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Court of Appeals
Division III
State of Washington

No. 32254-8-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Chelan County Superior Court
Cause No. 13-1-00048-3

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JAMES CASEY AUSTIN,
Defendant/Appellant.

RESPONDENT'S MOTION ON THE MERITS

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1. Identity of Moving Party

State of Washington, by Edward N. Stevensen, Deputy Prosecuting Attorney for the County of Chelan.

2. Statement of Relief Sought

State of Washington, by counsel, makes this motion on the merits to affirm the action taken by the Superior Court for Chelan County as indicated herein.

3. Facts Relevant to Motion

In the fall of 2012, the defendant, James C. Austin, was 33 years old. RP 177, 10-23-13. Mr. Austin had a daughter, A.A., who was 9 years old, and a son, J.A., who was 11 years old. RP 177, 10-23-13; RP 219, 10-23-13.

The mother of the children is Donnitia McClellan. RP 176, 10-23-13. Ms. McClellan and Mr. Austin were never married. RP 177, 10-23-13. They lived together for over 11 years, during which time the children were born. RP 178, 10-23-13.

Ms. McClellan and Mr. Austin separated a few years prior to this case. RP 178, 10-23-13. After their separation, a court ordered that Mr. Austin have primary custody of the children. RP 180, 10-23-13.

Mr. Austin and his children lived with his mother in her home in Chelan, Washington. RP 184-87, 10-23-13. The home has 3 bedrooms. RP 185, 10-23-13. The grandmother's bedroom and the children's bedroom were upstairs, and the father's bedroom was downstairs in the basement. RP 264, 10-23-13.

The children slept in their father's bed most of the time. RP 264, 10-23-13. Mr. Austin's bed is just a twin size bed which was pushed up against the wall. RP 265, 10-23-13. J.A. slept on the bed against the wall with his head at the foot of the bed. RP 226, 10-23-13.

A.A. slept on her side, in the middle of the bed facing the wall. RP 270, 10-23-13. Mr. Austin slept on the outside of the bed next to A.A. with his head at the same end of the bed as A.A. RP 270, 10-23-13.

A.A. frequently slept in her underwear. RP 269, 10-23-13. Mr. Austin often wore boxer style shorts to bed. RP 229, 10-23-13.

On January 18, 2013, A.A. was staying at the home of her mother's parents for the weekend. RP 160-64, 10-23-13. On that date, A.A. told her 14-year-old cousin, Kiera Austin, that her father was touching her. RP 281-84, 10-23-13.

A.A.'s grandmother, Nancy Hart, awoke from sleeping at about 8:30 p.m. and heard the two girls talking and crying. RP 160-65, 10-23-13. Mrs. Hart asked what was going on, and, based on what she was told by the girls, she called A.A.'s mother, Donnitia McClellan. RP 167, 10-23-13. Mrs. Hart told her daughter that she needed to come to the house right away. RP 167, 10-23-13.

Ms. McClellan came over to her parents' home and asked A.A. what had happened. RP 193-94, 10-23-13. A.A. told her mother that, during her sleep, she had been waking up feeling her dad touching her on her panties with his penis. RP 194-95, 10-23-13. When she would realize what he was doing, she would move away from him, and then he would stop. RP 196, 10-23-13.

A.A. told her mother that she could remember waking up about 5 times with this happening. RP 196, 10-23-13. Ms. McClellan told A.A. that it would be okay and that she would deal with it. RP 196, 10-23-13.

The next day, Ms. McClellan called the Chelan County Sheriff's Office and reported the abuse. RP 197-98, 10-23-13. The responding deputy took oral and written statements from Ms. McClellan and her mother. RP 199, 10-23-13; RP 212-16, 10-23-13.

The deputy then called Detective Randy Grant and reported what he learned. RP 215-16, 10-23-13. Detective Grant set up an interview of A.A. at SAGE. RP 344-45, 10-23-13. SAGE is a resource center for children and adults who are victims of sexual and domestic abuse. RP 322, 10-23-13. SAGE has an interview room which allows for videotaped interviews of children. RP 322, 10-23-13.

