Supreme Court No. 102229-8
(Court of Appeals No. 56543-9-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

NATHAN ABBITT,

Petitioner

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

PETITION FOR REVIEW

DEVON KNOWLES
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
devon@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

Other Jurisdictions

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner, Nathan Abbitt, asks this Court to review the unpublished opinion of the Court of Appeals in *State v. Abbitt*, No. 56543-9-II (filed June 27, 2023). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Where the State seeks to convict an individual of child molestation, Washington courts have held that contact underneath clothing gives rise to an inference that the alleged contact was for the purpose of sexual gratification; but where the contact was over clothing or did not involve a primary erogenous area, the State must provide additional evidence to prove the element of sexual contact. Unlike other states, however, Washington has not considered whether the evidence supports an inference of sexual gratification in cases where the defendant did not initiate or encourage the contact. Should this Court accept review where this case involves a significant question of constitutional law and presents a question of

substantial public interest requiring this Court's guidance? RAP 13.4(b)(3)-(4).

2. Both defendants and the public have a constitutional right to public trials, including voir dire. The Court of Appeals erroneously concluded these rights were not implicated when the trial court introduced the parties, read the information, and administered the oath to the venire in a private jury assembly room, and when a juror was excused for cause based solely on her answers in a questionnaire. In so doing, the Court of Appeals explicitly relied on this Court's decision to deny review in other cases. Should this Court accept review where the Court of Appeals' decision conflicts with this Court's opinions in *State v. Slert*[1] and *State v. Schierman*[2], the overlap between voir dire and public trial rights involves significant questions of constitutional law, and the issue is a matter of

[1] 181 Wn.2d 598, 334 P.3d 1088 (2014).
[2] 192 Wn.2d 577, 438 P.3d 1063 (2018).

substantial public interest requiring this Court's guidance? RAP 13.4(b)(1), (3)-(4).

C. STATEMENT OF THE CASE

1. In an isolated incident and without warning, E.B. grabbed Mr. Abbitt's penis for approximately three seconds.

Nathan Abbitt met Katie Buchanan in 2010, when he was a customer at the QFC where Ms. Buchanan worked. 11/3/21RP 739. They began dating and, in spring 2011, Mr. Abbitt moved in with Ms. Buchanan and her daughters, six-year-old E.B. and three-year-old M.B. RP 479, 555. A few months later, Mr. Abbitt's teenage son also moved into the home. *See* RP 584. Mr. Abbitt acted as a stepfather to M.B. and E.B., playing with them, feeding them dinner, and picking them up from school. RP 556.

Tragically, his son committed suicide in the home. RP 89. After that, everything changed. Over the next eight years, Mr. Abbitt would go through periods where he stopped speaking to anyone–including Ms. Buchanan and the children–

for months at a time, instead communicating only in writing. RP 584-85. He became depressed, seemed to process information more slowly, and would take longer to answer questions. RP 585. He isolated himself in the garage, spending several hours a day meditating, dancing, and practicing his balance. RP 563, 755, 811. He was no longer charismatic or flattering. RP 574. According to Ms. Buchanan, it seemed as though Mr. Abbitt "had given up on life." RP 585. E.B. described him as "less of a dad, more like a child." RP 507.

Unfortunately, Mr. Abbitt's behavior continued to grow more extreme and he and Ms. Buchanan separated in 2019. RP 572. In February 2020, E.B. briefly described an incident where, eight years earlier, she and her sister were climbing on Mr. Abbitt and touched his penis. RP 487, 579. Ms. Buchanan called law enforcement and took E.B. for a forensic interview with the prosecutor's office. CP 580.

Detective Hoschouer was assigned to investigate the allegations. RP 670. Mr. Abbitt voluntarily discussed the

incident with Detective Hoschouer several times. RP 678. He was open that the incident occurred but was unequivocal that it was not sexual. RP 679. Indeed, according to Detective Hoschouer, Mr. Abbitt seemed repulsed at the thought of sexually touching children. RP 680. Mr. Abbitt initially described the incident as a poke lasting only a second, akin to touching a jellyfish in an aquarium. RP 685. Over subsequent conversations, Mr. Abbitt referenced the incident as lasting at most five-to-six seconds, but more likely around three seconds. *See* RP 686, 775. He also described the touching as a jerking motion. RP 686.

However, Mr. Abbitt remained adamant that his penis was flaccid during the incident. RP 708. He explained that he was taken by surprise and went into "lockdown" and froze up. RP 696-97. He acknowledged he heard either E.B. or M.B. made a comment that "it's hard and sticky," and believed they may have been talking about "leaky plumbing," a condition that cause him to leak ejaculate. *See* RP 679-80, 682. Detective

Hoschouer described Mr. Abbitt as coherent during some conversations; during others, he would talk extensively about religion, philosophy, and metaphysics. RP 693, 698-700. The State ultimately charged Mr. Abbitt with two counts of first-degree child molestation, one for each child. CP 8-9.

Both E.B. and M.B. testified at trial. M.B. did not remember ever seeing Mr. Abbitt naked or exposed, and did not remember the incident whatsoever. RP 540, 544. In the years Mr. Abbitt lived with the family, M.B. did not recall any instance in which he discussed sex with her or encouraged her to touch him. RP 541.

According to E.B., Mr. Abbitt was putting her and her sister to bed on the night of the incident. RP 486. E.B. remembers both E.B. and M.B. hanging and climbing on Mr. Abbitt. RP 486, 519. E.B. was on the top bunk, and climbed down onto Mr. Abbitt's shoulders. RP 518. She then continued to climb to the floor; although she didn't recall the details, she believed he was wearing pants, that his pants were down when

she reached the floor, and that she touched his penis. RP 486-87. E.B. also testified that his pants could have been pulled down because both children were hanging and climbing on him. RP 519.

When asked how she touched Mr. Abbitt's penis, E.B. could not recall the details, stating "I don't know. I mean, I think we were rubbing it. I don't know." RP 488. In her forensic interview, E.B. told Keri Arnold that "I think we were touching it." RP 490. She could not remember what Mr. Abbitt's penis felt like or how long the touch lasted. RP 491-92. She had no memory of Mr. Abbitt asking her to touch him and he did not touch her anywhere other than general roughhousing. RP 519. Mr. Abbitt did not say anything when it happened. RP 520. He did not make any threats or ask her to keep the incident a secret. RP 520.

While initially testifying that she thought he had an erection, E.B. clarified that she did not remember whether Mr. Abbitt's penis was hard or soft. RP 491, 522. She remembered

something wet and sticky on her hands, but did not remember the color or quantity. RP 492-93, 520. She didn't remember what happened afterwards, except that Mr. Abbitt left the room and she never really thought about it again. RP 493. Throughout the time they lived together, Mr. Abbitt never talked with E.B. about sex or intimate areas of the body. RP 485, 507-09.

