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Supreme Court No. 97601-5
(COA No. 77414-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO VALDIVIA-ENRIQUEZ,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), RAP 13.4(b)(3), and RAP 13.4(b)(4), Francisco Valdivia-Enriquez, petitioner here and appellant below, asks this Court to accept review of a Court of Appeals decision, issued on August 5, 2019, affirming his convictions. A copy of the Court of Appeals' opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Both the federal and the State constitution guarantee a defendant's right to present a defense. This includes the right to confront and cross-examine witnesses with evidence that impeaches their credibility and demonstrates a potential motive for their testimony. Mr. Valdivia-Enriquez attempted to impeach his accuser with his multiple crimes of dishonesty. Furthermore, he intended to correlate these crimes of dishonesty with a potential motive for his accuser's testimony. The court forbade Mr. Valdivia-Enriquez from impeaching his accuser with this critical evidence. As many years had passed between the allegations that formed the basis for his accuser's accusations, Mr. Valdivia-Enriquez's case stood or fell on his accuser's credibility.

a. Mr. Valdivia-Enriquez argued the court's ruling infringed on his right to present a defense. To assess this claim, the Court of Appeals first

applied the abuse of discretion standard to determine whether the trial court erred in excluding this evidence. But this Court accepted review in *State v. Arndt*, No. 48525-7-II, 2017 WL 1040 (Wash. Ct. App. Dec. 12, 2017), *review granted* 438 P.3d 131 (2019) in part to determine whether this is the correct standard of review, or if courts must instead employ the de novo standard of review to assess whether a court infringed on a defendant's right to present a defense.

Should this Court stay this case pending the resolution of *Arndt*, as this Court's ruling in *Arndt* will determine whether the Court of Appeals erred in applying the abuse of discretion standard of review? RAP 13.4(b)(1); RAP 13.4(b)(3).

b. Applying the de novo standard of review, did the court improperly infringe on Mr. Valdivia-Enriquez's right to present a defense? RAP 13.4(b)(3).

c. Did the trial court violate the rules of evidence when it refused to admit the evidence of Mr. Valdivia-Enriquez's accuser's prior crimes of dishonesty? RAP 13.4(b)(4).

2. A prosecutor commits misconduct when she vouches for the credibility of a witness. Here, the prosecutor unequivocally told the jury that Mr. Valdivia-Enriquez's accuser was credible. The Court of Appeals concluded these assertions were merely reasonable inferences from the

evidence. Does a prosecutor's explicit assertions that a witness is credible constitute inappropriate vouching, and if so, does the prosecutor's vouching in this case warrant reversal? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

J.M.A.H. was "trying new things" in the bedroom with his then girlfriend, Cynthia, when Cynthia experienced pain and started to cry "a lot." 6/12/17RP 124-25; 6/14/17RP 36. J.M.A.H. ran out of the house and did not return for two hours. 6/12/17RP 125. When he returned, J.M.A.H. claimed to Cynthia that Javier Valdivia-Enriquez raped him when he was a child. 6/12/17RP 129. Mr. Valdivia-Enriquez was J.M.A.H.'s soccer coach and a good friend of J.M.A.H.'s family, and for several years, Mr. Valdivia-Enriquez lived with J.M.A.H. and his family. 6/12/17RP 60, 91; 6/13/17RP 32. Cynthia told J.M.A.H. that he "needed to tell somebody." 6/12/17RP 132. At first, J.M.A.H. did not want to tell anyone, but Cynthia insisted. 6/12/17RP 132-33. J.M.A.H. eventually reported the alleged rapes to the police. CP 14-15. The State charged Mr. Valdivia-Enriquez with one count of rape of a child in the first degree and one count of rape of a child in the second degree. CP 1.

At the time that J.M.A.H. alleged to Cynthia that Mr. Valdivia-Enriquez raped him, J.M.A.H.'s relationship with his family was strained. 6/12/17RP 119-20. J.M.A.H. was 21 when he claimed to Cynthia that he

was raped, and just a few years before this, when he was a teenager, he acquired a lengthy juvenile record that led to him spending a significant amount of time in juvenile corrections. CP 4, 50-52; 5/31/17RP 22. After J.M.A.H. told his family about the purported rapes, J.M.A.H.'s relationship with his family improved. 6/13/17RP 10-11, 46, 68. Before this allegation, the family believed Mr. Valdivia-Enriquez was a good person. 6/13/17RP 44, 55.

