SUPREME COURT NO.

COA NO. 46426-8-II

SC# 93485-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN TYLER,
Petitioner.

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

The Honorable John P. Wulle, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner John Tyler, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

John Tyler seeks review of the Court of Appeals unpublished opinion entered on July 19, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: To convict for rape of a child, the state must prove that the accused engaged in sexual intercourse. Here, the state's evidence in support of count II provided only that "it" happened more than once during the relevant time period. Did the state present insufficient evidence for a rational jury to find beyond a reasonable doubt that Mr. Tyler engaged in sexual intercourse?

ISSUE 2: To convict for rape of a child in the first degree, the state must prove that the alleged victim was under the age of twelve at the time of the misconduct. Here, J.A.R. testified that the incident had occurred "last year," which was after her twelfth birthday. Did the state present insufficient evidence for a rational jury to find beyond a reasonable doubt that J.A.R. was under twelve at the time of the incident charged in count IV?

ISSUE 3: To convict for rape of a child in the first degree or child molestation in the first degree, the state must prove that the alleged victim was under the age of twelve at the time of the misconduct. Here, J.A.R. testified that she did not remember how old she was during the incidents comprising counts VI and VIII. Did the state present insufficient evidence for a rational jury to find beyond a

reasonable doubt that J.A.R. was under twelve at the time of the events charged in counts VI and VIII?

ISSUE 4: Prosecutorial misconduct can deprive the accused of a fair trial. Here, the prosecutor committed misconduct by appealing to the jury's passion and prejudice throughout her closing argument, expressing a personal opinion of guilt, and "testifying" to "facts" that had not been admitted into evidence. Did the prosecutor's improper arguments deprive Mr. Tyler of his Fourteenth Amendment right to due process?

IV. STATEMENT OF THE CASE

John Tyler was a strict father. His daughter and three stepchildren had to earn privileges by completing their chores well and on time. RP 240. Mr. Tyler used corporal punishment when they misbehaved. RP 151-52, 172, 215-16, 243.

After more than eight years of this routine, three of the children – J.A.R., H.M.R., and E.M.K. -- claimed that Mr. Tyler had been sexually abusing them for years. Based on their reports, the state charged Mr. Tyler with twenty child sex offenses. CP 15-21.

The prosecutor elected to base counts I and II (for rape of a child in the first degree) on Mr. Tyler's alleged conduct toward J.A.R. when they lived in an apartment, before moving into their current house. RP 495-98. Regarding count I, J.A.R. testified that Mr. Tyler engaged in intercourse with her and then gave her candy afterwards. RP 123-25. In support of count II, J.A.R. testified only that "it" happened more than once when they

lived in the apartment. RP 125. She did not clarify what "it" meant. RP 125.

The state elected to rely on a different incident for count IV, which was also for rape of a child in the first degree against J.A.R. RP 501-04. In support of that count, J.A.R. testified that Mr. Tyler engaged in intercourse with her one night while her mother was working at the fair. RP 136-38. She testified, however, that the incident happened "last year." RP 137. She also said that her twelfth birthday was two years before the trial. RP 116.

Counts VI and VIII were for first degree rape of a child and first degree child molestation, respectively. CP 17. Again, the prosecutor elected to rely on a specifically described incident for each of those charges. RP 509-12. J.A.R. testified, however, that she did not recall how old she was or what grade she was in during either one of those instances. RP 139-40, 146. Even so, the prosecutor argued that the jury could find that she was less than twelve years old at the time of the allegations because she also said that Mr. Tyler abused her over the course of many years. RP 514.

The prosecutor began her closing argument by telling the jury that they were "fortunate" because they had the opportunity to find Mr. Tyler

guilty. RP 486. She said the jury was lucky because they could "hold him accountable for torturing these little girls." RP 486.

She described Mr. Tyler as keeping a "harem." RP 534. She recounted J.A.R.'s description of the pain she felt when Mr. Tyler allegedly anally raped her. RP 508-09. The prosecutor also emphasized that E.M.K. was Mr. Tyler's "own flesh-and-blood, biological daughter." RP 540. She said the jury had heard firsthand about "one of the most horrifying experiences any child could endure." RP 486. She described Mr. Tyler as a "calculating human being." RP 524.

Finally, the prosecutor argued that Mr. Tyler had threatened to beat the girls if they told anyone about the alleged abuse. RP 524. She also claimed that Mr. Tyler hit the girls with a belt if they refused to take their clothes off. RP 539.

The jury found Mr. Tyler guilty of sixteen counts.[1] RP 567-70.

Mr. Tyler appealed.[2] The Court of Appeals affirmed Mr. Tyler's convictions. Opinion.

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[1] Of the twenty charges, the jury rejected four of the alternative charges. RP 567-70.

[2] Mr. Tyler's convictions were entered in 2002. RP 97. Mr. Tyler notified the court and defense counsel that he wanted to appeal his convictions. RP 609-10. The trial judge made an oral order appointing an attorney for Mr. Tyler's appeal. RP 610. After discussion with defense counsel, the court agreed to contact the appellate attorney from chambers to ensure that the proper paperwork was filed for Mr. Tyler's appeal. RP 611. But no notice of appeal was ever filed on Mr. Tyler's behalf. CP 122.

Mr. Tyler was unaware that no notice of appeal had been filed until the court clerk informed him in 2011. CP 122-23. In June 2014, the Court of Appeals granted his

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should grant review and hold that the state presented insufficient evidence to convict Mr. Tyler of counts II, IV, VI, or VIII. The Court of Appeals' opinion conflicts with its prior decision in *Jensen* and presents a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(2), (3) and (4).

1. No rational jury could have found beyond a reasonable doubt that Mr. Tyler engaged in sexual intercourse (as required for count II) based only on J.A.R.'s testimony that "it" happened more than once.

The state charged Mr. Tyler with two counts of first degree rape of a child based on alleged acts against J.A.R. while they lived in a previous apartment. RP 495-98. But J.A.R. testified only to one incident of sexual intercourse – that supporting count I. RP 123-25. Her testimony that "it" happened more than once was insufficient to prove beyond a reasonable doubt that Mr. Tyler had engaged in sexual intercourse a second time, as required to convict him of count II. RP 125; *State v. Jensen*, 125 Wn. App. 319, 327, 104 P.3d 717 (2005).

Conviction for first degree rape of a child requires proof of sexual intercourse. RCW 9A.44.073.

Generic testimony from an alleged victim of child sexual abuse can only support a specific charge if it describes:

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pro se request to file a late notice of appeal and to be appointed counsel as public expense. CP 131-62, 163-65.

> (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

Jensen, 125 Wn. App. at 327. In *Jensen*, the alleged victim testified to one instance of sexual contact. *Id.* at 326. The jury also heard testimony that Jensen had touched her private areas "a few times." *Id.* at 327. That evidence was insufficient to support more than once conviction for child molestation because it did not describe the alleged acts with sufficient particularity. *Id.* at 328.

Likewise, J.A.R.'s testimony that "it" happened more than once is insufficient to convict Mr. Tyler of an additional count of child molestation. *Id.* The evidence does not clarify what "it" means. The evidence was not particular enough for the jury to determine what misconduct, if any, occurred on those additional occasions. *Id.* It was certainly not specific enough to prove sexual intercourse.