Mr. Abbitt exercised his right to testify. The only time he recalled seeing E.B. and M.B. naked is when they were little and they would take baths or he had to wipe M.B. after she went to the bathroom. RP 756. Mr. Abbitt never spoke with the children about anatomy or any topics involving sex. RP 758-59.

Mr. Abbitt openly acknowledged that E.B. and M.B. saw him naked on two occasions. The first time was prior to the incident, when he and the kids were playing hide and seek, running around, and he was giving them horsey rides. RP 757. M.B. was on his back while he was giving her a horsey ride and E.B. "pantsed him," *i.e.* pulled down his pajama pants. RP 757.

The children clearly thought it was a game; E.B. started screaming "Ahhhhh," and ran out of the room while M.B. began laughing. RP 813. He tried to shake M.B. off, but she clenched on to his neck until he told her to "Get off of me, get off, my pants are down." RP 814. Neither E.B. nor M.B. touched him inappropriately. RP 814.

As to the incident in the bedroom, Mr. Abbitt had just gotten out of the shower; he was in a towel before going to sleep and walked around the house to make sure all the windows and doors were closed. RP 762. When he walked past the girls' room, E.B. called him in to give him a hug. RP 762-63. He was initially reluctant to go in because he was not dressed, but E.B. was insistent and Mr. Abbitt was trying to be a better listener following the death of his son. RP 762-63.

E.B. was on the top bunk and grabbed him to hang on his shoulders. RP 764. She flipped around while she was crawling

down him, trying to imitate a move she saw in a Ciara[3] video. RP 764. His towel fell to the floor, and when he realized M.B. was looking at his naked body, he became incredibly uncomfortable but didn't know what to do. RP 764-65. Everything "kind of went into slow motion." RP 765. M.B. poked his penis and E.B. pulled on his penis three times and "at that moment, I knew my life had changed." RP 765. Mr. Abbitt explained that he didn't tell them to stop because he was afraid it would just make them do it more; he was "freaking out" and his immediate emotional reaction was "oh, shit." RP 766. He estimated the entire incident lasted three seconds or less. RP 775.

Mr. Abbitt was adamant that he was not aroused and did not have an erection. RP 768. He explained that they "grabb[ed] my sexual organ" but that it was not at all sexual for him. RP

[3] Ciara is a popular R&B/Hip-Hop singer and dancer. Wikipedia, https://en.wikipedia.org/wiki/Ciara (last visited Sept. 15, 2022).

768. He felt uncomfortable around them for a while and, although they eventually began wrestling and playing again, “it was always lingering for me.” RP 769. Mr. Abbitt did not tell anyone about the incident because “it’s not something I like to have happen, let alone talk about it.” RP 770-71. Mostly he was afraid “because I just got touched by a ten-year-old and a seven-year-old.” RP 770. He ultimately described the situation as “a slow motion car crash[.]” RP 775.

Mr. Abbitt testified his conversations with Detective Hoschouer were an extremely emotional experience; because he held the information in for so long, it ultimately came out in bits and pieces and not entirely consistent. RP 774. Mr. Abbitt acknowledged telling Detective Hoschouer the touching lasted for up to five or six seconds, but explained it was in response to the detective’s pressuring him for a timeframe and asking whether the touching could actually have lasted longer than initially reported. RP 775.

Much of the trial was dedicated to Mr. Abbitt's semen leakage and whether the substance E.B. described was related to sexual arousal. Mr. Abbitt explained how he would occasionally have "seepage" where the tip of his penis would get wet or sticky. RP 749-50. He did not feel concerned that it could be a medical issue because he assumed it was a product of withholding ejaculation for prolonged periods of time. RP 748-49. It would typically be a pea-sized amount of liquid and, if it happened while he was dressed, he would use the inside of his pants pocket to dry himself. RP 806. He believed this is likely what E.B. felt on the night of the incident. RP 841.

2. The court reads the charges and opening pattern jury instructions in a closed jury administration room.

Prior to beginning jury selection, the court notified the parties that 70 jurors were requested and would be waiting in the jury administration room. RP 9. The court told the parties that it intended to go to the administration room to read the venire the charges in the amended information, the preliminary

instructions, administer the oath, and then ask the jurors to fill out the questionnaires. RP 9. The court invited the parties to the room, but did not ask whether either party objected to the process and did not notify Mr. Abbitt of his right to a public trial. RP 9. The parties did not attend. *See* RP 48.

The judge brought a court reporter to the administration room, explaining to the prospective jurors that she was present because "we are currently in session on this case." RP 49. The court read the amended information to the venire, gave the advance instructions in the pattern jury instructions, and administered the oath as a prerequisite to completing the questionnaire. RP 53-54.

Courtroom proceedings resumed after the parties reviewed the questionnaires and 15 jurors were excused without individual questioning. RP 75. Of those jurors, 12 were excused for financial or other hardships. RP 56-72. The court initially intended to keep two other jurors who claimed hardship in the venire for follow up questions, but reversed course after

discovering the jurors also expressed a bias in their questionnaires. RP 59-60, 66. The final juror was excused for cause based solely upon answers in her questionnaire. RP 72-73.

Other jurors who expressed potential bias were set for individual questioning the following day, but were not reminded of the oath before the questioning began. RP 76-77. Only after all individual excusals were complete did the court reread the charges, advance jury instructions, and re-administer the oath to the venire. RP 311-17

The Court of Appeals affirmed. In finding the evidence sufficient, the court relied primarily on contradictions between Mr. Abbitt's and Ms. Buchanan's testimony regarding his sexual practices during their time together and whether she walked in on the incident. Slip op. at 18-19. The court also concluded public trial rights did not attach to the procedure in the jury assembly room and subsequent excusals because it was

either not part of voir dire or it was done in open court. Slip op. at 11-14.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review to determine whether a jury may infer sexual contact when the defendant does not initiate or encourage the touching.

Under RCW 9A.44.083, a person is guilty of child molestation in the first degree when "the person has … sexual contact with another who is less than twelve years old and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "Sexual contact" is therefore an essential element of the crime of child molestation. What constitutes "sexual contact" is extremely limited in scope, requiring the State to prove beyond a reasonable doubt both (1) a touching of sexual or intimate parts occurred *and* (2) that the touching was for the express purpose of satisfying the sexual desire of either party. RCW 9A.44.101(13); *State v. Stevens*, 158 Wn.2d 304, 309, 143 P.3d 817 (2006). This necessarily requires the State to

prove the accused acted with a specific "intent," the highest *mens rea* under criminal law. *Id.* at 310; *see* RCW 9A.08.010.