Detective Grant requested the assistance of Jennifer Andrade, a CPS investigator who had experience in interviewing young female children about sexual abuse complaints. RP 314-19, 10-23-13; RP 344, 10-23-13. During the videotaped interview, A.A. said that she, her brother, and her father all slept in a small bed together. RP 329-30, 10-23-13. A.A. told the investigators that she had been waking up, feeling her father rubbing his penis against her bottom and vagina. RP 329-30, 10-23-13. She told

investigators that this happened 5 times in the last few months. RP 329-30, 10-23-13.

Later in the interview, A.A. told the investigators that, in 3 of the times, her father's penis went past her underwear and touched her vagina. RP 330, 10-23-13. A.A. the told investigators that her father had penetrated the inside of vagina, causing her pain. RP 330-31, 10-23-13.

After finishing the interview of A.A., Detective Grant contacted Mr. Austin and asked him to come in for an interview. RP 358-59, 10-23-13. The defendant voluntarily met Detective Grant at the sheriff's Chelan substation. RP 360, 10-23-13. The defendant gave his permission to be audio recorded. RP 362, 10-23-13.

The defendant was read his Miranda rights, and the defendant agreed to talk with Detective Grant. RP 365, 10-23-13. During the interview, Detective Grant told the defendant that, when they were in the spoon style sleeping arrangement, A.A. said that the defendant was getting an erection and touching her with it. RP 410, 10-24-13.

As the interview progressed, the defendant eventually agreed with some of the allegations made by A.A. RP 412,

10-24-13. The defendant admitted to pushing past his daughter's underwear, up against her vagina, twice. RP 413-14, 10-24-13. However, the defendant denied penetrating A.A.'s vagina. RP 414, 10-24-13.

On September 5, 2013, the court conducted pretrial evidentiary hearings. CP 205, CP 212, CP 216. One hearing concerned the State's motion to exclude a defense expert witness. CP 212.

The State sought to exclude the testimony of Dr. Deborah Connolly, Ph.D., L.L.B. CP 33. The court concluded that Dr. Connolly was qualified to testify about the three phases of the Reid technique and that her testimony would assist the jury in understanding it. CP 213-14. The court ruled that Dr. Connolly could testify about how the Reid technique was used in this case, by referring to specific examples or questions used during the interrogation. CP 214.

However, the court found that there was not a sufficient basis of reliability to permit Dr. Connolly to testify about the following: the frequency of false confessions, whether the Reid technique may affect the voluntariness of a confession, whether some of the detective's statements could be interpreted as

promises of leniency, whether a false confession occurred in this case, and whether the Reid technique had an effect on the defendant's confession. CP 214. The court concluded that Dr. Connolly's testimony in these areas would be highly speculative, and, therefore, was inadmissible at trial. CP 214.

On October 22, 2013, the Chelan County Superior Court began the trial of Mr. Austin. RP 111, 10-22-13. During the trial, the videotaped statement of A.A., taken by Detective Grant and Jennifer Andrade, was played to the jury. RP 428, 10-24-13; RP 436, 10-24-13. A.A. also testified, consistently with her videotaped statement. RP 252-303, 10-23-13.

The jury heard the audiotaped statement made by James Austin to Detective Grant. RP 415-27, 10-24-13. The jurors were also handed copies of the transcript of the audiotaped interview, to assist them in hearing what was being said on the tape. RP 415, 10-24-13.

The prosecutor started the recording, but paused the playback before the recording was finished. RP 416, 10-24-13. The prosecutor told the court that he looked ahead in the transcript and saw that the copies of the transcript, which were handed out to the jury, had some marks on them. RP 416, 10-24-13. The

prosecutor stated that he did not want to draw undue emphasis to those parts of the audio recording. RP 416, 10-24-13.

The prosecutor asked the court to permit him to collect the transcripts, to provide the jury with transcripts without any marks, and then to restart the recording. RP 416-17, 10-24-13. The court agreed. RP 417, 10-24-13.

Outside the presence of the jury, the prosecutor made a record of what had happened with the transcripts. RP 417-19, 10-24-13. The prosecutor informed the court that they were up to page 45 of the transcript, and the jury was following the audio recording, turning one page at a time following along. RP 418, 10-24-13. The prosecutor looked ahead in the transcript and saw some marks on the pages. RP 418, 10-24-13. Because it appeared to emphasize portions of the defendant's statement, the prosecutor stopped the recording before the jurors turned to that page. RP 418, 10-24-13.

