supervision fees. We remand to the superior court to strike the supervision fees. We otherwise affirm.

FACTS

New and Alexis Ham were in a relationship from 1994 to September 1995 while residing in Canada. Their daughter, J.T., was born on March 18, 1996. New saw J.T. briefly in her infancy and then did not see her again until she was five years old. In the meantime, New married Heather New.[1] A dispute over residential time with J.T. ensued between New and Ham. After increasing visitations, New was given full-time residential care in October 2003; J.T. was seven years old. Shortly after, New, Heather, and J.T. moved from Canada to Washington.

In summer 2007, 11-year-old J.T. spent two months with Ham in Canada. Early morning on July 29, 2007, J.T. told Ham that she had been "molested" on numerous occasions by New beginning at the age of six. Ham called Royal Canadian Mounted Police (RCMP) then took J.T. to the police station. The RCMP interviewed Ham and J.T. In the interview, J.T. disclosed that her father sexually abused her in both Surrey, British Columbia and Redmond, Washington. On August 22, 2007, J.T. had a medical exam at the HEAL[2] clinic in Surrey, British Columbia. The exam was conducted by Dr. Joan Fujiwara and included colposcopy photographs.

The RCMP investigation was forwarded to the Redmond Police Department in October 2007 and reviewed by Detective Patty Neorr. In August 2008, the State charged New by information with three counts of first degree rape of a child-domestic violence. New did not appear for an arraignment scheduled for September 3, 2008.[3]

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[1] We refer to Heather by her first name for clarity. We intend no disrespect.
[2] Health Evaluation Assessment and Liaison.
[3] The record before us does not indicate that New was aware of the charges or the arraignment.

On November 1, 2012, the State amended the information, adding a fourth count of first degree rape of a child-domestic violence. According to the amended information, the State believed New was living in Canada and had been convicted of financial fraud in 2007 and sentenced to 15 months of house arrest. Also according to the amended information, the State was preparing to extradite New to the United States. The record does not explain what measures the State took to extradite or prosecute New between 2008 and 2012.

In 2012, the State began negotiations with Canada. In 2015, Canadian authorities detained New on the Washington charges. New initially opposed extradition, but Canada eventually delivered New to Washington in April 2018.

After over 20 continuances, the trial commenced in July 2019. New objected to some continuances, but did not move to dismiss on speedy trial grounds. On July 16, 2019, New moved to dismiss for government mismanagement under CrR 8.3(b) because the State lost the colposcopy photos taken during the August 2007 medical exam in Canada. The trial court denied the motion, but excluded the State's witness slated to introduce the colposcopy photos.

Trial commenced in July 2019, but a mistrial was declared after defense counsel fell ill. The second trial began immediately. The parties did not relitigate pretrial motions.

The jury found New guilty as charged. The trial court imposed an indeterminate sentence of 285 months minimum to life.

New appeals.

ANALYSIS

A. Lost Colposcopy Photos

New argues that the trial court erred in denying his CrR 8.3(b)[4] motion to dismiss following the State's failure to preserve the August 2007 colposcopy photos that he claims were materially exculpatory evidence. We disagree.

We review the denial of a motion to dismiss under CrR 8.3(b) for abuse of discretion. State v. Athan, 160 Wn.2d 354, 375, 158 P.3d 27 (2007). To prevail on a motion to dismiss under CrR 8.3(b), the defendant must first show arbitrary action or government misconduct. "Absent a showing of arbitrary action or governmental misconduct, a trial court cannot dismiss charges under CrR 8.3(b)." State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). The second necessary element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. Michielli, 132 Wn.2d at 240.

Under the due process clause of both the U.S. Constitution and Washington State Constitution, criminal defendants have a right to the preservation and disclosure of material exculpatory evidence in the State's control. U.S. CONST. amend. XIV; CONST. art. I, § 3; State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). The State has a duty to both preserve and disclose "materially exculpatory" evidence. State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211 (2001). If evidence is materially exculpatory and not preserved, criminal charges against the defendant must be

[4] CrR 8.3(b) provides, in relevant part:

> The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

dismissed. Wittenbarger, 124 Wn.2d at 475. In contrast with exculpatory evidence, the failure to preserve evidence that is only "potentially useful" is not a due process violation unless the State acted in bad faith while failing to preserve the evidence. The defendant bears the burden of establishing that the State acted in bad faith. Wittenbarger, 124 Wn.2d at 477. "A trial court's determination that missing evidence is materially exculpatory is a legal conclusion which we review de novo." Burden, 104 Wn. App. at 512.