Neither the Court of Appeals nor the state is able to point to any testimony indicating that "it" in J.A.R.'s description of the allegation in Count II refers to an act of penetration. Even so, the Court affirms Mr. Tyler's conviction in Count II because J.A.R. described an act of penetration in her testimony *describing the allegation in Count I.* Opinion, p. 13.

No rational jury could have found that the state had proved that Mr. Tyler engaged in sexual intercourse with J.A.R. on more than one occasion during the charging period for counts I and II. Mr. Tyler's conviction for count II must be reversed. *Id.*

The Court of Appeals re-reads *Jensen* to permit innumerable convictions for rape of a child based on description of only one alleged incident of penetration. Opinion, pp. 13-14. This is precisely the type of overly-generic evidence that was deemed insufficient in *Jensen*. *Id.* at 326-328.

The Court of Appeals' decision in Mr. Tyler's case conflicts with *Jensen* and presents a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(2), (3), and (4). This Court should grant review.

2. No rational jury could have found beyond a reasonable doubt that J.A.R. was younger than twelve during the commission of counts IV, VI, and VIII.

Conviction for child molestation in the first degree requires proof that the alleged victim was under the age of twelve. RCW 9A.44.073. J.A.R. turned twelve two years before Mr. Tyler's trial. RP 116. For count IV, the state relied on evidence regarding an incident that happened one night in the room Mr. Tyler shared with J.A.R.'s mother, while her

mother was working at the fair. RP 501-04. J.A.R. testified that the incident had happened "last year." RP 137.

No rational jury could have found beyond a reasonable doubt that J.A.R. was younger than twelve at the time of the incident charged in count IV. *Jensen*, 125 Wn. App. at 325. Indeed, the state's evidence indicated that she was either twelve or thirteen at the time. RP 116, 137.

Likewise, count VI (for rape of a child in the first degree) and count VIII (for child molestation in the first degree) both required proof that J.A.R. was under twelve years old at the time of the incident. RCW 9A.44.073; RCW 9A.44.083. J.A.R.'s twelfth birthday was seventeen months before Mr. Tyler moved out of the family home. RP 116.

For count VI, the state relied on J.A.R's testimony about an alleged incident of anal sex in her bedroom during the day. RP 509. But J.A.R. testified that she did not remember how old she was during that alleged incident or what grade she was in at the time. RP 139-40.

Similarly, for count VIII, the state relied on J.A.R.'s testimony that Mr. Tyler put her hand on his penis in her mother's room. RP 510-12. Again, J.A.R. stated that she did not remember how old she was during that alleged incident. RP 146.

The state did not present any evidence that J.A.R. was younger than twelve at the time of the allegations in counts IV, VI, and VIII. *See*

RP *generally*. No rational jury could have found beyond a reasonable doubt that the incidents happened before her twelfth birthday. *Jensen*, 125 Wn. App. at 325. Mr. Tyler's convictions for counts IV, VI, and VIII must be reversed. *Id.*

The state elected to rely on specific alleged instances for each of the twenty counts against Mr. Tyler. RP 501-04, 509. Indeed, the state needed to elect specific instances for each of the charges in this case to avoid a significant double jeopardy problem. But the state failed to provide any evidence that the elected allegations in Counts IV, VI, and VIII happened before J.A.R.'s twelfth birthday.

Still, the Court of Appeals affirms Mr. Tyler's convictions in Counts IV, VI, and VIII because of evidence that Mr. Tyler allegedly abused her over the course of several years. Opinion, pp. 14-15.

The Court of Appeals has never before found sufficient evidence to support a conviction based on allegations other than those upon which the state elects to rely during argument to the jury. The issue of whether this is permissible poses a significant question of constitutional law that is of substantial public interest. This Court should grant review. RAP 13.4(b)(3) and (4).

B. This court should grant review and hold that the prosecutor committed flagrant and ill-intentioned misconduct by arguing facts

> not in evidence, appealing to the jury's passion and prejudice, and expressing her personal opinion. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction

could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

1. The prosecutor committed misconduct by arguing that Mr. Tyler beat the girls in order to get them to comply with his sexual advances and to prevent them from disclosing the alleged abuse when the evidence showed only that he used corporal punishment when they did not complete their chores.

The four children all testified that Mr. Tyler used corporal punishment as discipline. RP 151-52, 172, 215-16, 243. The two oldest children clarified that the spankings generally happened when they did not finish their chores. RP 151-52, 215-16. None of the children said that he hit them in order to prevent disclosure of the alleged abuse. RP 151-52, 172, 215-16, 243.

Likewise, none of them said that he hit them to get them to comply with his sexual advances. RP 151-52, 172, 215-16, 243. Rather, J.A.R. said that she would be grounded, not hit, if she told anyone about the alleged abuse. RP 152. No expert testified that children, in general, are more likely to delay reporting of sexual abuse if subjected to corporal punishment. *See* RP *generally*.

Still, the prosecutor argued in closing that Mr. Tyler hit the children in order to prevent them from telling anyone about the allegations. RP 524. She said this was evidence that he was "calculating."

RP 524. She also argued that Mr. Tyler "would beat them to a point that next time he wanted something from them, they would do it or else they would get hurt." RP 539.

A prosecutor commits misconduct by urging a jury to consider "facts" that have not been admitted into evidence. *Pierce*, 169 Wn. App. at 553. Here, the prosecutor "testified" to "facts" linking Mr. Tyler's use of corporal punishment to the alleged sexual abuse where no such connection existed in the evidence. RP 524, 539. The prosecutor's argument was improper. *Id.*

Nonetheless, the Court of Appeals finds that the prosecutor's arguments were supported by the evidence because the alleged victims testified to Mr. Tyler's use of corporal punishment. Opinion, p. 23. But neither the Court nor the state can point to any evidence suggesting that Mr. Tyler used physical violence to gain compliance with his alleged sexual advances. The Court's reasoning is unavailing.

Mr. Tyler was prejudiced by the prosecutor's misconduct. The alleged victims' extremely delayed reporting was enough to raise a reasonable doubt about the allegations in the mind of the jury. But the prosecutor's improper arguments that the delay was justified was based on "facts" that were not in evidence, "facts" which made Mr. Tyler appear even more reprehensible in to the jury. There is a substantial likelihood

that the prosecutor's improper arguments affected the outcome of Mr. Tyler's trial. *Glasmann*, 175 Wn.2d at 704.

Arguments with an "inflammatory effect on the jury" are generally not curable by an instruction. *Pierce*, 169 Wn. App. at 552. Here, the prosecutor's arguments used "facts" not in evidence to argue that Mr. Tyler was "calculating." The argument appealed to the jurors' emotions and was directly relevant to a reason to doubt the alleged victims' testimony. The prosecutor's misconduct was flagrant and ill-intentioned. *Id.*

Prosecutorial misconduct deprived Mr. Tyler of a fair trial. *Glasmann*, 175 Wn.2d at 703-04. The prosecutor's improper argument of "facts" not in evidence requires reversal of Mr. Tyler's convictions. *Pierce*, 169 Wn. App. at 553

2. The prosecutor improperly appealed to the jury's passion and prejudice and conveyed a personal opinion by arguing that the jury was "fortunate" because they got to convict Mr. Tyler and by emphasizing evidence that was legally irrelevant but was likely to inflame the jurors.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is misconduct for a prosecutor to make arguments designed to inflame the passions or prejudices of the jury. *Id.* It is also improper for a prosecutor to convey his/her personal opinion of the accused's guilt. *Id.* at 706-07.