Therefore, unless the jurors looked ahead in the transcript, they would not have seen the marks. RP 418, 10-24-13. If jurors had looked ahead in the transcript, they would have seen underlined portions of the transcript. RP 419, 10-24-13. Marks

were found on pages 46, 48, 53, 54, 55, 56, 57, and 59. RP 422, 10-24-13.

The court concluded that it was important to understand that what was inadvertently allowed to be viewed by the jury were portions of the transcript they were going to see anyway. RP 423, 10-24-13. There was not any portion of the transcript which was supposed to be deleted. RP 423, 10-24-13.

Mr. Austin moved for a mistrial. RP 421, 10-24-13. The court decided that a limiting instruction was more appropriate than a mistrial. RP 423, 10-24-13.

The court noted that there was only one transcript page where statements were underlined, and the rest of the marks in the transcripts were "just kind of placeholder marks, in the margin." RP 424, 10-24-13. The court found that the marks in the transcripts did not cause any unfair prejudice to the defendant, under the totality of the circumstances. RP 425, 10-24-13.

When the jury was brought back in, the court instructed the jurors they should disregard any marks they may have seen if they looked ahead in the transcript. RP 426, 10-24-13. The court also informed the jury that the transcripts were corrected. RP 426, 10-24-13. After the court's instructions, the jurors heard the

remainder of the audio tape of Mr. Austin's statement to Detective Grant. RP 427, 10-24-13.

After the State had concluded with its witnesses, Dr. Connolly testified for the defense. RP 506, 10-25-13. Dr. Connolly testified about the Reid technique of interrogation, going over the three phases, or three categories, of tactics of the Reid technique. RP 511-17, 10-25-13. Dr. Connolly then was permitted to testify about the techniques used in the interrogation of Mr. Austin, and Dr. Connolly pointed out several examples in the transcripts of the interrogation. RP 517-26, 10-25-13.

On cross examination, Dr. Connolly admitted that the interrogation of the defendant by Detective Grant was calm and conversational. RP 528, 10-25-13. Dr. Connolly admitted that she had never practiced criminal law, never had any direct experience with actual court cases, and did not have any experience as an attorney. RP 528-29, 10-25-13.

Dr. Connolly told the court that the Reid technique was developed in the late 60s, early 70s. RP 529, 10-25-13. She admitted that the Reid technique was permitted to be used in the United States. RP 529, 10-25-13.

After the testimony of Dr. Connolly, Mr. Austin testified. RP 530, 10-25-13. Mr. Austin told the court that he heard the audio of his statements to Detective Grant, that he heard the testimony of his daughter, and that he viewed the video of his daughter. RP 541-42, 10-25-13. However, Mr. Austin denied ever sexually abusing his daughter. RP 542, 10-25-13.

Mr. Austin admitted to waking up with an erection, pressed up against his daughter, on at least 2 occasions. RP 544, 10-25-13. Mr. Austin also admitted that, when he wore boxers to bed, sometimes his erection would come out of the flap in his boxers. RP 544, 10-25-13. He stated that when that happened, he'd push his daughter away and correct his position. RP 544, 10-25-13.

Mr. Austin denied pushing his penis inside his daughter's underwear. RP 548, 10-25-13. He also denied pressing his penis against his daughter's vagina. Id.

Mr. Austin testified that, during his recorded statement with Detective Grant, he did admit to the detective that he committed some of the things that A.A. was accusing him of doing. RP 545, 10-25-13. When asked why he admitted doing so, Mr. Austin said that the detective only gave him two options. RP 545, 10-25-13.

Mr. Austin said that he decided to choose the option of the guy who made a mistake, rather than the guy who would be treated as an evil, sexual predator. RP 546, 10-25-13.

On cross-examination, Mr. Austin admitted that he told the detective that he went past his daughter's underwear twice. RP 571, 10-25-13. He also admitted that he told Detective Grant that he pushed up against her vagina as well. Id.

Mr. Austin stated that, if he woke up and kept doing it for 5 minutes, he'd be aware of it. RP 571, 10-25-13. Mr. Austin also admitted that he told the detective that it felt good at the moment. RP 572, 10-25-13.