To be material exculpatory evidence, "the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Wittenbarger, 124 Wn.2d at 475. A showing that evidence might exonerate the defendant is not sufficient. Wittenbarger, 124 Wn.2d at 475. In contrast, potentially useful evidence is evidence that "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." Arizona v. Youngblood, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

In the course of her investigation, Detective Neorr contacted the HEAL clinic in Surrey, British Columbia, and requested that they send her the colposcopy photos taken during J.T.'s August 22, 2007 exam by Dr. Fujiwara. Detective Neorr retrieved the photos and delivered them to Dr. Sugar at the Harborview Center for Sexual Assault and Traumatic Stress. Detective Neorr asked Dr. Sugar to review the Canadian medical report and photos and provide her opinion. On August 1, 2008, Dr. Sugar told Detective Neorr that she "did not see the abnormality described in Canada's medical report, but that didn't mean it wasn't there" and that she would have preferred video.

Dr. Sugar died in 2013. The colposcopy photos were subsequently lost. New argues the colposcopy photos taken by Dr. Fujiwara were materially exculpatory because Dr. Sugar opined that they did not show an abnormality consistent with sexual abuse. To the contrary, the missing colposcopy photos, combined with Dr. Fujiwara's opinion after conducting J.T.'s examination, was inculpatory—not exculpatory. While Dr. Sugar opined that she did not see the abnormality described by Dr. Fujiwara, she also opined that it didn't mean that it wasn't there. At best, Dr. Sugar's statement regarding the missing photos might have been potentially useful for cross-examination of Dr. Fujiwara.

New compares his case to Burden. In Burden, the State lost the coat of a defendant charged with a drug crime. 104 Wn. App. at 510-11. Burden's defense was that the coat was a friend's, along with the drugs inside. He claimed the coat had the friend's initials written on the tag. The court concluded the lost coat was materially exculpatory evidence because it provided affirmative evidence establishing Burden's innocence and was "critical to the defense." Burden, 104 Wn. App. at 510, 512-13. But in this case, unlike the coat, the colposcopy photos did not provide affirmative evidence to establish New's innocence. To the contrary, the photos along with Dr. Fujiwara's testimony strongly favored the State. While New may have been able to find a witness to replace Dr. Sugar and agree that the photos did not show signs of trauma or were inconclusive, it would not have demonstrated his innocence.

Under CrR 8.3, it is also improper to dismiss a criminal case absent a finding of prejudice to the defendant. Michielli, 132 Wn.2d at 240. After correctly concluding that the missing colposcopy photos were not materially exculpatory, the trial court offered New two choices to cure the prejudice: exclusion of Dr. Fujiwara's opinion and all

physical evidence or a stipulation from the State that its expert disagreed with Dr. Fujiwara's opinion. New opted to exclude all physical evidence and opinion concerning the colposcopy photographs and exam. The exclusion of all physical evidence and Dr. Fujiwara's opinion cured any potential prejudice to New. Because the trial court was able to cure any prejudice, and New was able to argue a lack of physical evidence to present reasonable doubt, the lost colposcopy photos fail to rise to the level of materially exculpatory evidence and do not justify dismissal.

B. Right to Speedy Trial

New argues that this court should reverse his conviction and dismiss the case because his constitutional right to a speedy trial was violated. We disagree.[5]

We review an alleged violation of a defendant's Sixth Amendment right to a speedy trial de novo. State v. Ollivier, 178 Wn.2d 813, 827, 312 P.3d 1 (2013). Washington uses the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), to determine whether a constitutional speedy trial violation has occurred. Ollivier, 178 Wn.2d at 827. "The analysis is fact-specific and 'necessarily dependent upon the peculiar circumstances of the case.'" Ollivier, 178 Wn.2d at 827 (quoting Barker, 407 U.S. at 530-31). Among the nonexclusive factors to be considered are the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker, 407 U.S. at 530. "None of these factors is sufficient or necessary to a violation." Ollivier, 178 Wn.2d at 827.

[5] In its response brief, the State argues that New failed to assert below the violation of his right to a speedy trial for the period from 2008 to 2012. We disagree. While limited, in a letter to the trial court, New argued that the State's delay from 2008 onward was prejudicial and denied him the right to a speedy trial.

