

No. 69452-9-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

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STATE OF WASHINGTON, Respondent,

v.

RAYMOND ROSARRO ABITIA, Appellant.

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether defense counsel provided ineffective assistance of counsel by failing to object to admission of other sexual misconduct evidence with the victim where the evidence was admissible to show the defendant's lustful disposition and as res gestae because the incident led to the victim's disclosure of the charged sexual abuse, and where defense counsel used the other incident to attack the sufficiency of the evidence regarding the charged incident.
2. Whether defendant may assert on appeal for the first time that the child sexual assault expert's testimony is impermissible opinion under ER 701 where the basis of the objection below was that it was improper expert testimony under ER 702 and where defendant has failed to demonstrate that the alleged error is a manifest one of constitutional magnitude.
3. Whether the child sexual assault expert's testimony that one of the reasons it is known children often disclose abuse in a piecemeal manner is because sexual offenders often disclose more abuse than the victim when they are subjected to lie detector tests, when taken in context, was an impermissible comment on the defendant's guilt where the testimony about sexual offenders often not being truthful related to the basis for her opinion that children often disclose more about abuse over time and not to the defendant.
4. Whether the "abiding belief" language in WPIC 4.01, endorsed by the Supreme Court as the instruction courts are to give regarding reasonable doubt, dilutes the State's

burden of proof where that language has been previously approved in other cases.

5. Whether the prosecutor committed misconduct in closing argument by referencing the “abiding belief” language in the reasonable doubt instruction where the instruction has been approved by the Supreme Court and where the prosecutor did not make any argument regarding a jury’s “truth seeking” role.
6. Whether the sexual assault protection order regarding one of the witnesses should be vacated where the information was amended to remove charges relating to that person.
7. Whether a defendant may challenge imposition of legal financial obligations for the first time on appeal and whether there was insufficient evidence to support a finding that the defendant has the ability to pay legal financial obligations now or in the future where the PSI indicated that the defendant had previously made \$30,000 a year and where defendant did not provide the court with evidence at sentencing regarding his inability to pay the costs.

C. FACTS

1. Procedural facts

On May 26, 2011 Appellant Raymond Abitia was charged with one count of Rape of a Child in the First Degree regarding KAA during the time period of July 15, 1995 to July 15, 1996 and one count of Rape of a Child in the Second Degree regarding KMA during the time period of March 24, 2009 to April 3rd, 2011. CP 4-5. On March 6, 2012 the information was amended to add two counts of Distribution of a Controlled Substance to a Minor, one related to “J.A.” and the other

related to KMA. CP 8-10. Before trial the prosecutor amended the information again and removed the rape of a child count regarding KAA and the controlled substance distribution count regarding JA, leaving the two counts regarding KMA. CP 38-39; RP 3, 7. He amended the information to remove the count regarding KMA due to the statute of limitations that formerly applied when the State alleged Abitia committed the act against KAA. RP 351.

Abitia was found guilty by a jury of both counts and was sentenced to an indeterminate sentence with a minimum term of 136 months and a maximum term of life on the child rape count, concurrent with a sentence of 100 months on the drug conviction. CP 62, 65-78; Supp CP¹ __, Sub Nom. 82. The judge imposed a sexual assault protection order regarding Kerry Abitia² and KMA. CP 75; Supp CP __, Sub Nom. 82.

2. Substantive Facts

In April of 2011, Dawn White, Abitia's niece and KMA's cousin, held a birthday party in the afternoon at her house in Mt. Vernon,

¹ The initial judgment and sentence was entered on Sept. 25, 2012. Another judgment and sentence, which included a sentence on count II, was entered on Dec. 12, 2012. The second judgment and sentence was the subject of the State's RAP 7.2 motion that was granted.

² Kerry Abitia is the "KAA" referenced in the initial information(s). The State is not using initials regarding Kerry because ultimately the State did not proceed to trial on charges related to Kerry, and she was an adult when she testified. It also will simplify referencing the witnesses.

Washington for her two young children. RP 36-38. After most of the people at the party had left, Dawn noticed Abitia and KMA weren't around, so she went upstairs to look for them. RP 40.