Before trial, Mr. Valdivia-Enriquez moved to admit J.M.A.H.'s prior crimes to impeach his credibility and elicit a potential motive for J.M.A.H.'s allegations. CP 50-51; 5/31/17RP 21. The court denied the motion. 5/31/17RP 28-29. In turn, Mr. Valdivia-Enriquez adapted his theory of defense to claim that J.M.A.H.'s allegations were just an initial lie to Cynthia to explain why he left her in the bedroom for two hours, and that this lie snowballed out of control. 6/14/17RP 91-92.

At trial, J.M.A.H. claimed Mr. Valdivia-Enriquez raped him when he was nine years old and later raped him when he was 12 or 13, at the time that Mr. Valdivia-Enriquez lived with J.M.A.H.'s family. 6/13/17RP 136, 143; 6/14/17 RP 29.

During closing arguments, the prosecutor repeatedly claimed that J.M.A.H. was credible. 6/4/17RP 84-86; CP 88. The jury convicted Mr.

Valdivia-Enriquez of both counts of rape, and the Court of Appeals affirmed. CP 89-90.

D. ARGUMENT

1. This Court should accept review because the Court of Appeals' opinion raises important constitutional concerns regarding a defendant's right to present a defense.

a. This Court should stay this case pending the resolution in *Arndt*.

On appeal, Mr. Valdivia-Enriquez challenged his convictions in part because the trial court forbade him from eliciting evidence regarding his accuser's multiple crimes of dishonesty. *See* Op. Br. at 6-19. Mr. Valdivia-Enriquez strenuously maintained the court's ruling infringed on his right to present a defense, and he argued that the Court of Appeals should review this claim de novo. Op. Br. at 10.[1] However, the Court of Appeals reviewed Mr. Valdivia-Enriquez's claim under the abuse of discretion standard of review, believing it could only assess Mr. Valdivia-Enriquez's constitutional claim if it first found the trial court abused its discretion. COA Op. at 3-6.

[1] While trial counsel primarily raised this issue under the rules of evidence, Mr. Valdivia-Enriquez argued the court's ruling infringed on his right to present a defense, and so he raised this constitutional claim as a manifest error affecting a constitutional right. *See* Op. Br. at 18-19.

Recently, this Court accepted review in *State v. Arndt*, No. 48525-7-II, 2017 WL 1040 (Wash. Ct. App. Dec. 12, 2017), *review granted* 438 P.3d 131 (2019) in part to determine whether courts must employ the abuse of discretion standard or the de novo standard of review to assess whether a court infringed on a defendant's right to present a defense.

Accordingly, this Court stay this case pending the resolution of *Arndt*, as this Court's ruling in *Arndt* will determine whether the Court of Appeals erred in applying the abuse of discretion standard of review. RAP 13.4(b)(1); RAP 13.4(b)(3).

b. The Court of Appeals' opinion fails to recognize the trial court's infringement of Mr. Valdivia-Enriquez's right to present a defense.

In a criminal proceeding, the Sixth Amendment, the Fourteenth Amendment, and article I, section 22 afford the accused the right to defend against the State's accusations. U.S. CONST. amend. VI; U.S. CONST. amend. XIV; Const. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). A corollary of this right is the defendant's right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI.; Const. art. I, § 22; *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

The right to present a defense correlates with the right to cross-examination because it is essential to a defendant's defense. *See Davis*, 415 U.S. at 315-16. It is the primary way the accused can test a witness's believability because it permits the defendant to not only call into question the witness's perception and memory of the event, but also to discredit the witness through other means. *Id*. at 316.

For example, through cross-examination, the accused can expose the witness' bias, prejudice, or an ulterior motive behind his testimony. *Id*. It can also impress upon a jury that it should carefully scrutinize a witness' testimony because the witness has a penchant for dishonesty. *Id*.; *see also State v. Ray*, 116 Wn.2d 531,543-44, 806 P.2d 1220 (1991) (holding that evidence of an accuser's prior crime of theft should be admissible at trial because theft is a crime of dishonesty).

While the right to present a defense, like all rights, is not absolute, the defendant need only establish the evidence he seeks to introduce is minimally relevant. *Jones*, 168 Wn.2d at 720. Under this low bar, evidence is relevant merely if it tends to "make the existence of any fact of consequence more probable or less probable than it would be without the evidence." *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002). After the defendant establishes the relevance of the evidence, the State bears the burden of proving the evidence is so prejudicial "as to

disrupt the fairness of the fact-finding process." *Id*. Next, the court must balance the State's interest to exclude the prejudicial evidence versus the defendant's need for the evidence. *Id*. Only when the State's interest outweighs the defendant's need can the court withhold the evidence. *Id*.