Here, the prosecutor argued that the jury was "fortunate" because: "you can find the Defendant guilty. You can hold him accountable for torturing these little girls." RP 486.

During the remainder of her argument, the prosecutor emphasized evidence that was legally irrelevant but likely to inflame the jurors' emotions. For example, the state harped on J.A.R.'s testimony regarding the pain she felt during an alleged anal rape. RP 508-09. Even though the evidence was not relevant to any element of any charge, the prosecutor said "that's got to say something to you as a jury, sitting there, listening to a thirteen-year-old girl explain the pain that she went through." RP 508-09.

The prosecutor also described Mr. Tyler as keeping a "harem." RP 534. She emphasized that one of the alleged victims was Mr. Tyler's biological daughter, "his own flesh-and-blood." RP 540. She "thank[ed] God" that there weren't any more alleged victims "that we know of." RP 540. She said the jury had heard firsthand about "one of the most horrifying experiences any child could endure." RP 486. She described Mr. Tyler as a "calculating human being." RP 524.

The prosecutor's argument was improper. *Glassman*, 175 Wn.2d at 704, 706-07. It appealed to the jury's passion and prejudice rather than to the evidence in the case. It also conveyed the prosecutor's personal

opinion of Mr. Tyler's guilt. Indeed, the state concedes and the Court of Appeals agrees that arguments regarding the "harem," "thanking God," and the jury's "fortune" were improper. Opinion, pp. 22-24.

Mr. Tyler was prejudiced by the prosecutor's misconduct. *Glasmann*, 175 Wn.2d at 704. The prosecutor opened her argument with her opinion that the jury was fortunate because they could convict Mr. Tyler. RP 486. Those statements colored the entire argument and encouraged the jury to rely on fervor and personal opinion rather than the evidence in the case. The prosecutor continued her argument by appealing to the jury's emotions. RP 486, 524, 534, 540.

Also, as outlined above, the state's evidence for many of the charges against Mr. Tyler was very thin. There is a substantial likelihood that the prosecutor's improper arguments affected the outcome of Mr. Tyler's trial. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to standards and prior decisions prohibiting her from appealing to passion and prejudice or expressing a personal opinion of guilt. *See e.g. State v. Armstrong*, 37 Wash. 51, 79 P. 490 (1905); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993); *American Bar*

Association Standards for Criminal Justice std 3-5.8 (1993). The arguments were also inflammatory, and, accordingly, not curable by an instruction. *Pierce*, 169 Wn. App. at 552.

Even so, the Court of Appeals finds that reversal is not required. Opinion, pp. 24-25. The Court's unsupported conclusion that an instruction could have cured the prejudice from the prosecutor's improper arguments is not persuasive.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by appealing to the jury's passion and prejudice and arguing based on her personal opinion of Mr. Tyler's guilt. *Glasmann*, 175 Wn.2d at 704, 706-07. Mr. Tyler's convictions must be reversed. *Id.*

3. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Tyler's convictions.

The cumulative effect of repeated instances of prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

Nonetheless, the Court of Appeals does not consider Mr. Tyler's argument regarding the cumulative effect of the prosecutor's misconduct because it determined that each individual instance could have been cured by an instruction. Opinion, p. 25 n. 15. This Court should grant review to

determine whether the cumulative effect of numerous instances of misconduct can be flagrant and ill-intentioned even if this Court holds that the individual instances did not rise to that level. RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

In addition, the Court of Appeals decision conflicts with its prior opinion in *Jensen*. The Supreme Court should accept review pursuant to RAP 13.4(b)(2).

Respectfully submitted August 16, 2016.

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Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

John Tyler/DOC#901014
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Airway Heights, WA 99001

and I sent an electronic copy to

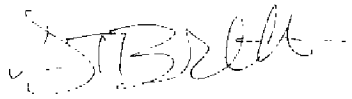
Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 16, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

July 19, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN THOMAS TYLER, Appellant.	No. 46426-8-II UNPUBLISHED OPINION

SUTTON, J. — John Thomas Tyler appeals his 11 convictions for first degree child rape, two convictions for second degree child rape, and two convictions for first degree child molestation. The three victims of Tyler's crimes were his biological daughter and two step-daughters,[1] whom he allegedly abused from the time they were ages four or five to when the oldest was 12 years old. Tyler argues that his convictions should be reversed and we should remand for a new trial because (1) the State presented insufficient evidence to support three of the convictions for first degree child rape and his conviction for first degree child molestation as to victim JAR,[2] (2) the trial court impermissibly commented on the evidence, (3) the trial court admitted irrelevant and unduly prejudicial evidence, (4) the prosecutor committed misconduct during closing argument, and (5) the State filed a deficient information by not factually differentiating between all of the charges. Tyler also argues that we should (6) remand to correct his judgment and sentence

[1] All three victims testified that Tyler was either their mother's ex-boyfriend or their father.

[2] Counts II, IV, VI, and VIII.

because the State did not present any evidence of his prior convictions and (7) that we should remand for resentencing because the trial court did not consider whether he had the ability to pay the discretionary legal financial obligations (LFOs).

We hold that (1) the State presented sufficient evidence to support the three convictions for first degree child rape and the conviction for first degree child molestation as to JAR, (2) the trial court impermissibly commented on the evidence by including the victims' birthdates in the to-convict jury instructions, but the error was harmless, (3) the trial court properly admitted evidence of Tyler's physical abuse of the victims, (4) the prosecutor engaged in several instances of misconduct but the comments were not so flagrant and ill-intentioned that no limiting instruction could have cured the error, (5) Tyler waived his ability to challenge the information for vagueness on appeal, (6) the State failed to prove Tyler's prior criminal history at sentencing, and (7) we exercise our discretion to reach the merits of Tyler's LFO challenge. We affirm Tyler's convictions, remand for resentencing under RCW 9.94A.530(2), and remand for the sentencing court to make an individualized inquiry into Tyler's ability to pay the discretionary LFOs as required under RCW 10.01.160(3) and *Blazina*.[3]

[3] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

FACTS

I. AMENDED CHARGES

JAR, HMR, and EMK disclosed that Tyler had sexually abused them repeatedly for many years.[4] At the time of their disclosures, JAR was 13 years old, 4 months, HMR was 11 years old and 11 months, and EMK was 9 years old. The State charged Tyler with 20 counts of child rape and molestation, 5 of which were charged in the alternative. [5]

As to JAR, the State charged Tyler with two counts of first degree child rape for the period September 25, 1992, through January 31, 1995 (counts I and II), one count of first degree child rape for the period January 1, 1995, through February 28, 1995 (count III), two counts of first degree child rape for the period February 1, 1995, through September 24, 2000 (count IV and VI), and one count of first degree child molestation for the period February 1, 1995 through September 24, 2000 (count VIII).[6] For counts IV and VI, first degree child rape, the State charged Tyler in the alternative with second degree child rape for the period September 25, 2000, and February 16,

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[4] We use the minor victims' initials and redact their birthdates to protect their privacy. Gen. Order 2011-1 of Division II, *In re the Use of Initials of Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.), *available at* http://www.courts.wa.gov/appellate_trial_courts/.