As a threshold inquiry to the Barker analysis, a defendant must show that the length of the delay crossed the line from ordinary to presumptively prejudicial. Ollivier, 178 Wn.2d at 827-28; Doggett v. United States, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). The State correctly concedes here that the delay of 11 years between the initial charges and trial satisfies the threshold finding of prejudice under Barker.

The first of the Barker factors is the length of the delay. The record is silent in respect to the State's and New's actions between 2008 and 2012. The State, however, did not begin extradition proceedings until 2012 and it took another 6 years before New was arraigned in Washington. The length of delay, particularly where there is no information explaining the State's initial four year delay weights against the State.

The second Barker factor examines the reason for the delay. We look "to each party's responsibility for the delay, and different weights are assigned to delay, primarily related to blameworthiness and the impact of the delay on defendant's right to a fair trial." Ollivier, 178 Wn.2d at 831. "At one end of the spectrum is the situation where the defendant requests or agrees to the delay and therefore 'is deemed to have waived his speed trial rights as long as the waiver is knowing and voluntary.'" Ollivier, 178 Wn.2d at 831 (quoting State v. Iniguez, 167 Wn.2d 273, 284, 217 P.3d 768 (2009)). "At the other end of the spectrum, if the government deliberately delays the trial to frustrate the defense, this conduct will be weighted heavily against the State." Ollivier, 178 Wn.2d at 832.

Again, the State fails to explain the four-year delay between initially charging New and seeking extradition. Once extradition proceedings began in 2012, subsequent

delay appears to be the result of New exercising his right to oppose extradition. We conclude that reason for the 11-year delay between the initial charges and arraignment in Washington is evenly weighted between the State and New.[6]

The third Barker factor requires us to consider the extent at which the defendant asserts his speedy trial right. Iniguez, 167 Wn.2d at 284. Essentially, the defendant is more likely to complain the more egregious the violation is. Barker, 407 U.S. at 531. While the defendant's assertion is entitled to strong evidentiary weight, the court must balance this in light of his other conduct. Barker, 407 U.S. at 531-32; United States v. Loud Hawk, 474 U.S. 302, 314, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). Here, New never asserted a violation of his rights to a speedy trial from the time extradition proceedings began, through his arrest in Canada in 2015, and through his arraignment in Washington in April 2018. He began objecting to trial continuances, asserting a violation of this right, in September 2018, but did not do so in litigating extradition, nor in reflection on the time between charges and the beginning of extradition. New simply did not assert this right for years after knowing of the charges and his rights. The third factor weighs against New.

Finally, the last factor of the Barker test examines the prejudice to the defendant as a result of the delay. Iniguez, 167 Wn.2d at 284. A defendant may be relieved of his burden to establish prejudice. However, "presumed prejudice is recognized only in the case of extraordinary delay, except when the government's conduct is more egregious

[6] Additionally, New asserts a violation of his speedy trial rights due to the trial court's grant of over 20 continuances. However, these continuances concerned trial transcripts, Canadian reports, and missing witnesses. New conceded to the necessity of many of these continuances. These continuances were reasonably justified and should not factor into the analysis. Barker, 407 U.S. at 531.

than mere negligence." Ollivier, 178 Wn.2d at 842 (quoting WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 18.2(3) (3d ed. 2007)). In deciding what is extraordinary enough to constitute presumption, the court considers the period between the time of the indictment and the time the government began diligently pursuing the charge. Ollivier, 178 Wn.2d at 842. Absent bad faith, the average for presumed prejudice is a post-indictment delay of at least five years. Ollivier, 178 Wn.2d at 843; United States v. Serna-Villarreal, 352 F.3d 225, 232 (5th Cir. 2003) (collecting cases). In this case, the post-indictment delay is approximately four years, therefore, there is no presumed prejudice.

An assessment of prejudice involves: (1) oppressive pretrial incarceration, (2) anxiety and concern of the accused, and (3) the possibility the defense will be impaired by dimming memories and loss of exculpatory evidence. Doggett, 505 U.S. at 654; Barker, 407 U.S. at 532. Additionally, a defendant must generally "establish actual prejudice before a violation of the constitutional right to a speedy trial will be recognized." Ollivier, 178 Wn.2d at 840.