Mr. Austin said that he frequently went to bed wearing "slickies" which had a hole in the crotch. Id. When asked, "And so your penis would commonly come out?" Mr. Austin responded, "The rip was quite big, so, yes." RP 573, 10-25-13.

At the end of the trial, the jury convicted Mr. Austin of one count of child molestation in the first degree. RP 692, 10-28-13.

4. Grounds for Relief and Argument

A. Mr. Austin's Claim That the Trial Court's Exclusion of Professor Connolly's Opinion Testimony Violated His Constitutional Right to Present a Defense is Clearly Without Merit.

The trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both the Frye[1] standard and ER 702. Lakey v. Puget Sound Energy, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). To admit evidence under Frye, the trial court must find that the scientific theory and the techniques, experiments, or studies utilizing that theory are generally accepted in the relevant scientific community and are capable of producing reliable results. Id. To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the witness's testimony will assist the trier of fact. Id.

Unreliable testimony will not assist the trier of fact. Id. Both Frye and ER 702 work together in the regulation of expert testimony: Frye excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology

[1] Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

is reliable; and ER 702 excludes testimony where the expert does not adhere to the reliable methodology. Id.

In the present case, Mr. Austin sought to call Dr. Connolly at trial to testify with regard to suggestibility and false confessions. Mr. Austin assigned error to two of the court's findings of fact and conclusions of law regarding Dr. Connolly's proposed testimony.

After conducting the pretrial hearing on the State's motion to exclude Dr. Connolly's testimony, the court found that Dr. Connolly testified that, while there was a possibility that the Reid techniques may affect the voluntariness of a confession, there was not a probability that it would. CP 213. The court also found there was not enough basis in the science, or in Dr. Connolly's own knowledge, to opine about the frequency of false confessions or whether one occurred in this case. CP 213.

The court concluded there was an insufficient basis of reliability to permit Dr. Connolly to testify about the frequency of false confessions, to testify about whether the Reid technique may affect the voluntariness of a confession, to testify that some of the detective's statements could be interpreted as promises of leniency, to testify whether a false confession occurred in this case, and to testify about the effect the Reid technique had on the

defendant's confession. CP 214. However, the court did conclude that Dr. Connolly was qualified to testify about the three phases of the Reid technique, to assist the jury to understand what it consists of and what type of things are involved in it. CP 213-14.

The analysis begins by first noting that under the United States Constitution, a criminal defendant is entitled to present to a jury "competent, reliable evidence bearing on the credibility of a confession . . . ." Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986). In addition, some forms of psychological testimony on the credibility of a defendant's confession have been found to be admissible because they were considered to be reliable. *See, e.g.,* U.S. v. Shay, 57 F.3d 126 (1st Cir. 1995); Beagle v. State, 813 P.2d 699 (Alaska Court of Appeals 1991); and Commonwealth v. Banuchi, 335 Mass. 649 (1957). However, in each of those cases, the psychological testimony concerned scientifically recognized mental disorders relevant to each defendant's confession, rather than, as here, testimony about the effect, in general, of police interrogation techniques.

In the present case, Dr. Connolly admitted, during the CrR 3.5 hearing, that it's impossible to estimate the incidents of false confessions. RP 205, 9-5-13. She also admitted that not all

people respond the same way to interrogation and that the actual incidents of false confessions cannot be known at this time. RP 176, 9-5-13.

In addition, Dr. Connolly could not provide the court with any information regarding how her principles would apply to Mr. Austin in particular. RP 207, 9-5-13. Dr. Connolly did not talk to Mr. Austin. RP 169, 9-5-13. She did not review any mental health records of Mr. Austin. RP 169, 9-5-13. Dr. Connolly did read any medical reports about Mr. Austin. RP 169, 9-5-13.

There is nothing in the record that Dr. Connolly knew anything unusual about Mr. Austin. Dr. Connolly was merely able to testify about general principles.

Further, Dr. Connolly admitted that there is not even a statistically adequate sample on which to base her opinions. RP 176, 9-5-13. The samples she did have available to her were all based on tests of college students and did not involve real defendants in criminal cases. RP 182, 9-5-13.

Therefore, Dr. Connolly's proposed testimony would not meet the Frye standard. In addition, Dr. Connolly's proposed testimony is not admissible under ER 702.

