CAUSE NO.92637-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON.
RESPONDENT

VS.

DONNALD McElfish
APPEALLANT

PETITION FOR REVIEW FROM THE COURT OF APPEALS DIVISION II AND
THE SUPRIOR COURT IN AND FOR THE COUNTY OF COWLITZ

DONNALD McELFISH
APPELLANT – IN PROPRIA PERSONAM

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A. IDENTITY OF PETITIONER

Donnald McElfish Pititioner by PRO-SE an inmate at the Coyote Corrections Center located at Connell Washington. Petitioner was convicted by a jurry of his peers. For the crimes of Second Degree Attempted Rape and First Degree Kidnaping, and Assault with sexual Motivation. These charges and conviction are from the Cowlitz County Kelso Washington. Petitioner asks this court to accept review of the Court of Appeals Division II decision.

B. COURT OF APPEALS DECISION

Petitioner seek's review of the Court of Appeals Division II Decision. Affirming the Convictions of First Degree Kidnaping, Second Degree Rape and Assault with Sexual Motivation. The Decision is unpublished and was filed on October 20,2015

C. ISSUES PRESENTED FOR REVIEW

1. SUFFICIENCY OF EVIDENCE

The State did not meet its burden of proof that Mr. McElfish had kidnaped Cheryl Maranda or that he had tried to touch her breast, and vagina or that he tried to rape her. when in fact there were no corroborating testimony or factual evidence.

2. PROSECUTORAL MISCONDUCT

(A). Defendant was denied a fair trial when the prosecution kept inferring

to the jurry that by Mr. McElfish not testifying he was hiding something.

(B). MISSTATING THE STATES BURDEN OF PROOF

The prosecution threw out the trial would continue to Misstate facts when there were no proof if evidence being present.

(C). CUMULATIVE PROSECUTION MISCONDUCT

The prosecution threw it's continuous barrage to the jurry about evidence being alleged erased from items. "Such as DNA from a chair" When the expert testified that Cheryl, McElfish, Jensons DNA was not present. But as a whole cumulative effect threw out the trial did PREJUDICED the defendant.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant was denied a constitutional right to be represented by counsel. Here the counsel refused to object to issues, rulings and from calling witness that would have changed the out come of the trial, and present evidence.

4. VOUCHING FOR WITNESSES

Here the Court of Appeals rejected the argument that the prosecution was vouching for the credibility of witnesses weather she was informing the jurry that the victim is telling the truth or that she would have no reason to lie. But it's also vouching for a witness when the prosecution refers that a witness is lying with out evidence if impeachment, or referring that there testimony is not credible or reliable.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

NO.1 When the Court of Appeals referred to the testimony of Cheryl Maranda as if it was factual and corroborated by evidence with out any factual evidence or direct testimony to support what transpired between her and McElfish. After Jennson and piglet had left. This became a case of She said!

NO.2 The Court of Appeals ruling has clearly based it's decision with out reviewing the whole record. The court ignored the fact that by the defendant not testifying it allowed the prosecution to infer to the jurry that he has something to hide. Which allowed the prosecution to misstate to the jurry about evidence and then alleging to the jurry that there were an attempted to cover up evidence. The prosecution continued to misstate the evidence when their experts testified there was no DNA that matched witness or that was found. The Appellate Court did not address or acknowledge the cumulative effect in opening and closing statements about evidence and referring to the jurry that clothing was hid.

NO.3 Defendant was denied a fair trial when his counsel refused to object to the prosecutions motion about Maranda's past. Counsel refused to call witness that would have allowed the jurry to have not convict the defendant. Defendant was highly prejudiced by the actions of his counsel.

NO.4 The Court O Appeal's sited to State v. Thorgerson. To say ineffect that when a prosecution vouches for a witness that it sometimes happens and that this is not a error. When a prosecution vouches for a witness as was done in this case. This allows the jurry to believe that the witness was more than credible. Even when the prosecution vouched for the Defendant

by referring to the jurry that he has not testified because he has something to hid "This is only a hypothetical statement" but to allow the prosecution to have a wide latitude as the court of appeals state this is dangerous because as it happened in this case the prosecution was allowed to say anything with out evidence to support her statements.

STATEMENT OF THE CASE

Mr. Donald McElfish at the age of 64 was convicted by a jurry trial in Cowlitz County for the crimes of Attempted Second Degree Rape, First Degree Kidnapping and Second Degree Assault with Sexeal Motivation.

The trial court concluded the second degree assualt conviction constituted the same criminal conduct as both the kidnapping and attemted the same criminal conduct as both the kidnapping and attempted rape convictions, and therefore did not impose a sentence for that conviction or count it towards McElfish's offender score the other two convictions.