[5] An alternative charge is not a lesser included offense but allows the jury to consider the most serious charge before considering the alternative charge. *State v. Peterson*, 94 Wn. App. 1, 6, 966 P.2d 391 (1998).

[6] Counts I and II were based on allegations that Tyler had intercourse with JAR when she was five years old, in kindergarten, and lived in an apartment. Count IV was based on sexual intercourse that Tyler had with JAR one night when her mother worked at the fair. Count VI was based on one incident of anal sex by Tyler with JAR and count VIII was based on a separate incident where Tyler put JAR's hand on his penis, and both counts alleged that JAR was under 12 years old because she turned 13 on September 25, 2000.

2002 (counts V and VII). For count VIII, first degree child molestation, the State charged Tyler in the alternative with second degree child molestation for the period September 24, 2000, through February 16, 2002 (count IX).[7] As to JAR, the State also charged Tyler with two additional counts of first degree child rape (counts XI and XIII) or in the alternative, second degree child rape (counts XII and XIV) and one additional count of second degree child rape (count X).

As to HMR, the State charged Tyler with four counts of first degree child rape (counts XV, XVI, XVII, and XVIII). As to EMK, the State charged Tyler with one count of first degree child molestation (count XIX) and one count of first degree child rape (count XX).

The structure of each of the State' charges in the information was identical, with a date range that the alleged criminal act occurred, the victim's name and birthdate, and the victim's age compared to Tyler's age. For example, count I alleged in relevant part as follows:

> That he, [Tyler], in the County of Clark, State of Washington between September 25, 1992 and January 31, 1995, on an occasion separate from that charged in Counts 2 and 3, did have sexual intercourse with another, to-wit: J.A.R. (female, DOB: []), who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim, in violation of RCW 9A.44.073, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 15. The charging language for several counts was identical, except that each count stated that it was based "on an occasion separate from that charged" in the other counts. E.g., CP at 15-17 (counts I, II, IV, and VI). Tyler did not object to the vagueness of the charging language below or request a bill of particulars as to the specific facts supporting each count.

[7] The dates pertaining to the remaining 11 charges as to JAR are not at issue in this appeal.

II. TRIAL TESTIMONY

Over Tyler's objections, the trial court ruled that evidence of Tyler's physical abuse of the victims would be admissible to explain the delay in the disclosure of the sexual abuse. Each victim testified that Tyler had sexual intercourse and sexual contact with them on multiple occasions. All three victims and JR, another child who lived in the home, testified that Tyler either spanked or hit them and that they were afraid of Tyler.

Janice Blakemore, a sexual assault nurse who interviewed JAR, testified that JAR "revealed a longstanding pattern of sexual abuse" by Tyler that occurred "every week or two." 3 Verbatim Report of Proceedings (VRP) at 356-57. JAR made similar statements to Dr. John Stirling, a medical doctor who interviewed and examined JAR, HMR, and EMK. Stirling testified that HMR revealed Tyler had sexually abused her since she was five or six years old and that EMK revealed Tyler's abuse of her started when she was in kindergarten or the year before. HMR also told Stirling that she was afraid Tyler would "beat her up" if she told anyone what was happening. 3 VRP at 380.

During the time period charged in counts I and II, between September 25, 1992 and January 31, 1995, JAR was between four and six years old. JAR's mother, Kimberly Kohlschmidt, testified that she and her children lived in an apartment when JAR was five, but moved to a house in February 1995. JAR testified that when she was five years old and in kindergarten, she lived in an apartment. While she lived there, Tyler started to touch her in a way that made her

uncomfortable by putting his penis in her vagina.[8] JAR also testified to several other incidents of sexual contact between September 25, 1992 and January 31, 1995. JAR testified as to the general frequency that "it" happened more than one time during this time period.

Dr. Stirling testified that JAR disclosed that Tyler sexually abused her at least every other week since she was in kindergarten. Blakemore testified that JAR disclosed that Tyler performed oral, vaginal, or anal sex on her every week or two.

At the time of trial, JAR testified that she was 13 years old, that her birthday was later that year, and that she was entering eighth grade. The State argued that JAR was less than 12 years old during the time periods charged in counts IV and V (September 25, 2000, and February 16, 2002). JAR testified that Tyler had sexual intercourse with her "a lot." 2 VRP at 140. Her testimony about this incident followed her affirmative answers that Tyler had sexual intercourse with her in her mother's room when she was 9 and 11 years old, and that she remembered it happening one time when her mother was working at the fair. She also testified that "last year," in seventh grade (after September 25, 2000), he told her "to be bare-butt naked" in her mother's or Tyler's bedroom, and then she should take her clothes off. 2 VRP at 136-37. When asked what he would do, she testified that "[h]e would put his penis in my vagina." 2 VRP 138. She confirmed that this happened when her mother worked at the fair at "nighttime." 2 VRP at 138. JAR also testified that Tyler told her she should find a boyfriend so that if he impregnated her they could blame it on the boyfriend.

[8] JAR testified that he touched her "bottom part" referring to it as "[a] pussy" or "vagina;" he put his "penis in there;" he told her to go somewhere, pull her pants down, and get on the bed. 2 VRP at 123-25.

Kohlschmidt also testified that she worked "a couple of the fairs" during the summer that JAR was in eighth grade. 2 VRP at 263. The State asked JAR if she remembered Tyler touching her "last year" when she was in the seventh grade and she agreed. 2 VRP at 136-137. JAR also testified that Tyler sexually abused her one night when her mom was working at a fair and described a specific incident that had been painful. JAR was unsure how old she was when Tyler made her place her hands on his penis.

JAR also testified to an incident of anal sex, but was not sure how old she was or what grade she was in at school. But she testified that the act took place in her room, during the afternoon, and when Tyler put the clear stuff on his penis from a tube, that it hurt really badly, she cried, and he told her to shut up. When asked how often this happened, she testified that this happened multiple times, but it did not happen "that much."[9] 2 VRP at 140. Blakemore testified that Tyler "used baby oil, especially during rectal penetration." 3 VRP at 357.

Tyler moved to dismiss counts I, II, III, VIII, and XI for lack of evidence as to the dates JAR testified that she was abused. The trial court denied Tyler's motion.

III. Jury Instructions

The trial court instructed the jury that "[t]he attorneys' remarks, statements[,] and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement[,] or argument that is not supported by the evidence of

[9] "[State]: How many times did he do that to you? [JAR]: Not that much. [State]: How come? [JAR]: Because it hurts." 2 VRP at 140.

the law as stated by the court."[10] CP at 24. The trial court also instructed the jury to disregard any apparent comment on the evidence by the trial court. Each to-convict jury instruction included the birthdate of the victim to which the instruction for the particular charge pertained.

IV. Closing Argument, Deliberations, and The Jury Verdict

The State opened its closing argument with the following statements:

> You've just learned firsthand about one of the most horrifying experiences any child could endure . . . . But you, as the jury, are fortunate, and the reason for that is because you can find [Tyler] guilty. You can hold him accountable for torturing these little girls. You get to take the evidence, you get to apply it to the facts of the case, and apply that to the information, to every element, and find [Tyler] guilty of raping and molesting [JAR, HMR, and EMK].