Under ER 702, the admissibility of expert testimony depends on whether the witness qualifies as an expert, whether the opinion is based on an explanatory theory generally accepted in the scientific community, and whether the expert testimony would be helpful to the trier of fact. The first two factors concern themselves with the Frye standard as discussed above.

Dr. Connolly's proposed testimony about risk factors and confessions is not only highly speculative, it would also not provide the jury with any assistance in evaluating the unusual facts of this case. Dr. Connolly could not testify to anything different about Mr. Austin and could not testify how the alleged coercive factors affected him. In addition, the concepts to which she would testify about were within the general understanding of jurors.

In State v. Rafay, 168 Wn. App. 734, 787, 285 P.3d 83 (2012), the court reviewed several cases in which courts permitted expert testimony on the risk of false confessions. However, each of those cases involved a specific personality or mental attribute that rendered the defendant particularly vulnerable to coercive interrogation methods, including the following: mental deficiency, personality disorder, debilitation resulting from extended drinking,

severe language disorder, recognized mental disorder, and low IQ. Id.

In the present case, Dr. Connolly could not offer any insight into the specific traits of Mr. Austin which would make him more susceptible to false confessions. Further, Dr. Connolly would have been unable to testify about any meaningful correlation between specific interrogation methods and the incidence of false confessions, nor could she have provided any method for the trier of fact to analyze the effect of the general concepts, which she would have testified about, on the reliability of the defendant's confession. *See*, Id. at 789.

Like Rafay, such limitations rendered Dr. Connolly's proposed testimony potentially confusing and misleading to the jury. Id. Like Rafay, under the circumstances, Dr. Connolly could not have helped the jury. Dr. Connolly's proposed testimony would have invaded the province of the jury in making its decision, concerning how much weight to put on the defendant's confession.

It is not beyond the understanding of ordinary citizens to listen to the defendant's recorded confession, to assess the format in which the questions were presented, and to assess the answers provided. The jury decided the issue of the reliability of Mr.

Austin's confession by using its common knowledge, by taking into consideration the testimony of all the witnesses, and by taking into consideration all of the evidence.

The jury would not have been aided by Dr. Connolly's testimony, beyond what the court permitted. Therefore, the court's findings of fact and conclusions of law in this case were correct regarding the admissibility of Dr. Connolly's testimony.

The court properly found that Dr. Connolly's testimony in these hearings would be highly speculative, and, therefore, was inadmissible at trial. Therefore, Mr. Austin's assigned of error regarding Dr. Connolly's testimony is without merit.

B. Mr. Austin's Claim That Improper Argument During the State's Closing Denied Mr. Austin a Fair Trial is Clearly Without Merit.

For a defendant to prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant establishes that the prosecutor made improper statements, then

the court reviews whether those improper statements prejudiced the defendant under one of two different standards of review. State v. Emery, 174 Wn.2d 742, 760, 278 P.3d 653 (2012).

First, when a defendant preserves the issue by objecting at trial, the court evaluates whether there was a substantial likelihood that the improper comments prejudiced the defendant by affecting the jury's verdict. Id. However, if the defendant failed to object to the improper argument at trial, the court employs a different standard of review. Id. at 760-61.

Under this second, heightened standard, the defendant must show that the prosecutor's misconduct "was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." Id. This more stringent standard of review requires the defendant to show the following: 1) no curative instruction would have eliminated any prejudicial effect on the jury, and 2) the misconduct resulted in prejudice which had a substantial likelihood of affecting the jury's verdict. Id. at 761. In conducting this analysis, the court focuses more on whether the prejudice resulting from the prosecutor's misconduct could have been cured. Id. at 762.

The court reviews a prosecutor's purportedly improper remarks in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

In the present case, Mr. Austin first alleges that the deputy prosecutor improperly shifted the burden to Mr. Austin during argument. He refers to two examples.

In the first example, he quotes the prosecutor during closing as follows:

> He appears immature. I mean, he's 34 now. He appears to have at least average intelligence.
>
> He has presented no evidence, whatsoever, that he in particular—

RP 633, 10-28-13.

At this point, Mr. Austin objected. RP 634, 10-28-13. The prosecutor then withdrew the comment and apologized to the jury. RP 634, 10-28-13. Mr. Austin's attorney asked the court to strike

the comment, and the court instructed the jury to disregard the remark. RP. 634, 10-28-13.