The court imposed a 96-month for the kidnapping and a minimum term of 100-months for the attempted rape. The court also imposed $4,935.69 in legal financial obligations, including $816.69 for "court appointed attorney" fees. Although there was no discussion of McElfish financial circumstances, "finding" 2.5 of the judgment and sentence provides:

> **Ability to PayLegal Financial Obligations.** The court has considered the total amount owing, the defendent's past, present and furture ability to pay legal financial obligation, including the defendent's financial resources and the likelihood that the defendent's status will change. The court finds that the defendent has the ability or likely future ability to pay the legal financial obligations imposed herein. **RCW9.94A.753**

The court of Appeals Division II delivered their decision on October 20.2015. The court reversed the trial court's imposition of discretionary **LFOs** and remand for the court to conduct an assessment of McElfish's present and future ability to pay discretionary LFOs and thereby determine whether the imposition of such **LFOs** is appropriate under **RCW 10.01.160(3).**

McElfish by **PRO-SE** filed a motion for re-consideration on November 9.2015 to the Court of Appeals, Asking in his motion for the court to stay their final judgment in the Appeal until the Appellate Court makes their ruling on the Personal Restraint Petition that was filed by the Superior Court of Cowlitz County pertinent to newly discovered evidence RE-Canted Testimony by Cheryl Meranda. This PRP petition was forward to the court of appeals after the petitioner had filed his SAG to the Court of Appeals. Prier to the courts ruling the petitioner asked the Courts Magistrate to consolidate the two. The courts Magistrate denied the request.
The Court heard and denied review on December 10,2015.

ARGUMENT

1. SUFFICIENCY OF EVIDENCE

The state did fail to prove that Mr. McElfish participated in the charge of kidnaping when Cheryl Maranda on direct stated that Brent Jennson and another man walked her to the garage March 12 at page 16 line 12 of the transcript, at page 18 Cheryl identifies the other man as Piglet. She continues to

state at page 19 line 23. She describes how Brant opens the door and starts yelling at Donnie and continues on at page 20. How Donnie is confused about what was going on. At page 23 line 4 Cheryl testifies how Brant hits her, at page 24 line 13 Brant tells Cheryl to get naked. At page 25 line 3 Cheryl says she gotten naked and sat in the chair were she was duck-taped. Here also is were Cheryl testifies to Brant having a gun and a knife. At this point Cheryl's testimony is about how Brant and Piglet had kidnaped her and made her strip. At page 26 line 22 Cheryl makes reference that these guys were probably scared them selves (believed to be referring to Donnie and Piglet) because Brant was making threatening gestures with the gun and verbally with the knife after cutting him self. At this point of time the State has not established convincing evidence of kidnaping or attempted rape threw corroborating testimony or evidence threw D.N.A. that Mr. McElfish attempted any of these charges. At page 35 line 6 Cheryl start's testifying as to what transpired after Brant and Piglet left. In order to convict a person of any crime Defined in this Chapter **RCW 9A.44.020** it shall be necessary that the testimony of the alleged victim be corroborated. The Court sites to **State v. Rose,** 175 Wn.2d 10,14. 282 P.3d 1087(2012). In a sufficiency of the evidence claim. Here Sufficiency of evidence the court would have you believe that the preponderance of lack of evidence is in support of ones testimony when there is no testimony to corroborate testimony of acts committed, or evidence in support of alleged actions

upon defendant. At page 35 threw 45 Cheryl describes to the jurry her version as to what transpired between her and Donnie. Here as in **STATE V. ROSE**. 175 Wn.2d 10, 14. 282 P.3d 1087 (2012). This Court ruled that the lack of evidence does not support the argument the state presented in it's argument that having a stolen credit card or it's usage by deffendent. Here in **STATE V. MILLER** 179 Wn.App.97, 105, 316 P.3d 1143 (2014) Circumstantial and direct evidence are equally reliable. ID. Page 38 line 3. here Cheryl start's testifying as to Donnie touching her boob and at page 39 line 1. Cheryl well, God, well you know, that area. Here after the prosecutor states at line 6. Q is it your vagina, and at line 8 from this point on the prosecution is leading the witness in to saying what the prosecutions wants the victim to say. With **State v. Miller** this case referred to circumstantial evidence. Which did have a showing of corroborated testimony and evidence. Miller does not apply to this case because not only are there the lack of physical evidence But there are no corroborating eye witness testimony Evidence is something tangible as in DNA testing. But here there is a lack of tangible evidence because there was no rape. "Where if there was" Evidence could be taken in support of the claim. Here there is no evidence that could or should be evidence in a light most favorable to the State, a rational trier of fact could find some one guilty beyond a reasonable dought! By the defendant not testifying at trial does not substantiate the claim that Cheryl Maranda states at pages 38 threw 45. Whether

a Defendant or a Witness we have a Constitutionally Right to stand on the 5th Amendment. **State v. Pinson** 333 P.3d 528. (sep. 3,2014).