A showing of "sexual gratification" is required to prevent a conviction based on inadvertent touching. *State v. Lorenz*, 152 Wn.2d 22, 32, 93 P.3d 133 (2004) (citing *State v. T.E.H.*, 91 Wn. App. 908, 916, 960 P.2d 441 (1998)). It also ensures individuals are not convicted based upon behavior that is "susceptible of innocent explanation." *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

This Court has drawn parameters around what the State must prove to establish sexual gratification. For example, where an unrelated adult with no caretaking function touches intimate parts of a child directly, it raises an inference that the touching was done for the purpose of sexual gratification. *Powell*, 62 Wn. App. at 917 (citing *State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224 (1989) and *State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1986)). However, where the touching was over

clothing, such inference is impermissible. *Id.* Similarly, the inference does not apply where the accused touches parts of the body that are not primarily erogenous; in both cases, the State must present additional evidence of sexual gratification. *Id.*

This Court has not, however, addressed whether the inference applies to a failure to act. In other words, even where the facts might otherwise support an inference of sexual contact, it is unclear whether due process requires the State to present additional evidence in cases where the defendant did not initiate or encourage the touching.

Other states have consistently required a showing that the accused induced the contact or allowed the contact to occur for a prolonged period of time. For example, in *State v. Olsen*, the Wisconsin Court of Appeals approved of a pattern jury instruction allowing a jury to find "sexual contact" for the purpose of gratification where a defendant "allowed" contact initiated by the child. 616 N.W.2d 144, 147 (Wis. 2000). However, the court cautioned that in such cases the State must

prove "that the defendant at least 'allowed'–that is, consciously and affirmatively consented to–the contact before an inference could be drawn that he (or she) intended sexual gratification or arousal." *Id*. (quoting *State v. Traylor*, 489 N.W.2d 626, 630 n. 2 (Wis. Ct. App. 1992)).

> The mere fact of a child's touching an adult does not raise the inference. There might indeed be evidence in a specific case that the adult called an immediate halt to this activity. Absent other evidence that the event was sanctioned by the adult, the mere fact that a touching took place is not the same as "allowing" it.

Id. (quoting *Traylor*, 489 N.W.2d at 630 n. 2).

The Supreme Judicial Court of Maine also examined the sufficiency of the evidence where a defendant fails to stop child-initiated contact in *State v. Severy*, 8 A.3d 715 (Me. 2010). In that case, Severy allowed the child to get on his lap on multiple occasions, during which she would unbuckle his belt, unbutton his pants, unzip his fly, and move her hand up and down on his penis. *Id*. at 717. Even though the defendant never touched the child or prompted the child to touch his penis, he

would make sounds of pleasure, told her to stop doing it only after repeated instances, and admitted to police that the touching felt good. *Id*. Based on these facts, the court concluded the State met its burden to establish "sexual contact" because the defendant "intentionally allowed" the child to touch his penis. *Id*. at 718.

In *Commonwealth v. Holbrook*, the Appeals Court of Massachusetts considered the sufficiency of the evidence where the defendant did not directly touch the minor. 16 N.E.3d 519 (Mass. App. Ct. 2014). In that case, Holbrook's grandniece entered his bedroom and asked if she could watch television with him. *Id.* at 521. She then put her hand in his pants, pulled his penis over the elastic in his underwear, and played with it for approximately one minute. *Id.* Holbrook became erect, but still did not stop the touching for another ten seconds before telling her to leave. *Id.* The court concluded Holbrook's intent to commit indecent assault could be inferred because, even if the child's grabbing of his penis was spontaneous, he allowed

her to touch him for a prolonged period of time before finally telling her to leave. *Id.* at 521-22. Moreover, witness testimony that the child was found in Holbrook's room in many occasions, at least once when he was undressed, supported the inference of sexual intent during the charged incident. *Id.* at 522.

Critically, the same court found the evidence insufficient to establish sexual contact in *Commonwealth v. Taylor*, 733 N.E.2d 584 (Mass. App. Ct. 2000). In that case, the State charged Taylor with indecent assault and battery because he "made" his daughter touch his penis. *Id.* at 585. Testimony established that he was naked around the child on several occasions and, at times, she reached for his penis. *Id.* In finding the evidence insufficient, the court took care to emphasize that her mother "never testified that the defendant had said or done anything to cause the victim to touch his penis." *Id*. Specifically, "there was no evidence that the defendant had asked the victim to touch his penis or intended that the victim touch his penis." *Id.* at 586.

Applying these principles to Mr. Abbitt's case reveals the State utterly failed to meet its burden to establish sexual contact. Even with the Court of Appeals' apparent conclusion that conflicting testimony by Mr. Abbitt and Ms. Buchanan supported the conviction, the **uncontroverted** evidence established the incident lasted no more than five-to-six seconds, likely three seconds or less. While E.B. initially answered "I think so" to the State's question of whether Mr. Abbitt was erect, she later clarified that she could not remember whether his penis was hard or soft and did not know if it was erect. RP 491-92, 522. In fact, she could not remember what his penis felt like, what it looked like, how long she was touching it, how she was touching it, how his pants came down, or how she came to be touching it in the first place.

The uncontroverted evidence, including testimony by Detective Hoschouer, also established Mr. Abbitt was disgusted at the idea of any sexual contact with children. Far from

gratifying his sexual desire, he was watching "a slow motion car crash[.]" RP 775.

Additionally, there were no signs of child molestation typically seen in other cases. There were no other alleged incidents in the eight years he lived in the home, he never discussed anatomy or sexual topics with E.B. or M.B., never touched them inappropriately, never asked or induced them to touch him, never told them to keep the incident a secret, and never made any sounds indicating it felt good or encouraging them to continue. *See Powell*, 62 Wn. App. at 918 (evidence insufficient to establish contact for purpose of sexual gratification where, *inter alia*, Powell did not threaten, bribe, or request secrecy from minor).

Mr. Abbitt clearly explained why he did not stop E.B. during the few seconds the incident lasted. Namely, he could not drop E.B. because he was still holding her by her legs and she would have fallen on her head if he let go. RP 766. He was also afraid telling them to stop would just make them turn it

into a game and they would do it more. Finally, he just "locked up" given the stress and surprise of the incident. Both the children's exploratory or playful touching and Mr. Abbitt's failure to act within seconds are therefore "susceptible of innocent explanation." *Powell*, 62 Wn. App. at 917.