It appears from the context of the statement that the prosecutor was about to make a statement that could be construed as burden shifting. However, the timely objection by Mr. Austin's attorney stopped the deputy prosecutor in mid statement. It is not clear from the context in which it was made what the prosecutor was going to say.

Assuming that the deputy prosecutor's statement was improper, clearly there is no likelihood, let alone a substantial likelihood, that the comment prejudiced the defendant by affecting the jury verdict. The prosecutor's statement was never finished and it's unknown what was going to be said. The defendant has not met his burden showing that there was a substantial likelihood that that remark prejudiced him.

In the second example of alleged burden shifting, Mr. Austin points to a remark made by the deputy prosecutor during rebuttal as follows:

> Then he goes in, and gives a statement to law enforcement, admitting most -- not all; he doesn't admit the penetration, but admits most of it.

> Okay. So what do we do?
>
> Well, if he didn't do it, then we have to have two things going here. He's got to prove two separate things.
>
> Well, strike that. He doesn't -- he doesn't have to prove anything.

RP 679, 10-28-13.

In this case, Mr. Austin failed to object to the deputy prosecutor's remarks. RP 679, 10-28-13. So, the analysis on these comments is different.

Because the defendant failed to object, the defendant must show that the prosecutor's remarks were so flagrant and ill-intentioned that an instruction couldn't have cured any resulting prejudice, and that such misconduct resulted in a substantial likelihood of affecting the jury verdict.

Here, again, the prosecutor started to say that the defendant had to prove two separate things, which would have been burden shifting, but caught himself. The deputy prosecutor emphasized that the defendant didn't have to prove anything. Likely, the defendant failed to object because any misconduct was cured. This failure to object to the alleged improper remark constitutes a

waiver of error. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Finally, Mr. Austin states that the deputy prosecutor committed misconduct by appealing to the passion and prejudice of the jury during closing argument. He refers to the following argument by the deputy prosecutor:

> He used the Reid technique. Oh, my God, the Reid technique.
>
> You know, you got Dr. Connolly coming here. She's a nice lady. Academic and, you know, ivory tower kind of person. Everything is perfect. She's not in the trenches, with the police.
>
> Do you think the police can't use any kind of techniques to try and get people to confess?
>
> Are we supposed to let 9-year-old girls be raped, and not try and get to the bottom of this?

RP 681, 10-28-13.

At this point, the defendant objected. RP 681, 10-28-13. The court sustained the objection and told the jury to disregard the last statement by the deputy prosecutor. RP 681, 10-28-13.

Mr. Austin argues that the above remarks by the deputy prosecutor were improper on two grounds. The first objection is to the comment about Professor Connolly. Mr. Austin argues that the

deputy prosecutor was trying to align the jury with the deputy prosecutor against Mr. Austin.

First, it's noted that Mr. Austin failed to object to the comments about Dr. Connolly. Therefore, Mr. Austin's failure to object constitutes a waiver of error, unless Mr. Austin can show that the remark was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice and unless Mr. Austin can show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict.

Second, a prosecutor has wide latitude in closing and may draw reasonable inferences from the evidence and express such inferences to the jury. "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of a case is subject to the same searching examination as the State's evidence." State v. Contreras, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

Putting the prosecutor's remarks in context of his argument to the jury, it is clear the prosecutor was arguing against Dr. Connolly's opinions regarding the use of the Reid technique and how it affected Mr. Austin's confession. The prosecutor was not

trying to malign Dr. Connolly and thereby malign the defendant with improper argument.

The second objection to the prosecutor's remarks by the defendant is in regard to the last sentence, which was objected to by Mr. Austin's attorney. Mr. Austin states in his brief that the remark had no basis in the evidence presented at trial, and therefore the prosecutor committed misconduct.

However, evidence was presented in this case that the victim was a 9–year-old girl at the time of the incidents. The victim testified that she was penetrated, which is rape. Clearly, there was a basis in the evidence to make the remarks.

The court instructed the jury to disregard the statement. It is presumed that a jury follows the court's instructions. State v. Hagger, 171 Wn.2d 151, 160, 248 P.3d 512 (2011).