In addition to the constitutional right to confront and cross-examine adverse witnesses, the rules of evidence also permit a defendant to cross-examine a witness and impeach his credibility by eliciting relevant evidence relating to the witness' motive or bias. ER 401; ER 404(b). The rules also enable a defendant to impeach a defendant with his prior crimes of dishonesty. ER 609. Crimes of dishonesty include theft, robbery and attempted robbery, and possession of stolen property. Karl B. Tegland, Washington Practice Series: Evidence Law & Practice § 609.4 (6th Ed. 2018) (internal citations omitted). Theft and robbery are crimes of dishonesty because such crimes "reflects adversely on a man's honesty and integrity…the act of taking property is positively dishonest." *Ray*, 116 Wn.2d at 545 (quoting *State v. Brown*, 113 Wn.2d 520, 551-52, 782 P.2d 1013 (plurality opinion)).

ER 609(a) provides that if a witness was previously convicted of a crime of dishonesty as an adult, the court *must* admit this crime if it is

elicited from the witness.[2] This is because it is largely accepted that a crime of dishonesty is probative on the witness' truthfulness. Michael H. Graham, Handbook of Fed. Evid. § 609:4 (8th Ed. 2017). But if the witness committed his crimes of dishonesty when he was a juvenile, it is "generally" not admissible. ER 609(d). However, the crime is admissible if (1) the conviction would be admissible to attack an adult's credibility; and (2) the court is satisfied that admission is necessary for a fair determination of the defendant's guilt or innocence. *Id*. "The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619.

Consistent with Mr. Valdivia-Enriquez's right to present a defense, the trial court should have allowed him to cross-examine J.M.A.H. regarding his multiple crimes of dishonesty. This is because these crimes not only bore directly on J.M.A.H.'s credibility as a witness, but also revealed a potential motive for J.M.A.H's testimony. Because the jury's determination of Mr. Valdivia-Enriquez's guilt or innocence rested on J.M.A.H.'s credibility (or lack thereof), the court's preclusion of this

[2] So long as no more than ten years have elapsed since the date of the conviction or the date of the witness' release for the crime, whichever date is later. ER 609(b).

critically relevant information was not harmless beyond a reasonable doubt.

In a pre-trial motion, Mr. Valdivia-Enriquez moved to admit J.M.A.H.'s lengthy juvenile record, which included multiple crimes of dishonesty: five convictions for residential burglary (all theft related), one conviction for possession of a stolen vehicle, and one conviction for theft of a firearm. CP 50-51. J.M.A.H. committed these crimes between 2009 and 2011, when J.M.A.H. was between the age of 14 and 16. *See* CP 1; 50-51. J.M.A.H. reported the alleged rapes in 2015, when he was 21 years old. CP 4. At the time of trial (May-June 2017), J.M.A.H. was barely 23 years old.

Mr. Valdivia-Enriquez requested to admit this evidence for two reasons. First, he argued the evidence was relevant to J.M.A.H.'s credibility. CP 51; 5/31/17RP 21; ER 401. Because no concrete evidence supported J.M.A.H's allegations and the case rested almost entirely on J.M.A.H.'s testimony, Mr. Valdivia-Enriquez argued the evidence was highly relevant so that the jury may reliably assess J.M.A.H.'s credibility. CP 51, 5/31/17RP 21. Second, Mr. Valdivia-Enriquez argued J.M.A.H.'s lengthy juvenile record was relevant to J.M.A.H's motive for his testimony. CP 51; 5/31/17RP 21-23. Part of Mr. Valdivia-Enriquez's theory of defense was that J.M.A.H. fabricated the allegations in order to

repair the relationship between him and his family, which was strained and "icy" before J.M.A.H. told his family about the alleged rapes. CP 51; 5/31/17RP 22-23. Mr. Valdivia-Enriquez argued,

> It's a motive about why -- if these allegations are not true, why would someone, you know, for lack of a better term, make up such a horrible accusation, and part of that, from our perspective, would be his motive to try to gain sympathy from his family and reconnect with his family and that these incidents that occurred in -- when he was juvenile gives some background and narrative and story about what was happening with his family.

5/31/17RP 23.

While Mr. Valdivia-Enriquez did not have direct proof that J.M.A.H.'s lengthy criminal history, in and of itself, led to the deterioration of his relationship with his family, he knew the family would testify that J.M.A.H.'s relationship before the disclosures was distant. 5/31/17RP 23.