This Court should accept review to determine whether evidence that would otherwise support the inference of sexual contact under *Powell* is sufficient in cases where the allegation is based on the defendant's failure to act.

2. Review is warranted because the Court of Appeals' decision conflicts with this Court's decisions, raises a significant question of constitutional law, and involves an issue of substantial public interest.

Both the state and federal constitutions guarantee an accused the right to a public trial. Const. art § 22; U.S. Const. amend. VI; *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012). The Washington Constitution also vests the right of a public trial with the broader public, guaranteeing that "[j]ustice in all cases shall be administered openly." Const. art. I, § 10.

In finding the procedure in Mr. Abbitt's case was not part of voir dire implicating public trial rights, the Court of Appeals explained "the criminal rules establish that voir dire **commences** when jurors are questioned[.]" Slip op. at 12 (citing CrR 6.4(b)) (emphasis added). Because the jurors were not questioned in the jury administration room in Mr. Abbitt's case, "formal voir dire … had not yet commenced," precluding a public trial right violation. Slip op. at 12.

This is simply inaccurate. The rule states "[t]he judge shall initiate the voir dire examination by identifying parties and their respective counsel and by briefly outlining the nature of the case." CrR 6.4(b). It is after this initiation that the court and counsel are able to question and challenge jurors. CrR 6.4(b). Here, the court initiated voir dire under CrR 6.4 when it introduced the parties and read the charging document to the venire in a closed jury assembly room.

The Court of Appeals opinion also conflicts with this Court's opinions in *State v. Slert*, 181 Wn.2d 598, 334 P.3d

1088 (2014), and *State v. Shierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018). In *Slert*, this Court concluded that reviewing juror questionnaires and excusing jurors for administrative reasons, while part of the general jury selection process, was not part of voir dire and, therefore, did not implicate public trial rights. 181 Wn.2d at 608. Specifically, voir dire had not begun because there was no "initiation" under CrR 6.4(b) before the questionnaires were reviewed. *Id.* at 605-06 (citing CrR 6.4(b)); *see State v. Russell*, 183 Wn.2d 720, 730-31, 357 P.3d 38 (2015) (relying on CrR 6.4(b) to distinguish hardship and for-cause challenges in the context of public trial rights).

Meanwhile, in *Schierman*, this Court affirmed that "the public trial right attaches to juror challenges and the rulings thereon." *Id.* at 609. Namely, for-cause challenges "require the court to scrutinize jurors' answers and behavior for indications of bias that may be subtle." *Id.* at 605. The challenges can also "reflect racial, ethnic, and other forms of bias in jury selection." *Id.* at 609.

Read together, *Slert* and *Schierman* stand for at least two propositions: (1) juror questionnaires are not part of voir dire because they are merely a screening tool for questioning during voir dire; and (2) for-cause challenges are part of voir dire and must be done in open court. Here, one juror was excused for cause based solely upon an answer in her juror questionnaire and without questioning by the trial court or attorneys. But if the questionnaire is not a substitute for voir dire examination, it necessarily follows that a court cannot rely solely on a questionnaire to rule on a for-cause challenge. The Court of Appeals erred in finding the juror questionnaires were not part of voir dire while also concluding the for-cause excusal was proper because the answer to her questionnaire was summarized in open court.

Review is also necessary because the issue of when voir dire implicates a public trial right is a significant question of law under article I, sections 10 and 22 requiring guidance by this Court. Particularly as jury selection processes are

increasingly conducted remotely or in jury assembly rooms, different divisions of the Court of Appeals have attempted to parse out what constitutes "voir dire" in the context of a public trial right. Does it attach when the oath is administered to the voir dire in a private room? Is it when the jurors are informed about the nature of the case or introduced to the parties? Is it determined by CrR 6.4? Is it after the jurors complete a questionnaire describing hardships and biases? Or does voir dire only amount to asking questions of a panel?

In this case, the Court of Appeals relied on the fact that this Court **declined review** in *State v. Parks*[4] to limit Mr. Abbitt's and the public's constitutional rights. Slip op. at 13. In *Parks*, Division Three concluded swearing in the jury in the assembly room did not implicate public trial rights, finding the issue a matter of first impression. 190 Wn. App. at 866. In deciding Mr. Abbitt's case, Division Two has now expanded on

[4] 190 Wn. App. 859, 363 P.3d 599 (2015).

Parks, holding that administering the oath, introducing the case and parties, seeking out biases through questionnaires and excusing a juror for cause based on a brief summary of her answers did not implicate article I, section 22 because it began "before formal voir dire." Slip op. at 12-14. Review is clearly required when the Court of Appeals based its decision on the **absence** of guidance by this Court in *Parks* or "any case." Slip op. at 13.

Finally, the issue is one of substantial public interest because it directly affects the public's right to the open administration of justice. To understand the scope of that right, the public must know both what happens in court and behind closed doors. In this way, a decision by this Court will promote the public's confidence in the judiciary through a clear and consistent application of article I, section 10.[5]

[5] The Court of Appeals did not reach the question of whether a closure occurred or whether the error was harmless. For the reasons articulated in Mr. Abbitt's briefing, the jury administration room is intended to be used only by prospective

E. CONCLUSION

For the reasons set forth above, Mr. Abbitt respectfully requests that this Court grant review.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains 4,925 words (word count by Microsoft Word).

DATED this 27th day of July, 2023.

s/Devon Knowles
WSBA No. 39153
Washington Appellate Project (91052)
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
Email: devon@washapp.org

jurors and the errors require reversal. Br. of App. at 48-50; Reply Br. of App. at 21-22.

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 27, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHAN LOWELL ABBITT, Appellant.	No. 56543-9-II UNPUBLISHED OPINION

GLASGOW, C.J. — Nathan Lowell Abbitt had his pants off in front of his two young stepdaughters, and the girls touched his penis until he ejaculated. After one of the girls disclosed the incident years later, the State charged Abbitt with two counts of first degree child molestation.

Before jury selection began, the trial judge addressed a pool of prospective jurors in the jury administration room. There, the trial judge read introductory instructions, placed the prospective jurors under oath, and handed out preliminary questionnaires. The parties later discussed excusing prospective jurors and conducted voir dire in open court.

In closing arguments at trial, the prosecutor repeatedly asked the jury to hold Abbitt accountable by convicting him. The jury then convicted Abbitt of both charges. The judgment and sentence included boilerplate language imposing community custody supervision fees.

Abbitt appeals. He argues that the proceeding in the jury administration room violated his right to a public trial. He further asserts that the prosecutor committed misconduct and that there

was insufficient evidence to convict him. He also contends, and the State concedes, that the community custody supervision fees must be stricken from his judgment and sentence.