Reviewing all of the prosecutor's remarks in the context of the entire argument, the issues in this case, the evidence addressed in the argument, and the instructions to the jury, it is clear that the defendant has failed to meet his burden to prove that misconduct by the prosecutor resulted in prejudice which had a substantial likelihood of affecting the jury verdict. Therefore, Mr.

Austin's claim that improper argument during prosecutor's closing denied him a fair trial is clearly without merit.

C. Mr. Austin's Claim That His Conviction Should Be Reversed Because the Jury was Improperly Given an Exhibit With the State's Highlighting is Clearly Without Merit.

In general, the admission or refusal of evidence lies within the sound discretion of the trial court and will not be reversed on appeal absent a showing of abuse of discretion. State v. Clapp, 67 Wn. App. 263, 272, 834 P.2d 1101 (1992). Audio tapes, like other evidence, are admissible within the discretion of the trial court, but should be excluded if they are unduly prejudicial. State v. Frazier, 99 Wn.2d 180, 188-90, 661 P.2d 126 (1983).

The trial court also has discretion to admit both a tape and a transcript as exhibits. Id. at 188. The admission of a tape recording as an exhibit as well as a transcript, in and of itself, does not overly emphasize the importance of a confession. Id. at 190.

However, a trial court should be aware of the potential for over-emphasizing the importance of such evidence and should prevent such exhibits from going to the jury if unduly prejudicial. Id. That decision is best left to the sound discretion of the trial judge.

Id. In the absence of an abuse of that discretion to the prejudice of the defendant, its exercise will not be disturbed on appeal. Id. at 191-92.

In Clapp, each time the tapes were played or the transcript was used, the judge admonished the jury as to the limited purpose of the transcript. State v. Clapp, 67 Wn. App. at 274. The judge in Clapp did not allow the tape or the transcripts to be taken to the jury room, did not give the jury access to a tape recorder, and only allowed the jury to hear the tape in open court. Id. The Clapp court carefully considered the possibility of prejudice and guarded against it. Id. There was no abuse of discretion in that case.

In the present case, when the State played the audio recording of Mr. Austin's confession, the deputy prosecutor handed out transcripts of the recording to the jury. RP 415, 10-24-13. As the jury listened to the audio tape, the prosecutor paused the recording and informed the court that he had noticed that the copies of the transcripts that were handed out had some marks on the pages. RP 416, 10-24-13.

Outside the presence of the jury, the deputy prosecutor made a record of what happened. RP 417, 10-24-13. The jury was up to page 45 of the transcript, following along with the audio

tape, when the prosecutor looked ahead in the transcript and noticed the marks. RP 418, 10-24-13. The prosecutor stopped the audio tape before the jurors were to turn to the page with the first set of marks. Id. So, unless the jurors looked ahead in the transcript, they would not have seen the marks. Id.

The court asked, "And, if they did flip it, they didn't see something that was supposed to be edited out. They're going to hear it eventually, right?" RP 418-19, 10-24-13. The prosecutor responded, "They're going to hear it. It's just that they would have seen my underlining." RP 419, 10-24-13.

Mr. Austin moved for a mistrial. RP 421, 10-24-13. In ruling on the motion, the court found that it was important to remember that the mistake of the marks on the transcript was inadvertent and that these portions of the transcript were going to be seen by the jury anyway. RP 423, 10-24-13. The court also noted that this was a long case, and there was a lot of evidence for the jury to consume. RP 425, 10-24-13.

The court did not find any unfair prejudice to the defendant, considering the totality of all the circumstances. RP 425, 10-24-13. The court denied the motion for a mistrial. RP 424-25, 10-24-13.

The court informed the jury that, during the playing of the first portion of the audio tape, it was discovered that a few pages of the transcript had some markings on them beginning with page 46. RP 426, 10-24-13. The court told the jurors that there wasn't any writing and that there were just some lines. RP 426, 10-24-13. The court instructed the jurors that if they had seen the marks, they were to disregard them. RP 426, 10-24-13.

In his brief, Mr. Austin argues that the highlighted transcript, provided to the jury, emphasized specific parts of Mr. Austin's statement, which gave the jury insight into what the State thought was most objectionable. Mr. Austin further argues that, because the jury shouldn't have received the marked copy of the transcript, which was prejudicial to him, the court should reverse the trial court's decision.