In response, the State argued the court should not admit J.M.A.H.'s lengthy criminal record because juvenile convictions are generally not admissible "for very important reasons;" the State did not articulate these reasons. 5/31/17RP 25. The State acknowledged the court had discretion to admit the evidence but argued the defendant's theory regarding J.M.A.H.'s motive was "an incredible stretch." 5/31/17RP 25. It also argued the court should not admit the convictions because the crimes

happened "years" after the alleged rapes and years before the J.M.A.H. made these allegations to the police. 5/31/17RP 25-26. The State also argued the evidence should not be admitted because it would simply give Mr. Valdivia-Enriquez the ability "to say this boy's a liar;"[3] it also argued the evidence was "highly prejudicial." 5/31/17RP 27.

In response, Mr. Valdivia-Enriquez emphasized the entire case rested on J.M.A.H.'s credibility. Accordingly, the jury needed to learn about J.M.A.H.'s prior crimes, all of which involved dishonesty. 5/31/17RP 27-28.

Despite this, the trial court denied Mr. Valdivia-Enriquez's request to introduce this evidence. 5/31/17RP 28-29. Under ER 609, the court seemed to implicitly rule the evidence could be used to impeach an adult's credibility, but opined the evidence was unnecessary to determine Mr. Valdivia-Enriquez's guilt. 5/31/17RP 28. And under ER 401 and ER 404(b), the court ruled the evidence was essentially irrelevant, stating the probative value was "non-existent or very low." 5/31/17RP 29. It also concluded Mr. Valdivia-Enriquez did not make a sufficient showing of motive and held the evidence was unfairly prejudicial to the State. 5/31/17RP 28.

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[3] This is precisely the point of impeaching a witness.

The court's ruling was in error for several reasons. First, the court mistakenly concluded the evidence was, at minimum, barely relevant; however, this conclusion was patently wrong. Evidence of Mr. Valdivia-Enriquez's accuser's multiple prior crimes of dishonesty was highly relevant because the entire case rested on the jury either believing or disbelieving his testimony, and these crimes strongly suggested the jury should pause before accepting J.M.A.H.'s allegations at face value. *See State v. A.S.*, No. 463164, 2015 WL 4922569 (Wash. Ct. App. Aug. 18, 2015)[4] (holding that evidence of an accuser's credibility was "clearly a fact of consequence" and relevant because "the State's entire case depended on the fact-finder believing [the accuser's] accusations"). Even if the evidence was minimally relevant, Mr. Valdivia-Enriquez was still entitled to introduce it, so long as the evidence was not so prejudicial as to disrupt the fairness of the trial.

And the State completely failed to establish how the evidence was more prejudicial than probative. Here, the State articulated one unavailing reason for barring Mr. Valdivia-Enriquez from introducing his accuser's multiple crimes of dishonesty: because allegedly, for "very

[4] This case is unpublished and cited to pursuant to GR 14.1 and "may be accorded such persuasive value as the court deems appropriate."

important reasons," the rules of evidence do not generally allow a defendant to impeach someone with his prior juvenile convictions.

It is important to note the State did not even elaborate as to what these purportedly important reasons are. Consequently, it failed to establish that its interest in excluding the evidence outweighed Mr. Valdivia-Enriquez's need for the evidence. But even if the State articulated a reason, "for evidence of high probative value, it appears no State interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Jones*, 168 Wn.2d at 720; *see also Davis*, 415 U.S. at 320 ("the State's desire that [its witness] fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself").

In fact, "where a case stands or falls on the jury's belief or disbelief of essentially one witness, the witness' credibility or motive *must* be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (emphasis added). Moreover, in a sex offense case, "the credibility of the accuser is of great importance, essential to the prosecution and defense alike." *Id.* at 834-35. The evidence was highly probative because it not only illuminated J.M.A.H.'s

penchant for dishonesty, but it also colored and strengthened Mr. Valdivia-Enriquez's theory of defense.

Relatedly, the trial court and the Court of Appeals appeared to believe that Mr. Valdivia-Enriquez was required to present concrete evidence that his accuser's prior convictions directly resulted in his strained relationship with his family. 5/3117RP 28-29; COA Op. at 5-6. But neither the rules of evidence nor the United States and Washington constitutions require such a high threshold of evidence; rather, the defendant must merely present some circumstantial evidence that tends to support his theory of defense. *See Davis*, 415 U.S. at 311 (finding reversible error under the United States constitution where the trial court prohibited the defendant from using the accuser's status as a probationer to show "or at least argue" that the accuser only made the accusation against the defendant because he was afraid that if he did not accuse someone else of a crime that was committed in his neighborhood, the police would pin the crime on him instead); *Franklin*, 180 Wn.2d at 381 (reversing conviction because the trial court required the defendant, who attempted to present "other suspect" evidence, to present direct evidence that another person perpetrated the crime when circumstantial evidence was all that was necessary).