2. PROSECUTORIAL MISCONDUCT

A. Commenting on failure to testify

It is not just the statement alone. But the accumalative effect which the prosecution makes to the jurry. On March 14,2013 (RP) page 57 line 2. Now, you cannot hold the defendant not testifying against him. Don't do that. It's the state's job to prove the case. But my point is, the evidence that you have is that the clothing was not out in the open for the police to see, But the accumative effect or refferring guilt to defendant. At line 9-15 page 57 where she is reffering to Cheryl's clothing and then the ongoing statement about (DNA) at line 16. But at line 18 if we had the chair that night reffering that quit possable (DNA) evidence would have been pressent. But then the prosecution goes in to the argument that the chair was clean. Washington Criminal Pratice in Courts limited Juradiction § 17.06 Misconduct during closing argument. Makes it clear its a violation for the prosecution to make any refference as to Guilt to a jurry when a party takes the 5th Amendment. **STATE V. BARRY** 183 Wn2d 297, 306, 352 p.3d 161 (2015) Here the court held that it bars the prosecution from commenting on a defendant's failure to testify to infer Guilt, **STATE V COLES** 28 Wn. App 563, 573, 625 P.2d 713 (1981). A defendant in a criminal case has a

constitutional right not to testify at trial, and thus not be subjected to cross-examination. See **U.S. Constitution Ammendment 5**, and **Washington's Constitution Artical 1§9.** Drawing attention to the defendant's failure to testify is a constitutional error. **STATE V. SARGENT**, 40 Wn, App 340, 347, 698 P.2d 590 (1985).

B. MISSTATING THE STATES BURDON OF PROOF

During opening statements, the prosecutor explained that a deoxyribonucleic acid (DNA) expert would tell the jurry that her tests on the chair from McElfish room were enconclusive because she was able to Identify at least 5 contributors. But that she could not identify as to who the contributors were. Heather Piles Direct March13 (RP)page 104 and states that the crime lab experts deem the profiles are inconclusive. Duringthe prosecutions opening statement at page 13-14 March 13 (RP) line 24-6 here the prosecution makes thestatement thsat the 5 contributors are jumbled up and that it's like baking a cake. You can't just pull the ingreadents out. **STATE V. GREGORY** 158 Wn.2d 759, 859-60. 147 P.2d 1201 (2006) Court of Appeals found that the prosecutor mistated that the burden of proof by compairing the beyound a reasonable dought standard to figuring out a jizzsaw puzzle and crossing the street. **STATE V. Johnson** 158 Wn.App 677, 684-85, 234 P.3d 936 (2010) (fill in the blank and a partially completed puzzle). Prosecutors arguments disscussing the reasonable standard in the contex of making an affermative decision baced on partly completed

puzzle tribulized the States Burden, focussed on the degree of certainty the jurry needed to act, and then the prosecution continues on with stating. So they send the chair on to Susan Wilson to look for tape residue. You're going to hear from Ms. Wilson that chair was clean, very very clean. When in fact at (RP) March 13,2014 page 129 line 5 Wilson testify's that the chair was fairly clean. Again mistating the evidence as the prosecution continues on Qeuestioning about tape resadue and the lack of. At page 107 March 13. line 4 the prosecution questions Piles the (DNA) expert about cleaners distroying questioned samples. Again reffering to the jurry by the line of questioning of witness that the chair had been cleaned. When in fact the chair was not cleaned. The evidence is clear that there were tape resadue and that the (DNA) expert was able to obtain (DNA) samples evon though they could not match any one particulare person. The fact remains that there were (5) contributors. Further more the Sates Witness Deputy Hamer had testified that the chair look to be in the same condiction as he had looked at it ont he night of the incident. As the prosecution inferres to the jurry that this chair had been cleaned it is beyound a reasonable doubt that the prosecution intentionly keep referring that evidence had been tampered with by questioning witness about the cleanlyness of the chair and cleaners being used. This line of questioning is and was very prejudicial to defendent. The prosecution has led the jurry to believe that evidence was missing because in Cheryl Maranda's testomony is that there should of been

Blood from Jenson cuting him self and her (D N A) on the duck tape resadue. When in fact there were none found.

C. CUMULATIVE PROSECUTORAL MISCONDUCT

During the defence closing arguement, Mar. 14 Page 69 Line 21 Jason hammer said he looked at it very closely ahd it looked the same to him now after it had been senty to the lab and looked at and they tried to find stuff on it. They didn't find any tape or remnants of any tape. They didn't find any D.N.A. on it, they didn't find anything on it.