Dawn noticed the door to one of the bedrooms was shut, which was unusual, so she opened it. RP 40. As she did, she saw Abitia getting up from the mattress on the floor and holding onto the door. Id. Abitia was breathing hard, sweating and shaking, standing in front of the door. RP 41. Dawn asked him what he was doing, and when he refused to move, she pushed him out of the way and saw KMA on the mattress, with one leg out of her pants and underwear. RP 41-42, 80. KMA looked like she was in shock, like she had just seen a ghost. RP 42. Dawn demanded, "What did you do to her?" and told Abitia to get out of her house, that she was going to call the police. RP 42. KMA said, "No, no, no." RP 55, 64-65. Abitia left the room and went into the upstairs bathroom. RP 42. KMA had her hands on her face, appeared scared and was crying. RP 43-44. Dawn asked her how long it had been going on and KMA told her for a while. RP 44, 67, 79.

Dawn heard her children coming up the stairs, so she left and took them to her sister's. RP 45-46. Kerry, KMA's half-sister³, was on her way

³ Abitia is also Kerry's father. RP 84.

back from the store when Dawn called her and told her what happened. RP 84-87, 92. When Kerry got back, KMA was on the porch crying. RP 86. KMA was only willing to talk with Kerry about what happened. She told Kerry that Abitia had been having sex with her that day and that he'd been having sex with her for a while, that it first started at Wiser Lake Road⁴, that Abitia would get her high and then have sex with her. RP 87-89.

Soon thereafter, while Kerry was in a bathroom downstairs, she heard Abitia say to KMA, "These little bitches making you lie?" Kerry came out and asked KMA who was making her lie, and KMA said that she wasn't lying, that she was telling the truth. RP 89-90.

When Dawn returned to the house, she asked Abitia if he was going to get any help, and he said, "What for? I didn't do anything." RP 50. Abitia then left with his parents, Dawn's grandparents. RP 49, 216. Dawn didn't call the police because KMA told Dawn she'd deny it and she refused to talk with Dawn anymore. RP 50. KMA then left to stay at Dawn's sister, Stephanie's, house. RP 48, 50. The incident tore the family apart. RP 91.

When contacted by Det. Smith of the Whatcom County Sheriff's Office and CPS, KMA denied that anything had happened and told them

⁴ Wiser Lake Road is in Whatcom County. RP 167.

that Abitia hadn't been at the party that day. RP 152-53, 171, 181-85, 196. In fact, it wasn't until the third time she was contacted by law enforcement that she was able to talk about it, because she was scared and afraid her family would disown her. RP 152-53, 186-88.

At trial, KMA, who was 15 then, was able to testify about the abuse. RP 130. She testified that she had been using methamphetamines since she was 12, when her father Abitia first gave it to her while they were living on Wisser Lake Road. RP 130, 136. Abitia had been smoking it and put some in a pipe and put the pipe up to her mouth. RP 136-37. She said it made her feel good for days. RP 137. She said that she normally smokes it, but the day of the party, Abitia, who was on meth at the time, gave her some meth crystals and a card, so that she could crunch up the crystals in order to snort it. RP 134-35, 138-39. She said that when she uses meth, she's up for a few days and she doesn't feel in her right mind. RP 136. After the first time, she used meth almost on a daily basis. RP 163. Abitia would give her the meth, but she also got it from others. RP 163. KMA quit using meth in April of 2011. RP 166.

KMA testified the first time Abitia had sex with her was at their house on Wisser Lake Road where she was living with Abitia, her two brothers and sometimes her sister Kerry. RP 154. Abitia had been

smoking meth and she had as well that day. RP 155. Abitia started telling her about sexual things he had done with her mother and some of her cousins and started telling her about things he wanted her to do. RP 156. He started touching her and didn't stop when she asked him what he was doing. RP 157. He told her not to tell anyone, and then he had penile-vaginal intercourse⁵ with her. RP 157. At the end, she just sat there crying. RP 157. She was 13 years old at the time and she never felt right after that. RP 158.