Here, Mr. Valdivia-Enriquez had evidence that J.M.A.H.'s relationship with his family was "icy" *before* he reported the alleged rapes and that it improved *after* he reported the alleged crimes to the police. One could infer that a relationship between a son and his parents might become strained after the son commits a string of crimes. One could therefore also logically infer that J.M.A.H.'s allegations were motivated by his desire to strengthen his relationship with his family. The trial court should have therefore allowed Mr. Valdivia-Enriquez to explore the possibility, on cross-examination, that J.M.A.H.'s prior crimes not only rendered him less credible, but also contributed to the strained relationship between him and his family. The court's ruling to the contrary was untenable and violated Mr. Valdivia-Enriquez's right to present a defense.

This Court should accept review. RAP 13.4(b)(3).

2. This Court should also accept review to determine whether a prosecutor's explicit assertion that a witness is credible constitutes misconduct.

A prosecutor commits misconduct when she vouches for the credibility of a witness. *State v. Ish*. 170 Wn.2d 189, 196, 241 P.3d 389 (2010). While it is permissible for a prosecutor to argue to the jury that they may infer that a witness is credible based on the evidence at trial, it is improper for a prosecutor to express her personal belief as to the veracity of the witness. *Id*.; *State v. Jackson*, 150 Wn. App. 877, 884-85, 209 P.3d

553 (2009). The latter invades the province of the jury because it is entirely for the jury to decide whether a witness is credible. *Ish*, 170 Wn.2d at 196. It is particularly troublesome for a prosecutor to vouch for the credibility of a witness because it places the prestige of the State behind the witness, thereby bolstering the witness' credibility to the jury. *See id*. at 199.

Here, the prosecutor engaged in repeated misconduct when she told the jury numerous times that J.M.A.H. was "credible." As discussed, Mr. Valdivia-Enriquez's case stood or fell on J.M.A.H.'s credibility (or lack thereof). However, during closing argument, the prosecutor made the following comments regarding J.M.A.H.'s alleged credibility:

> Ladies and gentlemen, *[J.M.A.H.] is credible*, and the reason why *we* know that the State proved this case beyond a reasonable doubt really comes down to that. It comes down *to the fact that the credibility of [J.M.A.H.] is without question*. Without question.

6/4/17RP 84 (emphasis added).

The prosecutor also presented a PowerPoint to the jury with a slide titled,

> [J.M.A.H.] Is Credible.

CP 88.

Later, the prosecutor argued,

> *We* know Jose is credible for four reasons.

6/4/17RP 84.

Afterwards, the prosecutor discussed how J.M.A.H. relayed the alleged rapes to his wife. The prosecutor then went on to say,

> The disclosure to Cynthia was compelling. When you heard him describing it, it was heart-breaking. *There is no question that that disclosure was credible in that moment*.

6/4/17RP 86.

When the prosecutor reached the end of her argument, she stated,

> Finally, what makes [J.M.A.H.] so incredibly credible is his demeanor.

6/4/17RP 86.

The Court of Appeals concluded these remarks did not constitute vouching because these assertions were simply instances of the prosecutor drawing reasonable inferences from the evidence. COA Op. at 6.

But these assertions are improper and constitute misconduct for several reasons. First, the prosecutor's assertion that J.M.A.H. *is* credible and that his credibility was "without question" sent an unequivocal message to the jury that she personally believed J.M.A.H. was credible. Second, the prosecutor further impressed upon the jury that she personally believed J.M.A.H. was credible when she presented the jury with a visual image asserting her belief. This compounded the prejudice to Mr. Valdivia-Enriquez because "visual arguments manipulate audiences by

harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information." *Glasmann*, 175 Wn.2d at 708-09 (quoting Lucille A. Jewel, *Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 289 (2010)).

Third, the prosecutor's arguments that "*we* know" J.M.A.H. is credible necessarily means *both* she and the jury "know" J.M.A.H. is credible. This therefore also reaffirmed to the jury that the prosecutor believed J.M.A.H. was credible. And finally, the two last two arguments were improper ("there is no question that the disclosure was credible in that moment;" "what made [J.M.A.H.] so incredibly credible was his demeanor") because these comments did not tell the jury they could *infer* J.M.A.H. was credible based on his demeanor, but instead *asserted* J.M.A.H. was credible.

This Court should accept review. RAP 13.4(b)(3); RAP 13.4(b)(4).