4 VRP at 486-87. The State then described the elements of each charged crime and the evidence supporting each of them. The State argued that specific incidents to which JAR testified supported each charge as to her, but also that JAR's generic testimony that the abuse happened over many years supported the charges and supported the fact that she was under 12 years of age. When discussing the evidence supporting count VI, the State recounted JAR's testimony about a specific incident when her mother was working at the fair at "nighttime" and that JAR testified that "[Tyler] would put his penis in [her vagina]." 4 VRP at 503-04.

After reviewing the counts and supporting evidence pertaining to JAR, the State recounted JAR's testimony that Tyler told her she should find a boyfriend so that if he impregnated her they could blame it on the boyfriend. The State characterized this statement as "calculating" behavior. The State also said that JAR testified that Tyler abused her every week, and the State then said,

[10] At the beginning of trial, the trial court orally instructed the jury that the attorneys' remarks, statements, and arguments were not evidence.

"[T]hese girls were abused whenever [Tyler] felt like it. I mean, he had his own little harem there in the house." 4 VRP at 524.

The State argued that the victims' fear of Tyler, which all three testified about, explained why they did not report the sexual abuse, and why they complied with his requests. The State exclaimed, "Thank God there aren't any more [victims] that we know of" and characterized one of the victims as Tyler's "own flesh-and-blood." 4 VRP at 540.

The State also argued that for count IV, if the jury was not sure that JAR was under 12 years of age, then they could convict on the alternative lesser included charge in count V, child rape in the second degree, because the only difference between the counts was that Tyler told JAR to go in to the bedroom bare-butt naked after September 25, 2000. Tyler did not object to any portion of the State's closing argument.

During deliberations, the jury asked the trial court to clarify as to count IV:

> Please clarify whether Count 4 pertains to a specific incident or just an additional incident within the timeframe given. Also, if we can't all agree that she is under 12 in Count 4—do we automatically vote for Count 5 or do we all have to agree she is 12 or older?

CP at 67. The trial court responded that the jury should "[r]ead carefully instruction #16 and instruction #31[11] as pertains [sic] to counts 4 & count 5." CP 67.

The jury found Tyler guilty as charged with one exception. The jury did not find Tyler guilty of count XIII, which alleged that Tyler committed first degree child rape of JAR between

[11] Instruction no. 16 was the to-convict instruction for count IV and the alternative lesser included count V. Instruction no. 31 instructs the jury on how to complete the verdict forms and defines the lesser-included alternative charges.

February 1, 1995 and September 24, 2000. Instead, the jury found Tyler guilty of count XIV, second degree child rape for the time period September 25, 2000, through February 16, 2002.

V. Sentencing and Timely Appeal

The State did not present evidence of Tyler's prior criminal history at sentencing or at the presentation hearing to enter the judgment and sentence. However, the judgment and sentence signed by the sentencing court listed five prior convictions in Tyler's criminal history.[12] Tyler did not object.

The trial court also imposed mandatory and discretionary legal financial obligations. The trial court did not inquire on the record regarding Tyler's current or future ability to pay the discretionary LFOs. Tyler did not object.

Tyler was convicted and sentenced in October 2002. At sentencing, the court advised him of his right to appeal and at his request appointed him an appellate attorney. However, Tyler's notice of appeal was not filed and he was not assigned appellate counsel. Tyler brought the issue to the trial court's attention in July 2011. In June 2014, the Clark County Superior Court entered an order allowing Tyler to appeal his case, finding him indigent, and appointing him appellate counsel.

ANALYSIS

Tyler argues that the State presented insufficient evidence of sexual intercourse as to count II, first degree child rape of JAR during the time period of September 25, 1992, through January 31, 1995 and did not distinguish the act of sexual intercourse charged in count I for the same time

[12] Tyler had five prior convictions for burglary, theft, attempted robbery, escape, and forgery.

period. Tyler also argues that the State presented insufficient evidence that JAR was younger than 12 years old during the commission of count IV, first degree child rape for the period between February 1, 1995, through September 24, 2000, because JAR "testified that the incident had happened 'last year,' which was after her twelfth birthday." Br. of App. at 11. Tyler also argues that the State presented insufficient evidence related to count VI, first degree child rape for the period between February 1, 1995, through September 24, 2000, and count VIII, first degree child molestation during the same period as count VI, because JAR could not remember how old she was when the incidents occurred. We disagree and hold that sufficient evidence supports the convictions for counts II, IV, VI, and VIII.

I. SUFFICIENCY OF EVIDENCE

A. LEGAL PRINCIPLES

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). We review sufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Homan*, 181 Wn.2d at 106.

To convict a defendant of first degree child rape, the jury must find, beyond a reasonable doubt, that the defendant had "sexual intercourse with another who is less than twelve years old and not married to the [defendant] and the [defendant] is at least twenty-four months older than the victim." RCW 9A.44.073. Sexual intercourse "occurs upon any penetration, however slight"

of the "vagina or anus" and also includes "sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1).

To convict a defendant of first degree child molestation, the jury must find, beyond a reasonable doubt, that the defendant had "or knowingly cause[d] another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the [defendant] and the [defendant] is at least thirty-six months older than the victim." RCW 9A.44.083. 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(2).

In a case involving a resident child molester, the "victim's generic testimony can be used to support multiple counts." *State v. Jensen*, 125 Wn. App. 319, 327, 104 P.3d 717 (2005). Generic testimony is, for example, a victim's estimation that the abuse occurred "'once a month for three years,'" which "'outlines a series of *specific*, albeit undifferentiated, incidents *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.'" *State v. Hayes*, 81 Wn. App. 425, 437, 914 P.2d 788 (1996) (internal quotation marks omitted) (quoting *People v. Jones*, 51 Cal. 3d 34, 792 P.2d 643 (1990)). For generic testimony to support multiple counts of sexual abuse, the victim must be able to describe:

> (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

Jensen, 125 Wn. App. at 327.

B. COUNT II—FIRST DEGREE CHILD RAPE OF JAR

As to count II, Tyler first argues that JAR testified only that "it" happened more than once without specifying what "it" meant. JAR was between four and six years old during the time period September 25, 1992 and January 31, 1995 stated in counts I and II for first degree child rape between. Kohlschmidt testified that she and her children lived in an apartment when JAR was five, but moved to a house in February 1995. JAR testified that she lived in an apartment for half of kindergarten and that, during that time period, Tyler put his penis in her vagina. Such conduct satisfies the definition of sexual intercourse and JAR described this conduct as "it" several questions later. RCW 9A.44.010(1) (requiring *any* penetration). Thus, Tyler is incorrect that the State presented insufficient evidence for the jury to find that sexual intercourse occurred as to count II.

Tyler next argues that JAR's testimony did not specify that "it" happened more than once at the apartment so as to distinguish between conduct supporting count I, first degree child rape during the time period September 25, 1992, through January 31, 1995, and conduct supporting count II, first degree child rape for the same time period.

Sufficient evidence supports count II. JAR testified that Tyler touched her in a way that made her uncomfortable by putting his penis in her vagina while she lived in the apartment. Later, JAR stated that she remembered "it" happening "more than once" while she lived in the apartment. 2 VRP at 125. This generic testimony satisfies the three part test in *Jensen* to support a conviction for count II. *Jensen*, 125 Wn. App. at 327.