However, there is nothing in the record which shows prejudice to Mr. Austin from the transcripts. The prosecutor stopped the audio recording before the jurors reached the marked pages of the transcripts.

The jurors were listening to the audio recording and reading the transcripts at the same time. It is very unlikely that the jurors even noticed the marks in the transcripts.

Even if a juror, or jurors, had looked ahead in the transcript and saw some of the marks, it is unlikely that the marks would have had any effect on the jurors. The marks were on a different portion of the transcript, out of context to the audio which the jurors were hearing at the time. Later, when the jurors did hear that portion of the recording, they were following along with new transcripts without the marks.

In addition, the court instructed the jurors to disregard the marks, if they saw any of them. The court carefully considered the possibility of prejudice to Mr. Austin, and the court did not find any prejudice to him under the totality of the circumstances.

The court did not abuse its discretion in denying the motion for a mistrial. Therefore, Mr. Austin's claim, that his conviction should be reversed because the jury was improperly given an exhibit with the State's highlighting, is clearly without merit.

D. Mr. Austin's Claim That the Legal Costs Imposed Against Mr. Austin Should Be Stricken and the Case Remanded is Clearly Without Merit.

At sentencing, the Felony Judgment and Sentence (J&S), signed by the court and the parties, included costs and

assessments. CP 274. Section 2.5 of the J&S states as follows:

> The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
>
> [x] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 271.

At sentencing, neither party made any presentation of evidence or argument directly addressing Mr. Austin's ability to pay legal financial obligations. RP 701-22, 1-27-14. Mr. Austin did not object to the costs imposed or to the court's findings. RP 701-22, 1-27-14.

For the first time on appeal, Mr. Austin contends that the record does not support the trial court's findings that he has the current or future ability to pay discretionary legal financial obligations. He asks that the appellate court remand his judgment and sentence to the trial court with instructions to strike the objectionable findings as was done in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011).

In State v. Duncan, 180 Wn. App. 245, 253, 327 P.3d 699, *petition for review filed*, No. 90188-1 (April 30, 2014), this court observed that the issue whether a defendant will be perpetually unable to pay legal financial obligations imposed at sentencing is not an issue that defendants overlook, it is one that they reasonably waive. The court concluded that it would henceforth decline to address a challenge to a court's findings on that issue if raised for the first time on appeal. Id. *citing* RAP 2.5(a).

The record in Mr. Austin's case does not affirmatively show an inability to pay legal financial obligations now or in the future, as was the case in State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011). Just the opposite in true in this case.

At the 3.5 hearing, based on Mr. Austin's testimony, the trial court found that Mr. Austin was of average intelligence, that he was articulate and knowledgeable, that he did not suffer from any disease, that he did not have any mental health problems, and that he did not need any treatment. RP 78, 9-9-13. In addition, at the 3.5 hearing, Mr. Austin testified that, while he was unemployed when he was arrested, he previously worked in a variety of jobs since last attending high school. RP 5, 9-9-13.

Mr. Austin did not object to the findings of the trial court at the 3.5 hearing. RP 78-91, 9-9-13. As previously stated, Mr. Austin did not object to the findings of the trial court at sentencing.

Because Mr. Austin failed to object to the court's findings, he thereby waived any challenge to those findings. Therefore, Mr. Austin's claim, that the legal costs imposed should be stricken and that the case should be remanded, is clearly without merit.

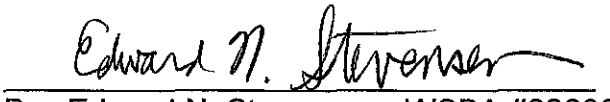
5. Conclusion

For the reasons set forth above, the assignments of error are clearly without merit.

DATED this 20th day of January, 2015.

Respectfully submitted,

Douglas J. Shae
Chelan County Prosecuting Attorney



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Deputy Prosecuting Attorney

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. JAMES CASEY AUSTIN, Defendant/Appellant.	No. 32254-8-III Superior Court No. 13-1-00048-3 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 20th day of January, 2015, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

Kathleen A. Shea
David L. Donnan
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said electronic transmission and envelopes containing true and correct copies of Respondent's Motion on the Merits.

Signed at Wenatchee, Washington, this 20th day of January, 2015.

Cindy Dietz
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Chelan County Prosecuting Attorney's Office

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