E. CONCLUSION

Based on the foregoing, Mr. Valdivia-Enriquez respectfully requests that this Court accept review.

DATED this 29th day of August, 2019.

Respectfully submitted,

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FILED
8/5/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. FRANCISCO JAVIER VALDIVIA-ENRIQUEZ, Appellant.	No. 77414-0-I DIVISION ONE UNPUBLISHED OPINION FILED: August 5, 2019

CHUN, J. — A jury convicted Francisco Javier Valdivia-Enriquez of one count of rape of a child in the first degree and one count of rape of a child in the second degree. The charges stemmed from incidents occurring years earlier when the victim, J.M.A.H., was a child. By the time of the charges, J.M.A.H. was 20 years old. On appeal, Valdivia-Enriquez claims (1) the trial court erred in denying his motion to admit evidence of J.M.A.H.'s juvenile criminal record, and (2) the State engaged in prosecutorial misconduct by vouching for the credibility of J.M.A.H. We affirm. However, we remand the case for the trial court to strike the DNA collection fee from the Judgment and Sentence.

I. BACKGROUND

When he was 20 years old, J.M.A.H. had a sexual encounter with his girlfriend that caused bad memories to resurface. J.M.A.H then revealed to his girlfriend that his former soccer coach and friend, Valdivia-Enriquez, molested and raped him as a child. His girlfriend convinced J.M.A.H. to report the abuse to

the police. The State charged Valdivia-Enriquez with one count of rape of a child in the first degree and one count of rape of a child in the second degree.

Prior to trial, Valdivia-Enriquez moved to admit evidence of J.M.A.H.'s lengthy juvenile criminal record, including multiple adjudications for theft-related residential burglary, as well as an adjudication for possession of stolen property and theft of a firearm. Valdivia-Enriquez requested admission of this evidence under ER 609(d) and ER 404(b) and sought to admit this evidence to demonstrate that J.M.A.H. made the accusations of sexual assault to repair the family relationships strained by his prior juvenile criminal behavior. Valdivia-Enriquez also hoped to admit the juvenile convictions for the jury to evaluate and assess J.M.A.H.'s credibility. The trial court denied admission of this evidence.

A jury convicted Valdivia-Enriquez as charged. The trial court sentenced Valdivia-Enriquez to a standard range sentence and imposed legal financial obligations, including a $100 DNA collection fee.

Valdivia-Enriquez appeals.

II.
DISCUSSION

A. Evidentiary Issues

Valdivia-Enriquez argues the trial court deprived him of the right to present a defense by prohibiting him from impeaching J.M.A.H. with evidence of prior juvenile convictions for crimes of dishonesty. The State asserts the trial court properly excluded the evidence because Valdivia-Enriquez failed to show the

relationship between the witness's juvenile record and his testimony. We agree with the State.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution grant criminal defendants the right to present a defense and the right to confront and cross-examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). However, the right to present a defense is not absolute. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). It is subject to the established rules of evidence. State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015). "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence." Jones, 168 Wn.2d at 720 (emphasis omitted). Additionally, courts may deny cross-examination if the evidence sought is vague, argumentative, or speculative. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

We review for abuse of discretion a trial court's decision to exclude evidence. State v. Perez-Valdez, 172 Wn.2d 808, 814, 265, P.3d 853 (2011). "A trial court's evidentiary ruling is an abuse of discretion only if it is 'manifestly unreasonable or based upon untenable grounds or reasons.'" Perez-Valdez, 172 Wn.2d at 815 (quoting State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). When a defendant alleges that a constitutional error arises from an adverse evidentiary ruling, we first review for abuse of discretion. State v. Blair, 3 Wn. App. 2d 343, 353, 415 P.3d 1232 (2018); State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). If we determine the court has not abused its

discretion, the inquiry ends because there is no error. Blair, 3 Wn. App. 2d at 352. If the trial court abused its discretion, we turn to a de novo review of the constitutional claim. Blair, 3 Wn. App. 2d at 353.

1. Credibility

Valdivia-Enriquez requested admission of J.M.A.H.'s prior juvenile adjudications to impeach credibility. ER 609 governs the admissibility of prior convictions for crimes of dishonesty for purposes of attacking credibility. ER 609(d) generally bars admission of evidence of juvenile adjudications to impeach credibility. But the court may allow evidence of juvenile convictions "if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." ER 609(d). This requires an "indication of special reasons favoring admissibility" amounting to "a positive showing that the prior juvenile record is necessary to determine guilt." State v. Gerard, 36 Wn. App. 7, 12, 671 P.2d 286 (1983). The trial court has broad discretion on admissibility of juvenile adjudications sought solely for general impeachment purposes. Gerard, 36 Wn. App. at 11.