First, New did not experience oppressive pretrial incarceration. He was allegedly unaware of the charges for four years and then released to a bail supervisor while fighting extradition in Canada. New's incarceration between arraignment in April 2018 and trial in August 2019 does not constitute an oppressive pretrial incarceration. Ollivier, 178 Wn.2d at 844 (holding a pretrial incarceration of two years is not oppressive on its face).

Second, New does not argue anxiety and concern as prejudice on appeal. Third, the delay did not diminish the defense. New argues that the delay caused the loss of

two witnesses, his in-laws, the loss of colposcopy photos, and death of the expert, Dr. Sugar. However, as previously addressed, the loss of the colposcopy photos and death of Dr. Sugar did not prejudice New because the trial court struck all physical evidence, removing any possible prejudice. Therefore, New failed to establish actual prejudice resulting from the delay.

Overall, we conclude that the Barker factors weigh in favor of the State and New's speedy trial rights were not violated.

C. Right to Be Present

New argues that the trial court violated his right to be present when it answered a jury question, after conferring with counsel, in his absence. We disagree.

A criminal defendant has the constitutional right to be present at trial. U.S. CONST. amend. XI, XIV; CONST. art. I, § 22. This includes the right to be present at all critical stages of the trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); State v. Sublett, 156 Wn. App. 160, 182, 231 P.3d 231 (2010), aff'd on other grounds, 176 Wn.2d 58, 292 P.3d 715 (2012). Also, the defendant has a due process right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). In Washington, the right to be present means the right "to appear and defend in person and by counsel . . . at every stage of the trial when his substantial rights may be affected." CONST. art. I, § 22; State v. Irby, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). A defendant's right to be present is a question of law reviewed de novo. State v. Slert, 186 Wn.2d 869, 874, 383 P.3d 466 (2016).

Shortly after the jury began deliberations, the trial court gave counsel their options for responding to jury questions. The court explained, "[y]ou know, my practice is I follow whatever method you like. I never respond to jurors without talking to you first, but I can talk to you over the phone, or I can talk to you here in court, . . . some combination thereof, whatever works." Neither party objected nor took issue with the court's suggestion. Later that day, the jury sent two written questions: "[w]as evidence excluded because it took place outside of the time frame in question or because it was from outside the Court's jurisdiction?" and "[d]oes the Court have jurisdiction only over acts committed inside its geographic jurisdiction?"

The next morning, the court consulted with counsel over the phone. It then sent the jury a response, "Please [re-read] and follow your instructions, including instruction No. 1, which tells you the evidence you are to consider during your deliberations consists of the testimony you have heard from witnesses and exhibits I have admitted during the trial. If the evidence was not admitted, then you are not to consider it in reaching your verdict." On August 16, 2019, the Court read the questions and response in open court with New present prior to hearing the jury's verdict. New did not object when informed that the court gave counsel the option to discuss issues over the phone and did not object to the court's response when read to him prior to the jury's verdict.

If a defendant fails to timely object to an alleged violation of the right to be present, he waives appellate review. Slert, 186 Wn.2d at 875; State v. Jones, 185 Wn.2d 412, 426-27, 372 P.3d 755 (2016). In Slert, the court conducted some portion of jury selection outside of the defendant's presence. 186 Wn.2d at 873. And in Jones, the court selected alternate jurors in the defendant's absence. 185 Wn.2d at 426-27. In

both cases, the courts determined that the defendants had a right to be present, but they waived that right because each failed to timely object to the violations at trial. Slert, 186 Wn.2d at 875-76; Jones, 185 Wn.2d at 426-27. Conversely, prompt objection may be excused based on particular facts of the case. Slert, 186 Wn.2d at 875-76; Irby, 170 Wn.2d at 884. In Irby, the court dismissed 10 jurors through an e-mail conversation between the judge and counsel. 170 Wn.2d at 884. In that case, because the record did not indicate Irby knew of the e-mail, or had a reasonable opportunity to object, the court heard the merits of his claim. Irby, 170 Wn.2d at 884; Slert, 186 Wn.2d at 875-76.

Unlike in Irby, New had the opportunity to object on two occasions. First, the court informed New and counsel of the plan to take juror questions at the discretion of the parties, including and specifically by phone. If New intended to object and enforce his right to be present, he could have objected at that notion. Second, the court read New the jury question and the court's answer the following day in court, prior to summoning the jury and hearing the jury's verdict. New had a reasonable opportunity to object to his lack of presence during the discussion and the court's answer, but he did not. Therefore, the issue is unpreserved.