First, JAR's testimony specifically identified the offense that had been committed when, she testified that Tyler would touch her by putting his penis in her vagina and then stated that "it"

happened more than one time. Second, JAR's testimony sufficiently indicated the number of acts of vaginal and anal intercourse while she lived at the apartment. Lastly, JAR described the general time period in which these acts occurred by stating that it began when she was five years old and attended Head Start and lived in the apartment, and that she lived there until the middle of kindergarten. Thus, a rational jury could have found that the State proved every essential element of count II, first degree child rape, during the period of September 25, 1992, through January 31, 1995.

C. FIRST DEGREE CHILD RAPE OF JAR (COUNT IV)

As to count IV, JAR testified that she was 13 at the time of trial, August 20, 2002, and that her birthday would be later that year. She was entering eighth grade that year. On September 24, 2000, JAR was less than 12 years old. JAR testified that Tyler had sexual intercourse with her "a lot." 2 VRP at 130.

JAR's testimony about this incident followed her affirmative answers that Tyler had sexual intercourse with her in her mother's room when she was 9 and 11 years old, and that she remembered it happening one time when her mother was working at the fair. Kohlschmidt testified that she worked "a couple of the fairs" during the summer. 2 VRP at 263. Tyler correctly states that the State asked JAR if she remembered Tyler touching her "last year" when she was in the seventh grade and she agreed. 2 VRP at 136. He is also correct that JAR testified about an incident that occurred when her mom was working at a fair, and the State argued that this incident, in addition to JAR's general testimony, supported a conviction for count IV. Taken in the light most favorable to the State, a rational jury could have found that JAR was less than 12 years old as to count IV.

D. FIRST DEGREE CHILD RAPE OF JAR (COUNTS VI & VIII)

Like the evidence supporting count II, JAR's generic testimony as to counts VI and VIII satisfy the *Jensen* test. *Jensen*, 125 Wn. App. at 327. JAR testified to several acts of anal sex and her language indicated that Tyler did this on more than one occasion.[13] JAR also testified to several other incidents of sexual contact. JAR testified as to the general frequency that these things happened as well as the time frame. Furthermore, Dr. Stirling testified that JAR disclosed to him that Tyler had been sexually abusing her since she was in kindergarten. Thus, taken in the light most favorable to the State, a rational jury could find beyond a reasonable doubt that JAR was less than 12 years old at the commission of the crimes charged in counts VI and VIII. Tyler's claims of insufficient evidence fail.

II. TRIAL COURT'S COMMENT ON THE EVIDENCE

Tyler argues that the trial court impermissibly commented on the evidence when it included each of the victims' birthdates in the to-convict jury instructions. The State concedes this error, but argues that the error was not prejudicial. We hold that Tyler was not prejudiced by the trial court's impermissible comment.

A. STANDARD OF REVIEW

We review challenged jury instructions de novo in the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). A trial court may not instruct the jury on an issue of fact or comment on facts. Wash. Const. art. IV, § 16. A jury instruction that references a victim's birthdate, when the victim's age is an element of the crime, is an

[13] "[State]: How many times did he do that to you? [JAR]: Not that much. [State]: How come? [JAR]: Because it hurts." 2 VRP at 140.

impermissible judicial comment on the evidence. *State v. Zimmerman*, 135 Wn. App. 970, 973, 146 P.3d 1224 (2006) (citing *Jackman*, 156 Wn.2d at 744).

We presume that a trial court's comment on the evidence is prejudicial. *Zimmerman*, 135 Wn. App. at 973. The State bears the burden to show that the defendant was not prejudiced by an improper comment on the evidence, "unless the record affirmatively shows that no prejudice occurred." *Zimmerman*, 135 Wn. App. at 973-974 (holding that, though improper, the trial court's inclusion of the victim's birthdate in the to-convict jury instruction was not prejudicial).

B. TO-CONVICT JURY INSTRUCTION

For each charge of first degree child rape and first degree child molestation, the State was required to prove beyond a reasonable doubt the victim's age at the time of the offense as an element of the crimes. *See* RCW 9A.44.073 and 9A.44.083. The to-convict jury instruction for each count included the birthdate of the victim. Thus, under *Jackman*, the to-convict instructions constituted the trial court's improper comment on the evidence. However, the record shows that Tyler was not prejudiced by the improper comment.

Tyler relies on *Jackman* to argue that he was prejudiced because the victims' ages at the time of each of the offenses were disputed. In *Jackman*, the court held that the to-convict instructions with the victims' birthdates were prejudicial because the defendant testified that he did "everything he could" to determine the victims' ages, and it was conceivable that the jury could have found that the victims were not minors at the time of the charged crime if it were not for the trial court's improper comments in the court's instructions. *Jackman*, 156 Wn.2d at 745.

Conversely, in *Zimmerman*, this court reasoned that the reference to victim's birth date in jury instruction was not prejudicial because the record demonstrated that no jury could have

concluded that the victim was over the age of 12 at the time of the offense. *Zimmerman*, 135 Wn. App. at 975. "Critical" to that conclusion was the fact that Zimmerman was the victim's biological father and that "he knew and never disputed knowing her age." *Zimmerman*, 135 Wn. App. at 975. In addition, the victim and the victim's mother testified, as well as defense witnesses, about the victim's birthdate. *Zimmerman*, 135 Wn. App. at 975. Thus, the trial court's comment was harmless. *Zimmerman*, 135 Wn. App. at 975-76.

Here, JAR, HMR, and EMK testified as to their birthdates. EMK testified that Tyler was her biological father and JAR and HMR testified that Tyler was their mother's ex-boyfriend who had lived with them for many years. Although Tyler disputed the *sufficiency* of the State's evidence relating to JAR's age for the time period February 1, 1995 through September 24, 2000 as charged in counts IV, VI and VIII, he did not dispute the ages of HMR or EMK at the time of the charged crimes relating to them, nor did he dispute JAR's age at the time of the remaining charges for first and second degree child rape (counts I, II, III, XI, XIII, X). Tyler never disputed the basic fact of the victims' birthdates. Thus, like *Zimmerman*, we hold that the trial court's to-convict instruction containing each victim's birthdate was not prejudicial.

III. Evidence of Tyler's Physical Abuse of the Victims

Tyler argues that the trial court erred by admitting evidence that he physically abused the victims because it was irrelevant and unduly prejudicial under ER 403 and 404(b). We disagree.

A. Standard of Review

We review the trial court's interpretation of ER 404(b) de novo as a matter of law. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets the rule correctly, we review the trial court's ruling to admit evidence of misconduct for abuse of discretion. *Fisher*,

165 Wn.2d at 745. A trial court abuses its discretion if admitting the evidence was contrary to law, or when the decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Quaale*, 182 Wn.2d 191, 196-97, 340 P.3d 213 (2014). We may affirm the trial court's evidentiary rulings on any proper basis. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

B. EVIDENCE OF TYLER'S PHYSICAL ABUSE

ER 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." A danger of unfair prejudice exists "'[w]hen evidence is likely to stimulate an emotional response rather than a rational decision.'" *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting *State v. Powell*, 126 Wn. 2d 244, 264, 893 P.2d 615 (1995)). ER 404 generally prohibits admission of evidence of a person's character for the purpose of showing propensity to act according to that character. "Evidence of other crimes, wrongs, or acts . . . . may, however, be admissible for other purposes." ER 404(b).