Abitia also touched her inside her vagina later when they were living with her grandparents on Wiser Lane. RP 159. It happened in the living room while the grandparents were asleep, but Abitia stopped when her cousins entered the room. RP 160. Another time happened when Abitia drove her to Birch Bay to an abandoned house. They went up the stairs to where there was an old couch, and he "raped" her again with his penis. RP 165-66. She had used meth earlier that day. RP 144. All of the incidents in Whatcom County happened before she turned 14 in March of 2011, before the birthday party. RP 167.

KMA testified that after Abitia and KMA had used meth at the birthday party, KMA went up to the bedroom to ask Abitia for another

⁵ She testified that he raped her, that he stuck his "thing" in hers. RP 157.

scratch ticket. RP 140-41. When she went to get the scratch ticket, Abitia started touching her. While she was standing up, he took off her pants and pulled down her underwear to her ankles. RP 142-43. Then she went down onto the mattress. RP 143. Leaving his clothes on, he pulled out his penis and touched her inside her vagina with it, but it didn't last long because he heard someone coming up the stairs. RP 144-47. Abitia told her to hurry up and put her clothes on, and told her to say that he had walked in on her changing. RP 147. KMA tried to pull her clothes on, but Dawn came in after Abitia had jumped up and stood by the door. RP 148. Dawn started "going off" on Abitia. RP 148. KMA didn't remember talking to Dawn, but both Dawn and she were crying, and KMA felt lost. RP 149.

KMA talked with Kerry and Stephanie about what happened, but was concerned about talking with other family members because she didn't think they would believe her. RP 150-51. Afterwards she moved in with her mother because she wasn't allowed to have contact with Abitia at her grandparents. RP 151.

Abitia testified that he was watching a movie in the upstairs bedroom when KMA came in and asked for a scratch ticket. RP 210-11. He said she watched the movie with him for a little while, then got up and

started to change her clothes. RP 211. He asked KMA what she was doing and looked away and stood by the door while she changed. RP 211. He said he was used to his kids changing in his presence since he had been with them since they were little and had full custody. RP 212. He said that he told Dawn nothing was going on, that KMA was just changing her clothes when Dawn came in and demanded to know what was going in. RP 212. When Dawn told him to leave, he packed up his bag and eventually got a ride home with his parents. RP 213, 216. Before he left, he spoke with KMA. RP 216. While she initially seemed upset, she was okay after she spoke with him. RP 217-18. He denied using meth that day and said he didn't see anyone else using it. RP 220.

On cross-examination, Abitia admitted that when Dawn walked in, KMA's pant leg was off, but he didn't know why she was changing her clothes. RP 223-24. He testified that KMA had brought clothes with her and had put them in the bedroom. RP 224. He believed that Dawn was making this stuff up because he had gotten into a fight with Dawn's boyfriend a month or two before, and things had been bad between Dawn and him since then. RP 230-31.⁶ While he admitted he had experimented

⁶ On cross examination Dawn testified that Abitia and Dawn's boyfriend were friends, friends that would get drunk and hit each other, but that recently Abitia had given her boyfriend two black eyes. RP 56-57.

with meth, he claimed that Kerry was the one who had gotten KMA into drugs. RP 241.

On rebuttal, Kerry testified that she had seen Abitia use drugs at the house when she was living with him, and had seen him give it to KMA, but that all of them, including the brothers, gave it to one another. RP 295-96. Dawn and KMA both testified that KMA's extra clothes were in the laundry room, not the bedroom, and Dawn denied that Abitia had said KMA was just changing her clothes. RP 298, 300, 305. Dawn admitted having smoked meth with Abitia years before. RP 300.

D. ARGUMENT

- 1. Defense counsel was not ineffective in failing to object to testimony regarding the Mt. Vernon incident because the evidence was admissible as res gestae evidence and evidence of Abitia's lustful disposition to KMA and part of defense counsel's strategy to juxtapose the specificity of the evidence regarding that uncharged incident with the alleged lack of specificity regarding the charged incident.**