When it's offered to you for evidence, you cannot look at it and say, well there is a good reason they didn't find any so we now have to figure that it must have happened because it's not there. "That's Twisted". It didn't show any connection to anything. Did not show any connection to Cheryl M. Did not Did not show that she had satthere with no clothes on. Nor did it show that she was taped to the chair. Period. I think I even asked the last person from the lab. So the sum total of it was nothing, right? She said "Yeah". They didn't have anything to contribute olther than the fact that they had looked at it, but they couldn't find what they were looking for. You have to ask yourself, did it really happen?
Mar 14 Page 86 line 23:States re-buttal arguement. He talks about the crime labn. He says the crime lab didn't find D.N.A.. on that chair. That's not true, thazt is very untrue, against what M.S. Piles testifies to. Through Page 88 Line 2.

State attempts to infer to jury that inconclusive evidence

has probative value. Jury should conclude from inconclusive evidence that events portrayed ocurred.

In **State v Glasmann,** 175 Wn. 2d 696,707; 286 P. 3d 673 (2012). Here as in Glasmann "[T]he cumulative effect of repetative prejudicial prosecutoral misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect". Id.

Mr. McElfish must show prosecutoral misconduct caused prejludice. To show prejudice, the petyitioner must show a siubstantial likelihood that the prosecutors statements affected the jury's verdict. **State v Emery** 174 ;Wn. 2d 741; 278 P. 3d 653 (2012).

Citing **State v Anderson,** 153 Wn. App. 417,429; 220 P. 3d 1273 (2009)"Counsel did not object, but even if he did a jury instruction could not have cured lthe errors. The arore mentioned statement to the McElfish's jiury wew improper. (R.P.) Mar 14 Page 86 (states rebuttal arguement) Line 23 through Page 88 Line 2. The statements were highly prejudical to the defendant to have been guarenteed a fair tial.

3. INEFFECTIVE ASSISTANCE OF COUNSEL

Citing **STRICKLAND**, See U.S. 688, 80L Ed 2d 674; 104 S. Ct. 2052 (1984).

Two part test of effective assistance of defense counsel held (1) reasonably effective assistance and (2) reasonable probability of different result with effective assistance.

Marshall J. dissenting,stated that the announced standard for effictive representation is so malleable that in practice it will either have no grip at all or will yeild excessive variation in a manner in which the **Sixth Amendment** is interpretated and applied by different courts,and that the defendant in the present case was not effictively represented at and before the sentence hearing. Id.

March 12 page 15 line 12 -page 18 line 16 " Maranda Direct"

Ronald Heaslley was implicated at trial as a matlerial eye witness. Ronald Heasley's lack of testimony prejudiced my case at trial. Defense counsels lack of pursuit under **LORD v LAMBERT**, 528 U.S. 1198,146 L Ed 2d 118,2000 U.S. Lexis 1730,120 S. Ct. 1262 (2000).

Competant attorney would not have failed to put the witnesses on the stand who would have cleared petitioner of murder. Counsels failure to do so constituted deficient performance that was prejudicial to petitioners defense.

Ronald Heasley's presence at scene of alleged crime, puts him at house prior to and during Ms. Miranda's abduction from residence, her delivery to shop, and subsequent behavior by Brendt Jensen. Mr. Heasley's presence at scene of alleged crime would enable him to testify as to Donald McElfish's involvement on October 5 2013. Defense counsels lack of pursuit, lack of investigation prejudiced Donald McElfish.

Citing **LORD**: A lawyer who fails to adequately to investigate, and to introduce into evidence, information that raises sufficient doubt at to that question undermine confidence

in the verdict, renders deficient performance.

As in **STRICKLAND** my defense attorney, had at his fingertips information that could have undermined the prosecutions case, yet chose not to develop this evidence and use it at trial. Their performance therefore fell "outside the wide range of proffessionally competant assistance" that **STRICKLAND** requires. 466 U.S. at 6901, and we conclude that "there is a reasonable probability that, that for counsel unproffessional errors the result of the proceeding would have been different".

See Appellate L.F.O. breif cause #46216-8-II Christopher H. Gibson: Nielsen, Broman and Koch P.L.L.C. Arguement 4 Page 20 thru Page 22.

This case parrallels **Stricklands** Defense Counsels Performance, was deficient at and before the sentence hearing.

4. VOUCHING FOR WITNESSES

It is misconduct for a prosecutor to personally vouch for the credibility of a witness. **State v Thorgerson**,172 Wn. 2d 438,462;258 P.3d(2011).

In closing arguement, the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.