Even if New had timely objected, however, his claim that the conference with counsel over the jury's inquiry was a critical stage of the proceeding fails. A defendant does not have the right to be present when the trial court confers with counsel on a purely legal issue of how to respond to a jury request for clarification on one of the court's instructions. Sublett, 156 Wn. App. at 182-83; State v. Wright, ___ Wn. App. 2d ___, 492 P.3d 224, 229-31 (2021).

D. Prosecutorial Misconduct

New argues that various statements made during closing argument constitute prosecutorial misconduct, thus depriving him of a fair trial. We disagree.

Improper arguments made by prosecutors may deprive the defendant of a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 969, 703-04, 286 P.3d 673 (2012). To prove prosecutorial misconduct, the defendant bears the burden of establishing that the prosecutor's conduct was improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). If the defendant failed to object at trial, that burden increases. Any error is waived, "unless the remark is deemed to be 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. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). We view comments made in closing argument within "the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

New raises several arguments concerning the following statement made during the State's closing argument:

> And you know what else is credible? Do you remember how you shifted in your seats when she told you about those smells in the shower, the pain she felt when her father pushed another finger inside of her into that office chair? Do you remember how you felt when [J.T.] told you she couldn't smell Pantene anymore because it always brought those memories back to her? You felt those feelings because what you heard had a ring of truth to it. They rang true. You were uncomfortable hearing a woman describe her abuse when she was a child because you knew that what she was saying was true. You know she was not making this up. You can assess that credibility and decide for yourselves if you thought she was making this up. And you will come to the end of this trial and you will decide that

> yes, [J.T.] was telling the truth because, you know, if they were lying, if [J.T.] was lying, that they would have had a better plan, they would have a better story to tell you. She would [not] have told you how she liked it and went back and begged for more from her father, asking her to let it start up again, promising her dad that she would never tell again, just so long he'd start loving her again. But she did tell you that because that's her truth.

First, New contends the prosecutor referenced facts not in evidence and inflamed the jury's passions and prejudice by discussing the jurors' feelings and discomfort while listening to J.T.'s testimony. A prosecutor commits misconduct by making arguments unsupported by admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1998). Prosecutorial appeals to the passions and prejudices of the jury similarly constitute misconduct. Belgarde, 110 Wn.2d at 507-08.

"[P]rosecutors represent the public, including defendants, and have a duty to see that fair trial rights are not violated." State v. Craven, 15 Wn. App. 2d 380, 385, 475 P.3d 1038 (2020). "A prosecutor acts improperly by seeking a conviction based upon emotion rather than reason." Craven, 15 Wn. App. 2d at 285. In Craven, the prosecutor told the jurors "they would know Craven's guilt beyond a reasonable doubt by, in equal measure, recognizing it intellectually and feeling it emotionally in their hearts and viscerally in their guts." Craven, 15 Wn. App. 2d at 387. This court concluded that because the prosecutor's argument expressly invited jurors to use their emotions and instincts equally with intellect when reaching a verdict, the closing argument was improper. Craven, 15 Wn. App. 2d at 390.

This case is similar to Craven. The prosecutor's statement was inappropriate. Comments such as, "[d]o you remember how you shifted in your seats" and "[y]ou were uncomfortable hearing a woman describe her abuse" undoubtedly intended to ruffle the

jury and question more than just facts and credibility. The prosecutor, as in Craven, asked the jury to consider their gut feeling and emotional response to J.T.'s testimony. Emotions and gut feelings are not based upon the evidence presented at trial and are thus improper prosecutorial remarks.

While the court does not condone or appreciate these remarks, New did not object. Therefore, the remarks must be deemed so flagrant and ill intentioned that it leaves an enduring and resulting prejudice the trial court could not neutralize. Gentry, 125 Wn.2d at 596. While inappropriate, the prosecutor's remarks do not reach that level of prejudice.

Second, New argues that the above statement was improper because it implied that the jury must find J.T. was "lying" or "making this up" to acquit. It is improper for a prosecutor to assert that the jury must find the State's witnesses are lying or mistaken to acquit. State v. Rich, 186 Wn. App. 632, 649, 347 P.3d 72 (2015), rev'd on other grounds, 184 Wn.2d 897, 365 P.3d 746 (2016). That is not what the State did here. The State only pointed to J.T.'s testimony, including her statements that she went back to New asking for more. The State did not directly argue or imply that the jury needed to find J.T. was lying in order to acquit.