We affirm Abbitt's convictions, but we accept the State's concession and remand for the trial court to strike the supervision fees.

FACTS

I. BACKGROUND

Abbitt began dating KB in 2010. The couple moved in together in 2011 and married in 2013. KB had two young daughters, EB and MB, who were approximately six years old and three years old when KB began dating Abbitt. Abbitt and KB had two more children together. The couple then separated in 2019. While dissolution proceedings were ongoing, EB told KB that Abbitt sexually abused her and MB years earlier. The State initially charged Abbitt with one count of first degree child molestation, then later added a second count.

II. PRETRIAL PROCEEDINGS

Before jury selection began, the trial court informed the parties that there were 70 prospective jurors waiting in the jury administration room. The trial court intended to go down to the jury administration room to read the prospective jurors a preliminary instruction introducing the parties and explaining the process of a criminal trial. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.01 (5th ed. 2021) (WPIC). The trial court would also inform the prospective jurors of the charges, then place them under oath and have them complete a questionnaire addressing possible biases or hardships the prospective jurors would face if selected to serve on the jury. The trial court told the parties that they were "welcome to come down and watch." 1 Verbatim Rep. of Proc. (VRP) at 9. The trial court stated that it then expected

to discuss with the parties which prospective jurors they would excuse for hardship. Neither party objected to the trial court's suggested procedure. The parties also reviewed the questionnaire and other preliminary information that the prospective jurors would receive on the record in open court.

When the pool of prospective jurors assembled in the jury administration room, the trial court again informed the parties of its plan to read preliminary instructions, swear in the prospective jurors, and distribute questionnaires. The trial court stated, "[Y]ou're welcome to come down to [the jury administration room], if you wish, but you're not required to." 1 VRP at 43. Again, neither party objected.

The trial judge then went to the jury administration room. Neither party attended. Along with other courtroom staff, the judge introduced the court reporter to the prospective juror pool and explained, "She's over here diligently taking down everything that is said while court is in session. And we are currently in session on this case." 1 VRP at 48. The judge then read preliminary instructions about the process of a trial and explained the purpose and process of voir dire. The judge also placed the prospective jurors under oath and distributed a preliminary questionnaire.

That afternoon, the trial court and counsel reconvened in open court to discuss which prospective jurors they would excuse without individual questioning. The parties agreed to excuse 15 prospective jurors without further questioning based on their answers to the questionnaire. Only one prospective juror was excused for cause, and the others were excused for hardship. The juror excused for cause was excused because she was a victim of sexual assault and reported on the questionnaire that it would be difficult to "remove [her] experience from the facts" of the case. 1 VRP at 73. The parties agreed to excuse another prospective juror for hardship reasons before

noting that there was an "obvious bias" challenge as well. 1 VRP at 59. The trial court excused that juror for hardship. And the parties identified several other prospective jurors as having potential biases, but kept those jurors in the pool for further questioning.

The next day, the parties individually questioned prospective jurors about hardships they would face if they were to serve on a jury. The day after that, once individual questioning about hardships concluded, the trial court reread the same set of instructions it had read in the jury room to the remaining pool of prospective jurors, this time in the courtroom with the parties present. The trial court again placed the prospective jurors under oath before beginning formal voir dire to ask prospective jurors questions about their potential biases.

III. TRIAL

A. Evidence Presented

EB, who was in high school at the time of the trial, testified that the charged incident occurred one night when Abbitt was putting EB and MB to bed. EB believed that she was seven years old and MB was four years old at the time of the incident.

EB testified that the girls slept in bunk beds in a shared bedroom. That night, EB climbed onto Abbitt's shoulders from the top bunk, then down his body. She remembered Abbitt wearing jeans and a shirt. Abbitt's pants were down by the time EB reached the floor. EB testified that she and MB sat on the lower bunk bed and rubbed Abbitt's erect penis. Afterwards, there was something wet and sticky on her hands. Abbitt then left the room and never discussed the incident with the girls. MB had no recollection of the incident.

A forensic child interviewer, who interviewed EB, explained that delayed disclosures are common in child sex abuse cases. In particular, children frequently disclose abuse after the abuser has left the household or when there is a custody dispute.

Abbitt testified that on the night in question he put the girls to bed while wearing a towel wrapped around his waist. He stated that EB was 10 years old and MB was 7 years old at the time because he remembered that KB was pregnant with the couple's first child.[1] He testified that EB began roughhousing with him and that the towel fell from his waist while he was holding EB upside down. He said that MB poked at his penis and EB pulled on it for roughly 3 seconds. He also testified that KB walked in on the incident as it was occurring. And he denied ejaculating but said that he believed ejaculate could have leaked from his penis because he suffered from a "leaky plumbing" condition after years of withholding ejaculation, which he had discussed with KB. 7 VRP at 750.

KB testified that she never walked in on any scene where Abbitt had his penis exposed in front of her daughters. She also testified that Abbitt regularly ejaculated when they had sex, that he never mentioned any problem related to "'leaky plumbing'" and had full control of his ejaculatory response, and that he never told her that the girls saw his penis. 5 VRP at 567. And EB had no recollection of KB entering the room during the incident.

A detective, who spoke with Abbitt several times, testified that Abbitt repeatedly changed his assessment of how long the touching occurred, although he consistently maintained that it occurred for less than one minute. Although MB did not recall the incident, when Abbitt asserted

[1] The State amended the dates in the information to reflect the time period when Abbitt testified the incident occurred.

that he was a victim and the detective asked what charges he would like to file against the girls, Abbitt said, "'Penis touching on both of them.[2]'" 6 VRP at 687.

B. Jury Instructions, Closing Arguments, Verdict, and Sentencing

The jury instructions emphasized that the attorneys' statements were not evidence and told the jurors to "disregard any remark, statement, or argument that is not supported by the evidence or the law in [the jury] instructions." Clerk's Papers (CP) at 39. The instructions explained that to convict Abbitt of first degree child molestation, the jury had to find beyond a reasonable doubt that Abbitt had sexual contact with EB and MB when they were less than 12 years old and were not married to him. *See* former RCW 9A.44.083(1) (1994).[3] The instructions stated, "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP at 48; *see* RCW 9A.44.010(13).[4]

At the beginning of closing argument, the prosecutor told the jury that because of EB's disclosure, "the State has been given the opportunity to prove the defendant's guilt." 8 VRP at 872. "Today, I ask you to hold [Abbitt] accountable for what he did to [EB] and [MB]." *Id*. The prosecutor then explained the elements of first degree child molestation. She also addressed the jury instructions and the evidence presented, including EB's stated reasons for her delay in disclosing the incident.