R.P.(March 14 2013) at page 58 line 9"Bill Hog has a traumatic brain injiury". At no time during Bill Hogg's testimony was he impeached, nor was there testimony of impeachment or evidence presented to show where Bill Hogg had previously

lied on a witness stand or a conviction of perjury. R.P. (march 13 2014) Page 179 Line 22 through Page 191 Line 4. There is not revelancy or mention of how Bill Hogg's injury has effected his testimony, let alone why he is unbeleivable.

At no time in Bill Hogg's testimony is there admited impairment as to Bill Hogg's veracity. Bill Hogg was a defense witness.

Under **Thorgerson** the Court's quotation of **Thorgerson** is proper. However, as the Court's cites to the prosecutor, indicates that evidence not presented at trial supports the witness. But, here the prosecution has not presented any testimony or factual evidence that Mr. Hogg was ever charged for giving false testimony nor was he impeached on the witness stand by the prosecutor.

Such improper arguement, creates a likelihood that such misconduct affected the jury verdict.

(RP) (march 14 2013), Page 191 Line 13 through Page 200 Line 11.

The prosecutor makes the same arguement, that she used in Hogg. The prosecutor eludes to Ms. Carlin being my lovergives her bias! She does not impeach or attempt to impeach Ms. Carlin. She does not attack her credibility on witness stand. The prosecutor does not submit testimony or evidence of fact that Ms. Carlin lhas ever lied, given false testimony, or perjured herself at any time.

Such improper arguements, create a likelihood that such misconduct affected the jury verdict.

(RP) (march 14 2013) Page 86 Line 23, States Rebuttal.

He (defense counsel) talks about the crime lab, didn't find any D.N.A. on that chair. That's not true. That is very untrue and against what Ms. Piles has; testified to.

The prosecutor infers to jury that defense counsel has lied about not finding D.N.A. evidence on chair, when testimony of Ms. Piles stated there was no evidence of the D.N.A. of Cheriyl Miranda, Don McElfish, or Brandt Jensen found on chair. It is highly prejudicial to the defendants right to a fair trial, when when prosecution intentially and deliberately interjects to jury that witnesses for defense and defense counsel, to include prosecution expert D.N.A. witnesses testimony are unreliable.

CONCLUSION

Pititioner ask's that this Court to review the APPELLAT COURT DIVISION II decision on the issues pressented. Because petitioner is coming to this court by **PRO-SE** he respectfully ask's that the court will look at the whole record and make it's ruling not on just one issue alone. But to review all the issues as one. When Appellant had filed to the court of appeals his PRO-SE Brief, Cheryl Maranda had made a noterized Decleraction recanting her testemony. She had sent a copy of this decleraction to the Superior Court Judge Haan along with one to the Prosecutor and to Mcelfish's attorny and one to Mr. McElfish. Upon recieving this decleraction petitioner

filed a 7.8 motion to the Superior court asking that it be consolidated with his direct appeal. The Superior Court Judge Haan then filed it to the Appellet Court as untimely. The newly appointed prosecutor filed a motion to the court of appeals to remand it back to the seperior court for a fact finding hearing. The court had denied the cosolidation the withhis Direct appeal which was denied and the convictions were upheld. In effect silentcing the deffendent. Petitioner would point out that his appointed counsel once more had neglected to repersent defendent accordingly Petitioner has clearly showen inafectivnes of his counsel and ask's that this court remands this case back for a new trial or that the court reversa and orders that the case be dismissed because there is no factual evidence that Mr. McElfish had attemted to rape or touch Cheryl in any sexual way or manner. That he was not a part of any kidnapping scheme as the prosecution would have any one to believe.

Respectfully submitted,

Donald McElfish

PRO-SE DONNALD McELFISH

DECLARATION OF MAILING

GR 3.1

I, Donald McEachern on the below date, placed in the U.S. Mail, postage prepaid, 2 envelope(s) addressed to the below listed individual(s):

Courts of Appeals Div II
Att: David Ponzoza
950 Broadway Suite 300
Tacoma WA 98402

Cowlitz County Prosecutor
Att: Aila Walker
312 S.W. 1st Ave.
Kelso WA.
98626

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

1. Discretionary Review of decision terminating review
2. _____
3. _____
4. _____
5. _____
6. _____

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 10th day of January, 2016, at Connell WA.

Signature Donald McEachern

Filed
Washington State
Court of Appeals
Division Two

October 20, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD HOWARD McELFISH, Appellant.	No. 46216-8-II UNPUBLISHED OPINION

MAXA, J. – Donald McElfish appeals the trial court's imposition of discretionary legal financial obligations (LFOs) without assessing his ability to pay as required under RCW 10.01.160(3). We hold that the trial court erred in imposing LFOs without considering McElfish's ability to pay. In a statement of additional grounds (SAG), McElfish challenges his convictions of attempted second degree rape, first degree kidnapping, and second degree assault with sexual motivation on various grounds.[1] We hold that none of his SAG assertions has merit.