Third, New argues that the above statement resulted in the prosecutor vouching for J.T.'s credibility. A statement is vouching if "the prosecutor expresses his or her personal belief as to the veracity of the witness." State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). However, "[al]though it is improper for a prosecutor to vouch for a witness's credibility, a prosecutor has wide latitude in closing argument to draw

reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." State v. Lewis, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

New fails to demonstrate that the prosecutor improperly vouched for J.T. While the prosecutor stated "[y]ou know she was not making this up," this statement was immediately followed by the statement "[y]ou can assess that credibility and decide for yourselves if you thought she was making this up." The prosecutor did not express their belief that J.T. was credible.

New next argues it was misconduct for the prosecutor to argue that "the law in Washington doesn't require any sort of corroborating evidence to prove that a crime was committed." At trial, the State proposed that the trial court include as a written jury instruction the statutory language, "[i]t shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1). The court concluded, "there is no WPIC [] because, frankly, for the Court to say this to the jury is a comment on the evidence, and I don't think I should." The State asserted it intended to state the rule in closing. The court replied, "I'd be shocked if you didn't argue that. All right. And you're legally grounded to argue it, but it's not something I can say." New did not object.

A prosecutor's argument "must be confined to the law as set forth in the instructions given by the court." State v. Davenport, 100 Wn.2d 757, 766, 675 P.2d 1213 (1984). While this is true, the State's argument was not a misstatement of law, nor was it erroneous. The trial court gave explicit permission to present the rule in closing and New did not object. New cannot now argue on appeal that this constitutes prosecutorial misconduct.

Finally, New argues that the prosecutor denigrated the defense counsel in rebuttal by characterizing New's closing argument as intending to distract the jury. The prosecutor argued, "Mr. New wants you to focus on all of [Ham's] actions and look at the shiny object over here rather than the truth of what [J.T.] told you." New cites State v. Lindsay, 180 Wn.2d 423, 433-34, 326 P.3d 125 (2014) and State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011), for support. In Lindsay and Thorgerson, the court determined that the prosecution committed misconduct by referring to the defense theory as "a crock" or "bogus" and "sleight of hand." However, in those cases, the misconduct arose from prosecutors calling the defense theory dishonest and deceptive. Here, the prosecutor was citing portions of the defense testimony and closing as distraction. The prosecutor did not argue that defense counsel was deceiving the jury or being dishonest to the jury.

E. Cumulative Error

New argues that reversal is required because the cumulative effect of the violation of his right to be present along with prosecutorial misconduct deprived him of a fair trial. We disagree.

An accumulation of errors may deprive a defendant of their right to a fair proceeding. Chambers v. Mississippi, 410 U.S. 284, 290 n.3, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Emery, 174 Wn.2d at 766. The doctrine applies when errors, alone not justifying reversal, accumulate to deny the defendant a fair trial. Emery, 174 Wn.2d at 766. It does not apply if the defendant fails to establish error. Emery, 174 Wn.2d at 766. Because New did not establish error, the cumulative error doctrine does not apply.

F. Supervision Fees

New finally argues that the trial court improperly imposed nonmandatory supervision fees. We agree.

RCW 9.94A.703(2) provides that "unless waived by the court, as part of any term of community custody, the court shall order an offender to: (d) Pay supervision fees as determined by the department." State v. Dillion, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). Because they are discretionary, the court is not required to impose supervision fees. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). In Dillion, the trial court improperly imposed the Department of Corrections supervision fee on an indigent defendant. 12 Wn. App. 2d at 152. There, the appellate court struck the supervision fees because the record demonstrated that the trial court only intended to impose mandatory fees, and supervision fees are discretionary. Dillion, 12 Wn. App. 2d at 152.

Similarly in this case, the trial court stated, "I'm waiving all nonmandatory costs and fees. I really don't believe that Mr. New has resources." Therefore, consistent with the trial court's intent to waive discretionary costs, we remand the case to the superior court to strike the nonmandatory supervision fee.

We remand to strike the supervision fees. We otherwise affirm.

Mann, C.J.

WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. ROBERT NEW, Appellant.	)	No. 80561-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Robert New moved to reconsider the court's opinion filed on November 1, 2021. The panel has determined that the motion for reconsideration should be denied.

Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Mann, C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 80561-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: December 23, 2021

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