Before the trial court may properly admit evidence of prior misconduct under ER 404(b), it must "(1) find by a preponderance of the evidence [that] the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence." *Fisher*, 165 Wn.2d at 745. The third and fourth elements of this rule ensure that admission of the evidence does not violate ER 403. *Gresham*, 173 Wn.2d at 421. The party seeking to admit the evidence in question has the burden to prove the first three prongs of the test. *Gresham*, 173 Wn.2d at 421.

Evidence of prior misconduct is presumptively inadmissible. *Gresham*, 173 Wn.2d at 421. However, in sexual abuse cases, Washington courts allow admission of evidence of misconduct "to prove the alleged victim's state of mind," and to explain the victim's delay in reporting the sexual abuse. *Fisher*, 165 Wn.2d at 744-45.

Here, the State moved to admit evidence of Tyler's physical abuse for the purpose of explaining the victims' delayed reporting under ER 404(b). The trial court granted the motion and explained:

> [T]his case has got nineteen counts of child rape in various degrees or molestation in various degrees. I think the jury is going to be impacted by simply the statement of what the charges are and I think that the—when you talk about delayed disclosure to explain those things, I think I'm going to permit some of that to come in because it doesn't seem like it's going to inflame [the jury] any worse than the case itself will.

1 VRP at 19-20. Tyler argues that the trial court abused its discretion in admitting evidence that Tyler had physically abused the victims because the State did not present evidence linking the abuse to delayed reporting, and the trial court did not give a limiting instruction or conduct an explicit ER 404(b) inquiry on the record. Tyler is correct that the trial court did not conduct an explicit analysis of the four-factor ER 404(b) test on the record. He is also correct that the trial court did not give the jury a limiting instruction, but Tyler waives this argument because he did not request one.[14]

The record demonstrates that the trial court properly admitted evidence of Tyler's physical abuse of the victims because Tyler's threats that he would "beat [them] up if they told anyone"

[14] Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To establish manifest error, the appellant must show actual prejudice. *State v. Munguia*, 107 Wn. App. 328, 340, 26 P.3d 1017 (2001).

and each victim's testimony that they were afraid of Tyler explained why the victims did not report the sexual abuse for so many years, and showed that the sexual abuse actually occurred. 3 VRP at 380; *See Fisher*, 165 Wn.2d at 745-46; *see also State v. Wilson*, 60 Wn. App. 887, 890, 808 P.2d 754 (1991) (in sexual abuse of a minor case, evidence of physical assaults was properly admitted under ER 404(b) to explain delay in reporting the abuse and to rebut inference that the sexual abuse did not occur). All three victims testified that Tyler would hit or spank them and that they were afraid of him. In her closing argument, the prosecutor tied the victims' fear of Tyler to the victims delayed disclosure of the sexual abuse and why the victims complied with Tyler's requests. Thus, the trial court did not abuse its discretion when it admitted evidence of Tyler's physical abuse because the State linked that evidence to the victims' delay in disclosure of the sexual abuse and Tyler did not request a limiting instruction.

C. HARMLESS ERROR

The State argues that even if the trial court improperly admitted evidence of Tyler's physical abuse, there was overwhelming evidence of Tyler's guilt and no reasonable possibility exists that excluding it would have changed the outcome. We agree.

An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006). An evidentiary ruling is harmless error if "'the evidence is of minor significance'" compared to the "'overwhelming evidence [of guilt] as a whole.'" *Brockob*, 159 Wn.2d at 351 (internal quotation marks omitted) (quoting *State v. Bourgeois*, 133 Wn. 2d 389, 403, 945 P.2d 1120 (1997)).

JAR, HMR, and EMK each testified that Tyler had sexual intercourse and sexual contact with them on more than one occasion. Their testimonies included graphic and detailed descriptions of Tyler's actions over a period of eight years. They described specific incidents and generic testimony about its frequency. Two medical professionals, who interviewed and physically examined the victims, testified that the victims revealed Tyler's long pattern of vaginal, anal, and oral sexual intercourse over many years since each victim was four or five years old; Dr. Stirling testified about the physical evidence on JAR's and EMK's bodies that evidenced sexual intercourse had occurred at least three years prior to trial. There is no reasonable probability that the outcome of the trial would have been different had the trial court not admitted this evidence.

IV. PROSECUTORIAL MISCONDUCT

Tyler argues that the prosecutor committed misconduct several times during closing argument. We agree with Tyler that some of the prosecutor's comments were improper, but disagree that they were so prejudicial that no limiting instruction could have cured the error.

A. STANDARD OF REVIEW

The U.S. Constitution and the Washington State Constitution grant citizens the right to a fair trial. U.S. Const. amend. IV, VI; Const. art. I § 22; *Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct jeopardizes that right. *Glasmann*, 175 Wn.2d at 703-04. A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *Fisher*, 165 Wn.2d at 747. Prejudice exists when there is a "'substantial likelihood [that] the misconduct affected the jury's verdict.'" *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn. 2d 529, 561, 940 P.2d 546 (1997)). Because Tyler did not object to the prosecutor's allegedly improper conduct, we must

determine whether the prosecutor's misconduct was "so flagrant and ill-intentioned" that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Under this heightened standard of review, Tyler must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In analyzing a prosecutorial misconduct claim, we "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Emery*, 174 Wn.2d at 762 (alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932).

B. STATE'S CLOSING ARGUMENT

Tyler claims several instances of the State's closing argument amounted to improper prosecutorial misconduct. First, Tyler argues that the prosecutor referenced facts not in the record by arguing that Tyler physically abused the victims to gain their compliance and that he was "calculating." Second, Tyler argues that the prosecutor improperly appealed to the jury's passion and prejudice by saying the jury was "fortunate" to be able to convict Tyler, expressing thanks that there were no more known victims, characterizing the victims' experience as horrifying, and by emphasizing legally irrelevant evidence, such as the physical pain JAR testified about and characterizing the victims as Tyler's "harem." Br. of App. at 23-24. The State concedes that the

prosecutor's statement that the jury was "fortunate," its reference to the victims as Tyler's "harem," and its expression of thanks that there were no more known victims were improper.

A prosecutor's argument that is unsupported by the evidence is improper. *Pers. Restraint of Yates*, 177 Wn.2d 1, 58, 296 P.3d 872 (2013). However, a prosecutor has "'wide latitude'" in its closing argument and may draw reasonable inferences from the evidence admitted at trial. *Yates*, 177 Wn.2d at 58 (internal quotation marks omitted) (quoting *Fisher*, 165 Wn.2d at 747). A prosecutor may reference the nature of the crime and its effect on the victims. *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006) (prosecutor's comment that the crime was horrible and referencing witnesses' emotional reactions not improper or prejudicial). On the other hand, a prosecutor may not appeal to the jury's passion and prejudice or encourage the jury to base its verdict on the improper argument, rather than the properly admitted evidence. *Glasmann*, 175 Wn.2d at 711. We review the prosecutor's conduct within the full context of closing argument. *Yates*, 177 Wn.2d at 58.

Here, several of the prosecutor's statements that Tyler now claims were misconduct were not improper because the comment recounted, or was a reasonable inference from, the evidence at trial or referenced the nature of Tyler's crimes. The argument that Tyler used physical abuse to gain compliance from the victims was based on the evidence presented at trial. All three victims and JR testified that Tyler either hit or spanked them and that they were afraid of Tyler. HMR told Stirling that she was afraid Tyler would physically harm her if she told anyone what was happening to her. Likewise, JAR testified about the physical pain of Tyler's conduct. Thus, the portion of the State's closing argument referencing this evidence was not improper.