Accordingly, we affirm McElfish's convictions. But we reverse the trial court's imposition of discretionary LFOs and remand for the trial court to conduct an assessment of

[1] His SAG challenges his convictions on six grounds: (1) insufficient evidence of kidnapping and attempted rape, (2) a public trial right violation, (3) an improper accomplice liability instruction, (4) failure to give a unanimity jury instruction, (5) prosecutorial misconduct, and (6) ineffective assistance of counsel.

McElfish's present and future ability to pay discretionary LFOs and thereby determine whether the imposition of such LFOs is appropriate under RCW 10.01.160(3).

FACTS

Brandt Jensen accused CM of stealing a bag that belonged to him. With McElfish and another man present, Jensen displayed a gun and a knife and forced CM to take her clothes off. He told her that all three men were going to have sex with her. Jensen and the other man then left CM with McElfish. McElfish then grabbed CM's breast, tried to touch her vagina, and blocked her from leaving. She pleaded with him to leave her alone, but he persisted. CM finally was able to escape.

The State charged McElfish with attempted first degree rape, first degree kidnapping, second degree assault with sexual motivation, and indecent liberties. A jury found him guilty of attempted second degree rape, first degree kidnapping, and second degree assault with sexual motivation, but not guilty of indecent liberties. The trial court sentenced McElfish to 100 months to life in prison.

The trial court imposed LFOs of $4,935.69, including a discretionary LFO of $816.69 for court-appointed attorney fees. The judgment and sentence includes a boilerplate finding that the sentencing court considered McElfish's financial circumstances and present and future ability to pay before imposing any LFOs. However, the record shows that the trial court did not actually assess McElfish's ability to pay. In fact, the record shows that McElfish was 64 years old, was indigent, and suffered from serious health problems. Defense counsel did not object to the trial court imposing LFOs without making this assessment.

McElfish appeals his convictions and sentence.

ANALYSIS

A. LEGAL FINANCIAL OBLIGATIONS

McElfish argues that the trial court erred in imposing discretionary LFOs without assessing his present and future ability to pay as required under RCW 10.01.160(3). We agree.

1. No Objection in the Trial Court

McElfish failed to object when the trial court imposed discretionary LFOs without assessing his ability to pay. Under RAP 2.5(a), we ordinarily do not consider LFO challenges raised for the first time on appeal. *See State v. Lyle*, ___ Wn. App. ___, 355 P.3d 327, 329 (2015). However, under special circumstances we will consider an LFO challenge on appeal despite the defendant's failure to object at sentencing. *See State v. Bertrand*, 165 Wn. App. 393, 398, 403-04, 267 P.3d 511 (2011) (considering an unpreserved LFO challenge when the record showed that the defendant was disabled and unable to work and she was required to start paying within 60 days).

Here, the record shows that McElfish was 64 years old, indigent, and suffered serious health problems. In addition, he faced a sentence of 100 months to life. Given these facts, we exercise our discretion to consider McElfish's challenge to his discretionary LFOs.

2. Trial Court's Failure to Assess Ability to Pay

RCW 10.01.160(3) provides that the trial court (1) "shall not order a defendant to pay costs unless the defendant is or will be able to pay them," and (2) shall take account of the defendant's financial resources and the nature of the burden that payment of costs will impose in determining the amount and method of payment of costs. "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the

particular facts of the defendant's case." *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015).

The Supreme Court in *Blazina* made it clear that the trial court must expressly assess, on the record, a defendant's ability to pay LFOs.

> Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838.

Here, the record shows that the trial court failed to assess McElfish's current or future ability to pay. Under *Blazina*, inclusion of boilerplate language in the judgment and sentence that the trial court made such an assessment is not sufficient. *Id.* Accordingly, we hold that the trial court erred in imposing discretionary LFOs in violation of RCW 10.01.160(3).

B. SAG ISSUES

1. Sufficiency of the Evidence

McElfish claims that the State failed to prove the requisite elements of kidnapping and attempted rape because once Jensen and the other man left his room, he let CM go free. We disagree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all

reasonable inferences drawn from that evidence. *Id.* Credibility determinations are made by the trier of fact and are not subject to review. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). Circumstantial and direct evidence are equally reliable. *Id.*

CM testified that after Jensen left, McElfish grabbed her breast, tried to touch her vagina, and blocked her from the door. She pleaded with him to leave her alone, but he persisted. Only after he opened the door to yell for Jensen to help him was she able to escape out a different door. This evidence supports the elements of first degree kidnapping in that McElfish intentionally held CM against her will in an attempt to rape her. The evidence also supports the elements of attempted second degree rape in that McElfish intentionally took a substantial step toward raping CM.