Abitia asserts that his attorney provided ineffective assistance of counsel when he failed to object to testimony regarding the uncharged Mt. Vernon incident, and that even if the evidence were admissible, defense counsel was ineffective for failing to request a limiting instruction. Defense counsel was not ineffective in failing to object to the testimony

regarding the Mt. Vernon incident because it was res gestae of the abuse, being the incident that led to the disclosure of the prior abuse, and because it was admissible to show Abitia's lustful disposition toward KMA. Moreover, it appears defense counsel made a strategic decision to focus on the Mt. Vernon incident knowing that most of the State's evidence would relate to that even though Abitia was not charged with that incident. The detailed evidence regarding the Mt. Vernon incident provided the basis for defense counsel's argument that there was not enough specific evidence about where and when the charged incident occurred for the jury to find Abitia guilty. As the evidence was admissible as res gestae and lustful disposition evidence and defense counsel made a strategic decision to use the Mt. Vernon incident as part of the defense, defense counsel was not ineffective for failing to object to the testimony about the incident.

In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev.*

den., 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

In order to prevail on an ineffective assistance of counsel claim based on counsel's failure to object, the appellant "must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct ...; (2) that an objection to the evidence would likely have been sustained ...; and (3) that the result of the trial would have been different had the evidence not been admitted ..." State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Abitia contends defense counsel should have objected to admission of the Mt. Vernon testimony based on ER 404(b). ER 404(b) provides:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

preparation, plan knowledge, identity or absence of mistake or accident.

In order to admit evidence of other crimes or misconduct under ER 404(b), the court applies a four factor test:

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). While frequently understood as encompassing “exceptions” to ER 404(b), in actuality there is only one improper purpose for admission of such evidence, propensity, while there are an undefined number of “other purposes.” State v. Gresham, 173 Wn.2d 405, 420-21, 269 P.3d 207 (2012).

Evidence of other misconduct is admissible under ER 404(b) if it is res gestae of the crime. Under this permissible purpose, evidence of other bad acts is admissible in order to complete the story or “to provide the immediate context for events close in time and place to the charged crime.” State v. Warren, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006), *aff’d on other grounds*, 165 Wn.2d 17 (2008), *cert. den.*, 129 S.Ct. 2007 (2009). In Warren the court found that given the defense theory attacking

the victim's credibility, and the necessity to provide the jury with evidence regarding the timing and context of the victim's disclosures, that evidence regarding the circumstances of the victim's disclosure was admissible as *res gestae*. *Id.* at 63.

Evidence of collateral sexual misconduct is admissible under ER 404(b) if it shows a defendant's lustful disposition towards the same victim.⁷ State v. Ray, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); State v. Camarillo, 115 Wn.2d 60, 70, 794 P.2d 850 (1990); *see also*, State v. Guzman, 119 Wn. App. 176, 182, 79 P.3d 990 (2003), *rev. den.*, 151 Wn.2d 1036 (2004) ("evidence of a defendant's prior sexual acts against the same victim is admissible to show the defendant's lustful disposition toward that victim"). Courts generally find the probative value of ER 404(b) evidence to be substantial in cases where the proof that the sex abuse occurred depends almost exclusively on the testimony of the child victim. State v. Sexsmith, 138 Wn. App. 497, 506, 157 P.3d 901 (2007), *rev. den.*, 163 Wn.2d 1014 (2008).

⁷ The testimony would also probably have been admissible as evidence of common scheme or plan as Abitia either gave KMA methamphetamine prior to having sex with her and/or had sex with her after KMA had used methamphetamine. However, the evidence was not fully developed in this regard.

Here, the evidence was relevant and probative in order to establish that the incidents occurred where Abitia denied the abuse ever happened and argued that KMA's story was not credible and that Dawn was making this up because she was mad at him. *See, Sexsmith*, 138 Wn. App. at 506 (where defense was general denial implicating every element of the offense, court did not abuse its discretion in admitting evidence of prior acts of child rape and molestation where child sex abuse victim's credibility was central to the case); *see also, Guzman*, 119 Wn. App. at 182-83 (prior sexual contact with victim that occurred six years before was admissible to show defendant's lustful disposition towards victim despite fact that there had been contact between the two during the intervening years and no allegations occurred during that six year period).