[2] The parties stipulated that this statement and others Abbitt made to the detective were admissible under CrR 3.5.

[3] The legislature has since removed the requirement that the defendant and victim not be married. LAWS OF 2021, ch. 142, § 5.

[4] We cite to the current version of the statute because the relevant language has not changed since Abbitt's offense.

While discussing the credibility of the witnesses, the prosecutor reminded the jury that they could consider witnesses' motives: "In this case, the defendant has the biggest motive to lie so that you don't find him guilty [and] so that you don't hold him accountable for what he did to these girls." 8 VRP at 880. She then explained how Abbitt's testimony was contradicted by other evidence and testimony, including his own prior statements. At the end of closing, the prosecutor reminded the jury that it was the trier of fact and contended that, "based on the facts and the law . . . the State has proven all of the elements beyond a reasonable doubt." 8 VRP at 889. "I am going to ask that you find Nathan Abbitt guilty as charged and hold him accountable for what he did to [EB] and [MB]." *Id*. Defense counsel did not object at any point during the State's closing argument.

Defense counsel's closing argument primarily emphasized the presumption of innocence and the State's burden of proof.

The State began rebuttal by discussing the jury instructions, arguing that Abbitt's leaky plumbing defense did not create a reasonable doubt about whether he was sexually gratified by the incident. The prosecutor emphasized that Abbitt had mostly corroborated EB's version of the incident. After asking the jurors to review their instructions, the prosecutor said, "Again, I'm going to ask that you hold Mr. Abbitt accountable for what he did to [EB] and [MB] and find him guilty." 8 VRP at 909. Defense counsel did not object.

The jury convicted Abbitt of both counts of first degree child molestation. At sentencing, the State sought, and the trial court imposed, a sentence of 75 months, near the middle of the standard sentencing range. The trial court stated that it would waive all nonmandatory legal

financial obligations. The judgment and sentence imposed mandatory legal financial obligations as well as community custody supervision fees. CP at 60, 62.

Abbitt appeals his convictions and sentence.

ANALYSIS

I. RIGHT TO A PUBLIC TRIAL

Abbitt argues that the trial court violated his state and federal constitutional right to a public trial when it "read the advance oral pattern jury instruction, including the details of Mr. Abbitt's case, and administered the oath to the jury venire" in the jury administration room, because there was "no indication" that the public had access to the jury administration room." Br. of Appellant at 35, 40. Abbitt contends that the trial court should have conducted a *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), analysis on the record before beginning proceedings in the jury administration room and that failing to do so was reversible error. We disagree.

A. Public Trial Principles

Both the state and federal constitutions guarantee criminal defendants the right to a public trial. U.S. CONST. amend. VI; WASH. CONST. art. I, §§ 10, 22. In general, this right requires that certain proceedings be held in open court. *State v. Parks*, 190 Wn. App. 859, 864, 363 P.3d 599 (2015).

There are three steps to analyzing a claimed violation of the public trial right. "First, we ask if the public trial right attaches to the proceeding at issue. Second, if the right attaches we ask if the courtroom was closed. And third, we ask if the closure was justified." *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). The defendant bears the burden of proof for the first two questions and the State bears it for the third. *Id.* For the State to justify a closure, the trial court

must either conduct a *Bone-Club* analysis or otherwise effectively weigh the defendant's public trial right against the interests favoring closure. *State v. Effinger*, 194 Wn. App. 554, 559-60, 375 P.3d 701 (2016).

The first step of the closure test requires assessing whether the right to a public trial attached to a proceeding. If a proceeding was not one that the Washington Supreme Court has already recognized the public trial right attaches to, we "must apply the experience and logic test to determine whether the public trial right is implicated." *State v. Miller*, 184 Wn. App. 637, 644, 338 P.3d 873 (2014). The experience and logic test asks whether a proceeding's "process and place . . . historically have been open to the press and general public," and "whether access to the public plays a significant positive role in the functioning of the proceeding." *Id*. "If the answer to both is yes, the public trial right attaches" and the court must consider the *Bone-Club* factors before closing the proceeding to the public. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). It is the defendant's burden to show that the public trial right attaches to a proceeding. *Love*, 193 Wn.2d at 605.

B. When the Right to a Public Trial Attaches During Jury Selection

This court has explained that the public trial right does not apply "to every component of the broad 'jury selection' process," which "includes the initial summons and administrative culling of prospective jurors from the general adult public and other preliminary administrative processes." *State v. Wilson*, 174 Wn. App. 328, 338, 298 P.3d 148 (2013). Instead, the public trial right relates to *only* "the 'voir dire' of prospective jurors who form the venire (comprising those who respond to the court's initial jury summons and who are *not* subsequently excused administratively)." *Id*.

CrR 6.4(b) states that voir dire "shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges." The rule does not mention excusing prospective jurors for hardship reasons.

In *State v. Russell*, the Supreme Court held that the public trial right did not attach to in-chambers work sessions to excuse potential jurors for hardship. 183 Wn.2d 720, 730, 357 P.3d 38 (2015). The Supreme Court noted that "[d]etermining whether a juror is able to serve at a particular *time* or for a particular *duration* (as in hardship and administrative excusals) is qualitatively different from challenging a juror's ability to serve as a neutral fact finder in a particular *case* (as in peremptory and for-cause challenges)." *Id*. at 730-31. The Supreme Court later elaborated that "hardship determinations do not implicate the concerns underlying the public trial right, at least where no juror was excused for hardship without further (on-the-record) proceedings." *State v. Schierman*, 192 Wn.2d 577, 608, 438 P.3d 1063 (2018) (lead opinion of McCloud, J.); *id.* at 747 (Madsen, J., concurring); *id.* at 763-64 (Yu, J., concurring/dissenting in part).

Division Three concluded that the defendant's public trial right did not attach to a proceeding similar to the one at issue in this case. *Parks*, 190 Wn. App. at 866-67. In *Parks*, the trial court "swore in the venire and gave the venire questionnaires in the jury assembly room because the venire would not fit in the courtroom." *Id*. at 862. Because the Supreme Court had not previously indicated whether the proceeding implicated a defendant's public trial right, Division Three applied the experience and logic test. *Id*. at 865.

For the first prong, whether a proceeding has historically been open to the public, the *Parks* court emphasized that it had not been able to find any case holding that "swearing in a venire has

historically been open to the public," or that "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of peremptory challenges and for cause juror excusals." *Id*. at 866. Division Three further noted that the instruction read to the jury, WPIC 1.01, specifies that "it is to be read *before* the jury is selected and contains basic educational information the venire needs to know *before* voir dire begins." *Id*. And Division Three considered the reading of WPIC 1.01 to be analogous to "an administrative component of the jury selection process to which the public trial right does not attach." *Id*. at 866-67.