Additionally, the prosecutor's comment during closing argument that Tyler was "calculating" was a reasonable inference from the evidence and a characterization of the nature of Tyler's conduct. The State characterized Tyler as "calculating" after recounting JAR's testimony that Tyler told her that she needed to get a boyfriend so that if Tyler ever impregnated her he would be able to "blame it on [the boyfriend]." 2 VRP at 150. Likewise, the prosecutor's characterization of these acts as a horrifying experience for a child was a reasonable characterization of the nature of the crime. *See Borboa*, 157 Wn.2d at 123 (holding the prosecutor's description of the charges as "horrible" in his closing statement was not improper). Thus, these comments did not constitute improper prosecutorial argument.

The State concedes that the prosecutor's statement that the jury was "fortunate," its reference to the victims as Tyler's "harem," and its expression of thanks that there were no more known victims were improper. However, these comments were not so flagrant and ill-intentioned that no jury instruction could have cured the error.

Given the context of the prosecutor's closing argument, the jury's instruction that the attorneys' remarks were not evidence, and the overwhelming evidence of Tyler's guilt, we cannot say that these comments created such a feeling of prejudice against Tyler that he was denied a fair trial or that the remarks were incurable. Had Tyler objected and the trial court given the jury a limiting instruction to not consider these improper remarks, any prejudice would have been

obviated. Therefore, we hold that the prosecutor's closing argument did not constitute incurable prosecutorial misconduct that warrants reversal for a new trial.[15]

V. SUFFICIENT CHARGING DOCUMENT

Tyler argues that the State's information was deficient because it did not differentiate between all of the charges by including relevant facts for each charge. We decline to address the merits of this issue because Tyler argues only that the information was vague and he did not request a bill of particulars below under CrR 2.1(c).[16]

A charging document that states the essential elements of a crime, but is vague on some other significant matter, may be corrected under a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 687, 782 P.2d 552 (1989). "The function of a bill of particulars is 'to amplify or clarify particular matters considered essential to the defense.'" *State v. Allen*, 116 Wn. App. 454, 460, 66 P.3d 653 (2003) (quoting *State v. Noltie*, 116 Wn.2d 831, 845, 808 P.2d 190 (1991)). "A defendant may not challenge a charging document for vagueness on appeal" if he or she did not request a bill of particulars. *Leach*, 113 Wn.2d at 687 (internal quotation marks omitted).

Here, Tyler does not allege that the State's information omitted essential elements of any of the charged crimes. Rather, he argues that the information failed to include "the facts necessary" to differentiate between the charges. *See* Br. of Appellant at 26, 28. In other words, he argues that

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[15] Tyler argues that the cumulative effect of instances of misconduct requires reversal. Because the misconduct was not so flagrant and ill-intentioned that no jury instruction could have cured the error, we need not consider this argument.

[16] CrR 2.1(c) provides that the "court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit."

the information does not "describe the facts with great specificity." *State v. Winings*, 126 Wn. App. 75, 85, 107 P.3d 141 (2005). This argument goes to the vagueness of the charging document and not to any constitutional insufficiency. *Leach*, 113 Wn.2d at 686-87. Tyler never requested a bill of particulars to resolve any vagueness in the information. Thus, he cannot challenge the information for vagueness on appeal.

VI. EVIDENCE OF PRIOR CONVICTIONS

Tyler argues, and the State concedes, that the State failed to present evidence of Tyler's prior convictions at sentencing. We accept the State's concession and remand for resentencing to allow both parties to present relevant evidence regarding Tyler's criminal history under RCW 9.94A.530(2), including any criminal history not previously presented.

A trial court must conduct a sentencing hearing before imposing a sentence on a convicted defendant. RCW 9.94A.500(1); *State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012). A defendant's criminal history is based upon a defendant's offender score which is generally calculated by adding together the defendant's current offenses and prior convictions. RCW 9.94A.589(1)(a); *Hunley*, 175 Wn.2d at 908-09. At sentencing, the State must prove any prior convictions by a preponderance of the evidence and must "introduce 'evidence of some kind to support the alleged criminal history.'" *Hunley*, 175 Wn.2d at 910 (quoting *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)).

Tyler argues that the correct remedy is to remand to correct the judgment and sentence. We disagree. Under *State v. Cobos*,[17] we remand for resentencing to allow both parties to present

[17] *State v. Cobos*, 178 Wn. App. 692, 700-01, 315 P.3d 600 (2013).

relevant evidence regarding Tyler's criminal history under RCW 9.94A.530(2),[18] including any criminal history not previously presented.

VII. Imposition of Discretionary LFO's

Lastly, Tyler argues that the trial court erred by imposing discretionary LFOs without inquiring into his ability to pay them per RCW 10-01-160(3). The State argues that because Tyler did not object to imposition of the LFOs below and no compelling reason exists for us to reach the issue, this court should not exercise its discretion to reach the issue. However, because we are remanding for resentencing, we exercise our discretion under RAP 2.5(a) to review the LFO issue. *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

"A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *Blazina*, 182 Wn.2d at 832. Generally, we may refuse to review a claim of error raised for the first time on appeal. RAP 2.5(a). In *State v. Blazina*, we declined to reach the defendant's argument regarding the imposition of LFOs at his sentencing because he failed to object and preserve the matter for appeal. 174 Wn. App. 906, 911, 301 P.3d 492 (2013).

As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. *Blazina*, 182 Wn.2d at 830. Tyler argues that the sentencing court necessarily failed to consider his ability to pay because, if it had, it would not have imposed them based on Tyler's lengthy sentence, his indigent status, and the trial court's knowledge that Tyler received

[18] RCW 9.94A.530(2) states: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

Supplemental Security Income (SSI). However, the record indicates that Tyler was currently employed in addition to receiving SSI in March 2002.

Because we are remanding for resentencing on the prior convictions, the trial court is directed to inquire into Tyler's ability to pay the discretionary LFOs as required under RCW 10.01.160(3) and *Blazina*.

CONCLUSION

We hold that (1) the State presented sufficient evidence to support Tyler's three convictions for first degree child rape and his conviction for first degree child molestation as to JAR (counts II, IV, VI, and VIII), (2) the trial court impermissibly commented on the evidence by including the victims' birthdates in the to-convict jury instructions, but the error was harmless, (3) the trial court properly admitted evidence of Tyler's physical abuse for a purpose other than proving his prior bad acts, (4) the prosecutor engaged in misconduct, but the comments were not so flagrant and ill-intentioned that no limiting instruction could have cured the error, (5) Tyler waived his ability to challenge the information for vagueness on appeal, (6) the State failed to prove Tyler's prior criminal history at sentencing, and (7) we exercise our discretion to reach the merits of Tyler's

LFO challenge. We affirm all of Tyler's convictions, remand for resentencing under RCW 9.94A.530(2) at which hearing the State may present evidence of Tyler's criminal history, and remand and order the sentencing court to make an individualized inquiry into Tyler's ability to pay the discretionary LFOs as required under RCW 10.01.160(3) and *Blazina*.

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.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, C.J.
BJORGEN, C.J.

Melnick, J.
MELNICK, J.

ELLNER LAW OFFICE

August 16, 2016 - 1:21 PM

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