Abitia relies upon *State v. Dawkins*, in asserting that counsel's failure to object was ineffective assistance of counsel. In *Dawkins* the issue on appeal was whether the trial court *abused its discretion in granting a new trial* where new post-trial counsel moved for a new trial based on prior counsel's failing to move to limit evidence of prior incidents. *State v. Dawkins*, 71 Wn. App. 902, 906, 863 P.2d 124 (1993). The trial court, which had raised defense counsel's ineffectiveness sua sponte prior to sentencing, granted the motion, finding that if defense

counsel had so moved, it would have found that the evidence of prior incidents was more prejudicial than probative. *Id.* On appeal, the court noted that as Washington law now stood, the evidence of the prior incidents would have been relevant to demonstrate the defendant's lustful disposition towards the victim. *Id.* at 909. Noting that defense counsel had been correct in concluding that the evidence would have been admissible to show lustful disposition, it found the trial court did not abuse its discretion in granting a new trial because counsel had failed to appreciate that the trial court had discretion to exclude the evidence, and obviously would have done so. *Id.* at 910. The appellate court also noted that the trial court had not abused its discretion in determining that the failure to object was not a trial tactic. The court also found there was prejudice from defense counsel's ineffectiveness because the jury found the defendant not guilty regarding another victim alleged to have occurred on the same date. *Id.* at 911.

Here, the evidence regarding the Mt. Vernon incident was admissible based on *res gestae*, not just lustful disposition, therefore the probative value of the evidence here clearly outweighed the prejudice. It is hard to imagine how the trial would have occurred, and the defense presented, without testimony concerning the Mt. Vernon incident. The

incident is the one that led to KMA's disclosure, and the substance of her disclosure came in substantively as an excited utterance.

Moreover, unlike Dawkins, it is highly likely that defense counsel strategically chose to not object to the testimony in order to lay the foundation for his defense. At the beginning of his closing argument defense counsel stated:

Now, the State is asking you to find on both of these charges that, especially on the first one, that an event occurred, a rape occurred of [KMA], after she turned 12 but before she turned 14.

Now, the State has said something about, um, this happened in Skagit County. So we don't want you to think about that.⁸ Well, the situation is [KMA] turned 14 on March 23rd, on March 24th of 2011. And the party was April third. So, if you find that the incident that we have been, heard the most every time about, actually occurred, that's when she was 14, so that's not between the ages of over 12 and under 14. So that's why the State wants you to agree, all of you, that an incident occurred and you don't know when and you are not sure where, but you all have to agree that an incident occurred at a particular time and place.

RP 331-32. Defense counsel continued along this same vein:

So, again, the State is asking you to find that Mr. Abitia, Raymond, gave his daughter meth on that day. They want you to believe that he had it some time before and that there had to be a first time and that that was here in Whatcom County and that's what you are talking about.

⁸ Defense counsel is paraphrasing the prosecutor's argument at RP 317. The sentence should more accurately be punctuated: "... this happened in Skagit County, so we don't want you to think about that."

RP 334. Later he noted how KMA at the time of the Mt. Vernon incident denied that it had happened. RP 337. And then he continued:

... But that's not the level of proof. The level of proof is has the State proven to you as a person, beyond a reasonable doubt, that a crime, that this particular crime has occurred and that it occurred at a particular time in a particular place. Not was that story believable. But was that story sufficient enough if there is no other evidence to overcome not only the presumption of innocence, but any doubt that there may be as to whether something occurred on a particular time and particular place.

...

Now, you may think that he is not a very good father and you may have a lot of negative feelings towards him at this moment, but that's not the issue. The issue is did the State prove to you beyond a reasonable doubt that he raped his daughter between – when she was between the ages of 1 (sic) and 14. And did he give her methamphetamine. And if so, it all happened, you all agree it happened on the same time at the same place.