For the second prong, whether public access plays a significant role in the proceeding's function, Division Three held that Parks failed to demonstrate that "public access plays a significant positive role in the functioning of the swearing in a venire," that "swearing in a venire is a proceeding similar to the trial itself, or [that] openness during swearing in would enhance the basic fairness of his trial and the appearance of fairness." *Id*. at 867. Thus, Parks could not show that the public trial right attached to the challenged proceeding. The Supreme Court denied review. *State v. Parks*. 185 Wn.2d 1032, 377 P.3d 732 (2016).

C. Whether the Public Trial Right Attached Here

Abbitt asserts, "[I]t is well settled that public trial rights apply to voir dire," which he contends included the challenged proceedings in both this case and in *Parks*. Reply Br. of Appellant at 13. He asserts that the trial court telling the prospective jurors "'we are currently in session on this case,'" constituted beginning voir dire. Br. of Appellant at 40. Because he believes voir dire began at this point, he insists that the public trial right automatically attached "and further inquiry is therefore unnecessary" because the trial court did not conduct a *Bone-Club* analysis

before going to the jury administration room. Reply Br. of Appellant at 13. He also argues that voir dire began in the jury administration room because the distributed questionnaire constituted "'juror questioning,'" because the parties agreed to excuse one prospective juror for cause due to her answers to the questionnaire. Reply Br. of Appellant at 21. We disagree.

1. Whether the public trial right automatically attached

Abbitt has not carried his burden to establish that the public trial right automatically attached to the challenged proceeding in this case. First, the criminal rules establish that voir dire commences when jurors are questioned so that the parties may exercise peremptory and for-cause challenges. CrR 6.4(b). Formal voir dire—the process of questioning jurors to discover "any basis for challenge for cause" and to "enable an intelligent exercise of peremptory challenges"—occurred entirely on the record in open court in this case, as did any discussion of jurors' answers to the questionnaire, which were read aloud in open court if the juror was excused. *Id.* Although the prospective jurors received a preliminary oath in the jury administration room, voir dire had not yet commenced. Abbitt does not cite, and we cannot find, any Supreme Court case that holds that the public trial right automatically attaches to swearing in a pool of prospective jurors before they answer a questionnaire. Thus, this proceeding was not "within a specific category that our Supreme Court already has recognized for application of the public trial right." *Miller*, 184 Wn. App. at 644.

2. Whether the public trial right attached under the experience and logic test

For purposes of analyzing whether the public trial right attached under the experience and logic test, the challenged proceeding in this case is very similar to the one in *Parks*. The trial court was on the record in the jury administration room when it read the same pattern instruction as the

court in *Parks* and a short summary of the charges, swore in the prospective jurors, and distributed questionnaires. *See* 190 Wn. App. at 864. The parties then met in open court to discuss which jurors they would excuse for hardship or bias based on their answers to the questionnaires and which of the jurors required more questioning. Like in *Schierman,* no juror was excused without discussion on the record, including a description of the questionnaire answer that led to the dismissal. *See* 192 Wn.2d at 608. Only one juror was excused for cause; both parties and the court agreed that her history as a victim of sexual abuse, and her written statement about why she could not separate her own experience from the facts warranted dismissal. Abbitt also asserts that two prospective jurors were dismissed for "a combination of hardship and bias" without questioning. Reply Br. of Appellant at 17. But one juror's bias was raised only after the parties had each moved to excuse them for hardship, and the trial court excused that juror for hardship, while two other potentially biased jurors were kept in the pool for additional questioning.

Abbitt argues that *Parks* is "fundamentally dissimilar" from his case "and legally flawed" because he believes that the proceeding in that case also constituted voir dire. Br. of Appellant at 43. We disagree.

The Supreme Court denied review of *Parks* and has not reviewed any case citing its reasoning that public trial rights do not attach when a judge swears in a pool of prospective jurors and distributes questionnaires. 185 Wn.2d 1032. As discussed above, Abbitt has failed to cite any precedent holding that the public trial right automatically attaches to swearing in prospective jurors before they fill out a questionnaire. Abbitt does not cite any case where a Washington court has held that the parties' discussions of hardship determinations implicate the public trial right. Indeed, the case law points to the contrary, with the Supreme Court holding that "hardship determinations

do not implicate the concerns underlying the public trial right" as long as jurors are excused on the record. *Schierman*, 192 Wn.2d at 608. Moreover, the parties' discussion of both the hardship excusals and the single excusal for cause based on written answers to the questionnaires, occurred on the record in open court. Therefore, we follow *Parks* and hold that the public trial right did not attach to the challenged proceeding in this case.

Abbitt also relies on *State v. Slert*, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014) (plurality opinion), to argue that because the trial court placed the prospective jurors under oath, voir dire had begun. But in *Slert*, the parties agreed to dismiss four prospective jurors in an in-chambers conference. *Id.* at 602. In that case, the Supreme Court emphasized the drastic lack of information in the record about whether a courtroom closure had occurred, including whether voir dire had commenced. *Id*. at 608. Without such evidence, the justices who signed the lead opinion declined to infer that the proceeding constituted a courtroom closure. *Id*. Here, all discussions about the dismissals related to the questionnaires occurred on the record in open court before formal voir dire began the next day. Because we hold that the public trial right did not attach to the proceeding at issue here, we need not address whether a courtroom closure occurred.

II. PROSECUTORIAL MISCONDUCT

Abbitt argues that the prosecutor's closing and rebuttal arguments improperly appealed to the passion and prejudice of the jury, constituting misconduct that violated his right to a fair trial. He reasons that asking a jury to hold a defendant accountable is similar to asking the jury to "'declare the truth'" by convicting the defendant. Br. of Appellant at 53 (quoting *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009) (holding that prosecutor's comments were improper but not prejudicial)). We disagree.

A criminal defendant's right to a fair trial "is guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution and under article I, section 22 of the Washington Constitution." *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021), *review denied*, 198 Wn.2d 1041, 502 P.3d 854 (2022). We review the prosecutor's challenged conduct "'in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury.'" *Id.* (quoting *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)).

To demonstrate a violation of the right, a defendant who objected to a prosecutor's remarks need only show that the statements were improper and that there is a substantial likelihood the statements affected the verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). When a defendant did not object to a prosecutor's remarks, they must show that the statements were flagrant and ill-intentioned as well as improper, that no curative instruction could have remedied the prejudice from the statements, and that there is a substantial likelihood the statements affected the verdict. *Id.* at 760-61. "In evaluating whether the defendant has overcome waiver in cases where an objection was not lodged, we will 'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" *Gouley*, 19 Wn. App. 2d at 201 (quoting *Emery*, 174 Wn.2d at 762).