Valdivia-Enriquez fails to establish any special reason favoring admission of evidence otherwise inadmissible. Therefore, the trial court did not err in finding the prior adjudications unnecessary for a fair determination of guilt or innocence and properly exercised its broad discretion to deny admission of the evidence.

2. Motive

Valdivia-Enriquez also sought admission of the juvenile convictions to support his defense that J.M.A.H. made the allegations of molestation in order to improve J.M.A.H.'s strained relationship with his family. Valdivia-Enriquez argued the convictions showed motive:

> As far as for motive, it's on the basis of why he and his family might be on bad footing and why, as a way to get back on better footing with his family, it would explain, "All my behavior was kind of based on the fact that Mr. Valdivia had done this horrible things [sic] to me, and that's why I had all these indiscretions and everything," and now that he has revealed it, his life -- his relationship with his family is much better and they moved along and things like that.

The trial court determined the evidence lacked a sufficient nexus with the alleged motive, and that the prejudicial impact outweighed the very low probative value of the evidence.

ER 404(b) allows admission of evidence of other crimes to show motive. Prior juvenile adjudications are also admissible to show bias or motive. Gerard, 36 Wn. App. at 11. Even when relevant to prove motive, the trial court must evaluate the evidence under ER 403 and "exercise its discretion in excluding relevant evidence if its undue prejudice substantially outweighs its probative value." State v. Fuller, 169 Wn. App. 797, 829-30, 282 P.3d 126 (2012).

Valdivia-Enriquez requested admission of J.M.A.H.'s prior juvenile adjudications to show motive. Upon inquiry from the trial court, Valdivia-Enriquez acknowledged he lacked any proof that the prior convictions led to the strained relationship between J.M.A.H. and his family. The evidence of motive was "inference with a few steps" from anticipated testimony of an "icy" family

relationship prior to J.M.A.H.'s disclosure of the abuse. Valdivia-Enriquez also admitted that he could raise this defense without the juvenile adjudications: "I could do that without convictions. I believe that that provides a little bit of a further story."

Based on these statements, J.M.A.H.'s prior juvenile adjudications were not essential to Valdivia-Enriquez's defense. The trial court properly found very low or "non-existent" probative value of the juvenile adjudications. Moreover, the link between J.M.A.H.'s juvenile record and the alleged motive was merely speculation. Denial of this speculative evidence falls within the court's discretion. See Darden, 145 Wn.2d at 621. The trial court did not abuse its discretion by denying admission of the juvenile adjudications as evidence of motive.

Because the trial court's decision on the juvenile adjudications did not amount to an abuse of discretion, we do not reach Valdivia-Enriquez's claimed violation of his constitutional right to present a defense. See Blair, 3 Wn. App. 2d at 352.

B. Prosecutorial Misconduct

Valdivia-Enriquez asserts the prosecutor engaged in misconduct that deprived him of his right to a fair trial by vouching for the credibility of the sole witness against him. The State contends the prosecutor did not express a personal belief regarding the witness's credibility. Instead, the State argues the prosecutor drew reasonable inferences from the evidence. We agree with the State.

The prosecutor referred to J.M.A.H. as credible on multiple occasions during her closing argument. The record shows the prosecutor making statements such as "Ladies and gentlemen, [J.M.A.H.] is credible, and the reason why we know that the State proved this case beyond a reasonable doubt really comes down to that," and "It comes down to the fact that the credibility of [J.M.A.H.] is without question. Without question." Valdivia-Enriquez argues that these instances, as well as other examples discussed below, indicate prosecutorial misconduct.

A defendant that claims prosecutorial misconduct must prove that the prosecutor's comments were both improper and prejudicial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A prosecutor's comments are prejudicial only if there is a "'substantial likelihood the misconduct affected the jury's verdict.'" State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (emphasis omitted). Where, as here, the defendant failed to object to an improper remark below, such failure "'constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). "Jurors are presumed to follow the court's instruction." In re Pers. Restraint of Phelps, 190 Wn.2d 155, 172, 410 P.3d 1142 (2018).

Prosecutors have "wide latitude to draw and express reasonable inferences from the evidence" in their closing arguments. State v. Robinson, 189

Wn. App. 877, 893, 359 P.3d 874 (2015). "The prejudicial effect of a prosecutor's improper comments is not determined by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" 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)).