RP 337-38. Counsel ended with: “And look at this not from a perspective of, oh, must have happened, let's find the evidence to prove it. But from the perspective of something is going on, has the State proved what it was and when it was.” RP 339. Counsel was clearly trying to juxtapose the specific testimony about the incident in Mt. Vernon, which would be legally insufficient because she was 14 at the time of the offense, with the relative lack of specificity about the other, Whatcom County, incidents as

to when and where they occurred. The circumstances of the disclosure also permitted defense counsel to argue that Abitia's cousin was making up what she saw because she was mad at him, and provided the basis to attack KMA's credibility because shortly after the incident that led to the disclosure, KMA denied anything had happened. Given that specifics of the Mt. Vernon incident would come in to show Abitia's lustful disposition to KMA and to explain the circumstances of KMA's disclosure of the abuse, it was not ineffective for defense counsel to juxtapose the specificity of the evidence regarding a crime that his client could not be found guilty of with the lack of specificity regarding the incident(s) in Whatcom County with which he was charged.

a. Defense counsel was not ineffective for failing to request a limiting instruction

Acknowledging that defense counsel may have concluded that the evidence could have been admitted as lustful disposition evidence, Abitia asserts that defense counsel was still ineffective for failing to request a limiting instruction. "Where evidence is admissible for a proper purpose, the party against whom the evidence is admitted is entitled, upon request, to a limiting instruction informing the jury that the evidence is only to be used for the proper purpose and not for the purpose of proving the character of a person in order to show that the person acted in conformity

with that character.” Gresham, 173 Wn.2d at 420. A trial court has no duty to give such an instruction sua sponte. Id. at 423 n.2. Failure to give a limiting instruction is subject to harmless error review. Id. at 425. Failure to give an ER 404(b) limiting instruction is harmless “unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” Id.

Even if defense counsel had requested a limiting instruction, any limiting instruction may have been more confusing to the jury rather than helpful because the jury would have been instructed that it could only consider the evidence for the purposes of showing Abitia’s lustful disposition to KMA *and* to “complete the story” of, or provide context for, the offense. Given the nature of the defense, one can presume that defense counsel’s decision not to request a limiting instruction was tactical. *See, State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (where defense counsel asked defendant about other fights court could presume that counsel’s decision not to request limiting instruction regarding evidence of prior assaults was tactical). It is highly likely that defense counsel did not request a limiting instruction because a limiting instruction would not help his argument regarding the lack of specific evidence of place and date for the charged incident. Moreover, any limiting instruction

would have merely emphasized to the jury the evidence showing Abitia's lustful disposition towards KMA.

2. The expert's testimony explaining why she believed that children frequently disclose sexual abuse in a piecemeal manner was not a comment on Abitia's guilt or credibility.

Abitia asserts that the child sexual assault expert witness's testimony impermissibly commented on his credibility by telling the jury he is a liar. First, Abitia did not object to the expert witness's testimony based on it being impermissible opinion testimony, under ER 701, but on it not being appropriate expert testimony, under ER 702, and not relevant. He has not demonstrated that the witness's testimony is a manifest error of constitutional magnitude such that he may raise it for the first time on appeal. Second, Abitia takes the testimony out of context. In the course of testifying as to how she knew that children do not disclose abuse all at once, the witness testified that she had reviewed sexual deviancy evaluations and in those evaluations a perpetrator is required to disclose all their victims, and are given a lie detector test to make sure they are telling the truth because oftentimes perpetrators will not tell the truth about the abuse, and in her experience, she has found that the perpetrator discloses more abuse than the child did. Abitia may not raise this issue for the first time on appeal because the witness's testimony was not an explicit

comment on his guilt or credibility, and therefore doesn't constitute a manifest error of constitutional magnitude. Even if his objection had been sufficient to notify the trial court that he was objecting on the basis of impermissible opinion testimony, the testimony was admissible as it explained the basis for the child sexual assault expert's opinion that children frequently don't disclose sexual abuse all at once and it did not relate to him specifically.

a. RAP 2.5

Abitia asserts that he objected to the alleged improper opinion testimony below, however, the basis of his objection was that it was not proper expert testimony, which falls under ER 702, while on appeal he asserts that it is impermissible opinion testimony because it reflects on his credibility, which falls under ER 701. "A party may assign evidentiary error on appeal only on a specific ground made at trial." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *see also*, State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 232 (2004), *rev. den.*, 156 Wn.2d 1034 (2006) (in general appellant is limited on appeal to those specific grounds for evidentiary objections asserted at trial). Objecting below gives the trial court the opportunity to prevent or cure the error. Kirkman, 159 Wn.2d at 923.