Taking this evidence in a light most favorable to the State, a rational trier of fact could have found McElfish guilty beyond a reasonable doubt. Therefore, we hold that sufficient evidence supported McElfish's convictions for kidnapping and attempted rape.

2. Public Trial Right

McElfish claims that the trial court violated his public trial rights by not conducting a *Bone-Club*[2] analysis before allowing the prosecutor to show a PowerPoint presentation to the jury. But the record shows that the prosecutor used a PowerPoint presentation during closing argument, in open court, and there was no closure of his trial. A *Bone-Club* analysis is necessary only if there is a courtroom closure. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). We hold that the trial court did not violate McElfish's public trial right.

[2] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

3. Accomplice Liability Instruction

McElfish claims that the trial court gave a faulty accomplice liability instruction. We disagree.

The trial court gave an instruction based on WPIC 10.51. 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 10.51, at 217 (3d ed. 2008). We approved an identical instruction in *State v. O'Neal*, 126 Wn. App. 395, 418-19, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007). Nevertheless, McElfish seems to argue that because his role as a principal to the kidnapping and rape was vigorously controverted, the trial court erred in instructing the jury that he could be found guilty as either a principal or an accomplice.

The evidence showed that Jensen instigated the assault, kidnapping, and attempted rape of CM. But the evidence also showed that when Jensen left the room, McElfish attempted to rape CM and prevented her from leaving. This evidence was sufficient to support an accomplice liability instruction stating that McElfish could be both an accomplice and a principal. Therefore, we hold that the trial court did not err in giving an accomplice liability instruction.

4. Failure to Give Unanimity Instruction

McElfish claims that the trial court erred in not giving a unanimity instruction because the prosecution argued that he was either an accomplice or a principal with regard to the rape. We disagree.

A unanimity instruction is not required when the State argues that the defendant was either the principal or an accomplice. *State v. Walker*, 182 Wn.2d 463, 484, 341 P.3d 976, *cert. denied*, 135 S. Ct. 2844 (2015). The jury need not unanimously agree on the defendant's manner

of participation in the crime. *Id.* Accordingly, we hold that the trial court did not err when it did not give a unanimity instruction.

5. Prosecutorial Misconduct

a. Commenting on Failure to Testify

McElfish claims that the prosecutor committed misconduct by commenting on his right to not testify at trial. We disagree.

The Fifth Amendment bars the prosecution from commenting on a defendant's failure to testify to infer guilt. *State v. Barry*, 183 Wn.2d 297, 306, 352 P.3d 161 (2015). McElfish argues that the following was an improper argument: "Now, you cannot hold the defendant not testifying against him. Don't do that. It's the State's job to prove the case." Report of Proceedings (RP) (Mar. 14, 2012) at 57. But this was not a comment on the defendant's failure to testify to infer guilt. The prosecutor did not suggest that the jury should draw any inferences, and in fact told them that it could not draw such inferences. And the prosecutor's argument mirrored that in instruction 6, which stated, "The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way." Clerk's Papers at 22.

We hold that the prosecutor did not engage in misconduct by commenting on McElfish's failure to testify at trial.

b. Misstating the State's Burden of Proof

McElfish claims that the prosecuting attorney misstated the State's burden of proof by comparing that burden with baking a cake. We disagree.

Under certain circumstances, a prosecutor commits misconduct if he or she trivializes the State's burden of proof by comparing the burden to mundane tasks. *State v. Anderson*, 153 Wn. App. 417, 425, 431, 220 P.3d 1273 (2009) (elective surgery, babysitting, and changing lanes on the freeway); *see also State v. Johnson*, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010) (fill in the blank and a partially completed puzzle). But here, the prosecutor did not make such a comparison. During opening statements, the prosecutor explained that a deoxyribonucleic acid (DNA) expert would tell the jury that her tests on the chair from McElfish's room were inconclusive because she was able to identify at least five contributors. The prosecutor explained,

> [I]f there's more than three [contributors], they can't pull them apart. There's at least five. Okay. It's like when you make a cake and all the ingredients go on the cake, you can't pull out those ingredients later because they're all jumbled up. That's what you're going to hear.

RP (Mar. 12, 2012 Opening Statements) at 14. This comment had nothing to do with the State's burden of proof.

We hold that the prosecutor did not misstate the State's burden of proof.

c. Cumulative Prosecutorial Misconduct

McElfish claims that the cumulative effect of repetitive prejudicial misconduct denied him a fair trial, citing *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). He claims that the prosecutor acted unprofessionally and disrespectful toward him and the prosecutor's opening and closing statements denigrated defense counsel, misstated the burden of proof, and expressed the prosecutor's personal belief as to the defense witnesses' veracity. We disagree.