Prosecutorial misconduct by vouching occurs when the prosecutor either (1) places the prestige of the government behind the witness, or (2) indicates that information that was not presented to the jury supports the witness's testimony. Robinson, 189 Wn. App. at 892–93. Further, there is a difference between the prosecuting attorney's individual opinion presented as an independent fact, and "'an opinion based upon or deduced from the testimony in the case.'" McKenzie, 157 Wn.2d at 53 (quoting State v. Armstrong, 37 Wn. 51, 54–55, 79 P. 490 (1905) (emphasis omitted)).

Valdivia-Enriquez cites an instance in which the prosecutor, as part of a PowerPoint presentation, presented a slide entitled "[J.M.A.H.] is credible." In isolation, such a title may suggest prosecutorial vouching, but the content and context of the slide shows otherwise. Following the title, the prosecutor listed four bullet points as a means to guide the jury during her discussion of the witness's credibility. The bullet points, "NO MOTIVE," "Disclosure," "Corroboration," and "Demeanor," mirrored the prosecutor's talking points as she asserted why the evidence supported the witness's credibility. The prosecutor cited examples from the record that demonstrated the lack of "bad blood"

between Valdivia-Enriquez and the witness's family to emphasize the lack of motive, as well as the dubious likelihood that the witness could provide "the performance of a lifetime" and continuously feign distraught emotions, such as crying, as he recounted the events. This allowed the jury to consider the evidence and make inferences about credibility and in turn did not demonstrate prosecutorial vouching for J.M.A.H.'s credibility.

Valdivia-Enriquez also asserts the prosecutor vouched for the witness through statements such as "we know [J.M.A.H.] is credible" and that the witness's credibility was "without question." Again, the court cannot view such comments in isolation. When viewed in context, the comments express reasonable inferences from the evidence. For example, the prosecutor followed "we know [J.M.A.H.] is credible" with a reminder of the situation in which the witness first disclosed the incident to emphasize the witness's motivation:

> . . . [J.M.A.H.] was in the middle of an act with his girlfriend that was supposed to be interesting and fun and new, but it went horribly south when he hurt her and all of these memories flooded back into his back [sic]. He described a physical, visceral response to seeing pain and fear in his girlfriend's eyes because he was placing himself in the shoes of the person who had done it to him.

The prosecutor used this example along with the surrounding evidence following the incident to corroborate the credibility of the witness.

Further examples, such as the witness's desire to quit soccer, his emotional withdrawal from family, and his motivation for disclosing the crime, provided the jury with evidence to consider as it evaluated the witness's credibility. The prosecutor addressed credibility by examining the witness's

retelling of the incident and resulting emotional behavior after the incident, and thereby did not inappropriately vouch for the witness's credibility.

In light of the foregoing, we conclude that the prosecutor did not place the prestige of the government behind the witness or cite information not provided as evidence to the jury in order to support the witness's testimony. As a result, Valdivia-Enriquez fails to prove prosecutorial misconduct through vouching.

Even if Valdivia-Enriquez were able to successfully argue the comments were improper, he fails to prove his additional burden that the prejudice resulting from the prosecutor's flagrant and ill-intentioned comments was not curable by a jury instruction. Valdivia-Enriquez argues that the comments would unduly influence the jurors. However, the prosecution reminded the jury during its closing argument that it was up to the jury to "go back into that room to determine who was credible, what testimony was credible." Furthermore, the jury instructions in this case ordered jurors to disregard remarks and comments of any lawyer if they are inconsistent with the law or evidence, while also reminding jurors that the lawyers' statements are not evidence. In addition, the jury instructions informed jurors that they are "the sole judges of the credibility of each witness."

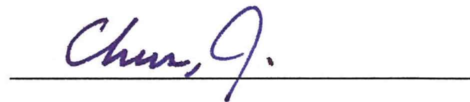
Had Valdivia-Enriquez objected to the prosecutor's statements during closing arguments, the trial court could have reiterated these jury instructions. Because jurors are presumed to follow the court's instructions, and because the instructions told the jurors to consider themselves the only determiners of

credibility, Valdivia-Enriquez cannot demonstrate that the comments resulted in prejudice.

C. DNA Fee

Valdivia-Enriquez and the State both request remand for the trial court to strike the $100 DNA collection fee because the State previously collected Valdivia-Enriquez's DNA due to prior convictions. A legislative amendment effective June 7, 2018, eliminated the mandatory $100 DNA collection fee where "the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541. This amendment applies prospectively to Valdivia-Enriquez due to his pending direct appeal at the time of the amendment's enactment. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). As a result, we remand for the trial court to strike the DNA fee from the Judgment and Sentence.

Affirmed. Remanded to strike the DNA collection fee.



WE CONCUR:

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