Where the defendant objected below, this court held that it was improper for a prosecutor to repeatedly ask a jury to "'declare the truth'" by convicting the defendant. *Anderson*, 153 Wn. App. at 429. However, the improper comments in *Anderson* did not require a new trial because they were made "in the context of jury instructions that clearly lay out the jury's actual duties and of thorough discussion of the evidence by both counsel during [closing] argument." *Id.* And

requests that the jury "'do[] justice'" and "return a 'just verdict'" were not improper, despite a defense objection, when the statements were "clearly made in the context of [pattern] jury instructions that explained what 'justice' would be." *Id.*

Here, the prosecutor asked the jury to hold Abbitt accountable four times, and defense counsel did not object to any of these statements. First, asking the jury to hold a defendant accountable is akin to asking the jury to find the defendant guilty, which is permissible. *State v. Jarvis*, No. 56086-1-II, slip op. at 20 (Wash. Ct. App. June 13, 2023)[5]. It's different from asking the jury "to declare the truth, which is akin to telling the jury that its role is to solve the crime and conduct an investigation, and is a misstatement of the jury's true duty of determining whether the State had proved its allegations against the defendant beyond a reasonable doubt." *Id.* "Asking the jury to hold a defendant responsible by finding them guilty in no way misstates the jury's duty." *Id.* Moreover, in context, the prosecutor's comments were based on the evidence presented at trial, argument about witness credibility, and the assertion that the State had carried its burden beyond a reasonable doubt.

In addition, viewing the prosecutor's comments in the context of the whole argument, evidence presented, and jury instructions, we conclude that any prejudice could have been remedied by an immediate curative instruction reminding "the jury that its purpose was to determine whether the State had met its burden to prove all the elements of the charged offenses." *Jarvis*, slip op. at 20-21. Further, the trial court's instructions to the jury clearly identified the burden of proof and the elements of first degree child molestation.

[5] https://www.courts.wa.gov/opinions/pdf/D2%2056086-1-II%20Published%20Opinion.pdf.

The trial court's instructions also warned that the attorneys' statements were not evidence and directed the jurors to "disregard any remark, statement, or argument that is not supported by the evidence or the law in [the jury] instructions." CP at 39. We presume that a jury followed the trial court's instructions, "absent evidence proving the contrary." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Abbitt has not demonstrated that the prosecutor's remarks were flagrant or ill intentioned, or that a curative instruction would not have remedied any ensuing prejudice. We hold that the prosecutor's remarks did not constitute misconduct.

III. SUFFICIENCY OF THE EVIDENCE

Abbitt argues that the State did not offer sufficient evidence to prove that he acted for purposes of sexual gratification as required to convict him of first degree child molestation. He cites to cases from Wisconsin, Maine, and Massachusetts to argue that the State must prove "that the accused induced the contact or allowed the contact to occur for a prolonged period of time." Br. of Appellant at 27. He reasons that "uncontroverted evidence" showed that the incident lasted less than six seconds and that he "was disgusted at the idea of any sexual contact with children." Br. of Appellant at 31, 33. And he asserts that evidence he presented established that he did not have an erection, did not intentionally expose himself, and could not have stopped the children from touching him because he would have dropped EB on her head. We disagree.

As a preliminary matter, the State has asked us to strike or disregard evidence outside the record that Abbitt submitted with his opening brief, including several medical articles. Our record on review is limited to the report of proceedings, clerk's papers, and exhibits from the trial. RAP 9.1(a). We decline to consider the evidence Abbitt submitted that is outside this record.

To convict Abbitt of first degree child molestation, the jury had to find beyond a reasonable doubt that Abbitt had sexual contact with a child who was less than 12 years old. Former RCW 9A.44.083(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(13). Abbitt argues solely that the State failed to prove that the touching in the incident was for sexual gratification.

When addressing a claim of insufficient evidence, we consider whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *State v. Dreewes*, 192 Wn.2d 812, 821, 432 P.3d 795 (2019). We take the State's evidence as true, and we consider circumstantial evidence equally reliable as direct evidence. *State v. Scanlan*, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). "Further, we must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

EB testified that Abbitt removed his jeans and that she and MB sat on the lower bunk bed and touched his erect penis, which resulted in EB getting something wet and sticky on her hands. In contrast, Abbitt testified that he had been wearing a towel that EB pulled off while roughhousing with him, that the girls poked at and pulled on his penis before KB walked into the room, and that ejaculate may have leaked out of his penis because of a preexisting condition he claimed he had discussed with KB.

EB testified she did not remember KB walking in on the incident and KB testified that she had never found Abbitt with his penis exposed in front of the girls. KB also had no memory of Abbitt withholding ejaculation, having any problems with ejaculation, or mentioning leaking

ejaculate at any point during their nine-year relationship. Taking the State's evidence as true and drawing all inferences in the light most favorable to the State, a reasonable jury could have found that Abbitt had EB and MB, both undisputedly under the age of 12, touch his penis for Abbitt's sexual gratification. *See Dreewes*, 192 Wn.2d at 821. Thus, we hold that the State provided sufficient evidence to convict Abbitt of both counts of first degree child molestation.

IV. SUPERVISION FEES

Abbitt argues, and the State concedes, that community custody supervision fees are discretionary fees that may be waived by the trial court. While Abbitt's case was pending on appeal, the legislature removed the authorization for trial courts to impose community custody supervision fees. *See* LAWS OF 2022, ch. 29, § 8. The statutory amendment eliminating community custody supervision fees became effective in 2022. The statutory amendment applies because Abbitt's case was still pending on review when the amendment became effective. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018). We accept the State's concession and remand for the trial court to strike the supervision fees.

CONCLUSION

We affirm Abbitt's convictions, but we remand for the trial court to strike the supervision fees from Abbitt's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Veljačić, J.

Che, 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. 56543-9-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Erica Ruyf, DPA
[erica.eggertsen@piercecountywa.gov]
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal Date: July 27, 2023
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 27, 2023 - 4:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56543-9
Appellate Court Case Title:	State of Washington, Respondent v. Nathan Lowell Abbitt, Appellant
Superior Court Case Number:	20-1-02413-1

The following documents have been uploaded:

- 565439_Petition_for_Review_20230727161400D2434936_9555.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.072723-01.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- erica.eggertsen@piercecountywa.gov
- pcpatcecf@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Devon Carroll Knowles - Email: devon@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230727161400D2434936