This case is not like *Glasmann* where the prosecutor made repeated assertions of the defendant's guilt, improperly modified exhibits, and made improper statements that the jury could only acquit if it believed the defendant. 175 Wn.2d at 710. McElfish cites no examples in the record where the prosecutor acted unprofessionally and showed disrespect to him as he is required to do under RAP 10.10(c). Similarly, he fails to cite any instances in the opening statement or closing argument where the prosecutor denigrated defense counsel. *Id.* And, as we held above, the prosecutor did not comment on McElfish's failure to testify or misstate the State's burden of proof.

We hold that McElfish's cumulative prosecutorial misconduct claim has no merit.

6. Ineffective Assistance of Counsel

McElfish claims that he was denied his right to effective assistance of counsel in multiple ways. We disagree that defense counsel was ineffective in any of the ways that McElfish claims.

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). To demonstrate deficient performance the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

a. Vouching For Witnesses

McElfish claims that his defense counsel should have objected when the prosecutor vouched for the credibility of the State's witnesses. We disagree.

It is misconduct for a prosecutor to personally vouch for the credibility of a witness. *State v. Thorgerson*, 172 Wn.2d 438, 462, 258 P.3d 43 (2011). Improper vouching generally occurs if the prosecutor expresses his or her personal belief about the veracity of a witness, or if the prosecutor indicates that evidence not presented at trial supports the witness's testimony. *Id.* However, prosecutors are afforded wide latitude during closing argument to argue from the evidence and reasonable inferences from the evidence. *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203 (2012).

Here, the prosecutor explained during closing argument why the jury should find the State's witnesses credible and the defense witnesses not credible. The prosecutor discussed the testimony presented and explained how that supported the State's position. At one point, the prosecutor argued that CM was not out to get anyone in trouble and there was "[n]o evidence or motive for her to lie." RP (Mar. 14, 2012) at 47. The prosecutor later argued that "[t]he defense witnesses are not reliable." RP (Mar. 14, 2012) at 58. She then explained why the jury should find them unreliable.

There was nothing objectionable about the prosecutor's arguments. The prosecutor did not express her personal beliefs about the veracity of any witnesses. Therefore, as a legitimate tactical decision, defense counsel could have decided to not object to avoid being overruled by the trial court in front of the jury. And had defense counsel objected, the trial court would have overruled the objection. McElfish's claim has no merit.

b. Admission of Prior Bad Acts

McElfish claims that defense counsel should have objected or proposed a limiting instruction before the trial court admitted evidence that he had a prior sodomy conviction. However, the record shows that the sodomy conviction was introduced at sentencing well after the jury had rendered its verdicts. Further, defense counsel objected to the State introducing it at all. McElfish's claim has no merit.

c. "Cloak of Righteousness"

McElfish claims that his attorney should have objected when the prosecutor stopped acting impartially and drew a "'cloak of righteousness'" around herself in closing. SAG at 3. But McElfish does not explain this claim with any reference to the record or provide any basis for his assertion. Without any such explanation informing us of the nature and occurrence of the alleged error, we do not consider it. RAP 10.10(c).

d. Comment on Defendant's Silence

McElfish claims that defense counsel should have objected when the prosecutor improperly commented on his decision not to testify. As we discussed above, the prosecutor did not improperly comment on McElfish's decision not to testify. Therefore, defense counsel's failure to object was not unreasonable or prejudicial. McElfish's claim has no merit.

e. Failure to Present Defense Witnesses

McElfish claims that defense counsel failed to interview or call witnesses on his behalf. But he does not support his claim by explaining who these witnesses are or what testimony they would have given. Therefore, we do not consider this claim. RAP 10.10(c).

f. Failure to Argue for Exceptional Sentence Downward

McElfish claims that defense counsel failed to argue for an exceptional sentence below the standard sentencing range. Former RCW 9.94A.535 (2011) provides that the trial court may impose a sentence outside the standard range if there are substantial and compelling factors justifying an exceptional sentence. But McElfish does not articulate what substantial and compelling factors would support an exceptional sentence downward under the facts of this case. Therefore, we do not consider this claim. RAP 10.10(c).

We affirm McElfish's convictions. However, we reverse the trial court's imposition of discretionary LFOs and remand for the trial court to conduct an assessment of McElfish's present and future ability to pay discretionary LFOs and thereby determine whether the imposition of such LFOs is appropriate under RCW 10.01.160(3).

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.

MAXA, J.

We concur:

BJORGEN, A.C.J.

LEE, J.