An appellant may raise an issue for the first time on appeal if he/she can demonstrate a manifest error that affected a constitutional right. RAP 2.5(a). Exceptions to RAP 2.5(a), however, are to be construed narrowly. Kirkman, 159 Wn.2d at 935. In order to show “manifest error,” an appellant must show that the alleged error had practical and identifiable consequences in the trial. *Id.* It is the appellant’s burden to demonstrate how the error actually affected his right to a fair trial such that the alleged constitutional error would fall within the narrow exception of RAP 2.5(a). In the context of improper opinion testimony, a “manifest error” requires a nearly explicit statement by the witness regarding the defendant’s guilt. *Id.* at 936.

Abitia’s objection below was based on Ms. Gaasland-Smith’s testimony not being proper expert testimony, not that it was impermissible opinion testimony. Abitia failed to object to the specific testimony that he argues was impermissible opinion testimony and his general objection to the Ms. Gaasland-Smith testimony is insufficient to preserve the error he asserts on appeal. *See, State v. Blake*, 172 Wn. App. 515, 529-30, 298 P.3d 769 (2012), *rev. den.*, 177 Wn.2d 1010 (2013) (defendant’s motion in limine to exclude impermissible opinions on guilt that did not specifically refer to the testimony complained about on appeal and lack of specific

objection at trial were insufficient to preserve the claimed error). Ms. Gaasland-Smith, an employee of the prosecutor's office, was testifying as a sexual assault specialist in the case. RP 101. After providing her qualifications, she began testifying about why children avoid or delay disclosing sexual abuse. RP 105. When she testified about why children might fear disclosing, that kids can be told by perpetrators that they won't be believed and that children may try to tell by making a "testing the water sort of statement," defense counsel objected. Defense counsel objected that the testimony did not relate to the case, that she was only talking in generalities, that there was nothing to indicate that what sexual predators do was occurring in the case. RP 106-07. When the prosecutor responded that she was testifying as an expert, defense counsel responded that the testimony was highly prejudicial because it implied that all sex offenders act in a certain way. RP 107. The court overruled the objection, finding it proper expert testimony and noting that she had just testified that "I don't think you can say that there is one reason that applies to every case." RP 107-09. The judge then cautioned the prosecutor, in front of the jury, not to suggest that everything applies in every case:

...so in establishing the range of an expert's testimony, it is appropriate to be a little bit more generalized. But we must be very cautious so that generalization does not directly or

indirectly suggest to the jury that that is what has happened in the particular case that the jury is dealing with.

RP 108. Ms. Gaasland-Smith then testified that sometimes a child can fear that they will be blamed for the abuse and that disclosure could break up the family. RP 109-10. In response to a question as to whether children disclose all at once, Ms. Gaasland-Smith testified that most of the time they don't and that she knows this from having read sexual deviancy evaluations, and it's common for the evaluations to reveal more abuse than the child disclosed. RP 110-11. In explaining what a sexual deviancy evaluation was and why her opinion was that children tend not to disclose all at once, Ms. Gaasland-Smith testified:

... part of the sexual deviancy evaluation is for the perpetrator to say, um, all of their sexual partners to disclose all of their victims, to talk about all of their sexual behaviors and then there is a lie detector test given because, um, oftentimes people who do this kind of thing don't tell the truth. So that's a way to kind of find out if they are telling the truth.

RP 111. Defense counsel did not object to this testimony. Ms. Gaasland-Smith then testified about other ways that "we" know that children don't disclose everything. RP 111-12. Ms. Gaasland-Smith also testified about why there might not be physical findings in child sexual assault cases and why sexual assault exams might not be done and what the grooming process is and how people within a family may not know that abuse is

occurring. RP 114-18. At the end of his cross examination, defense counsel renewed his objection, the same objection, to the “whole line of testimony of this expert,” arguing that it wasn’t relevant to the case, not helpful to the jury and highly prejudicial. RP 121.

Defense counsel did not object on the basis that it was impermissible opinion testimony because it reflected on Abitia’s credibility or that it implied Abitia was a liar. The testimony regarding perpetrators not telling the truth came up only in the context of why Ms. Gaasland-Smith believed that children oftentimes do not disclose all at once, and that one of the ways she knew that was because offenders who had received sexual deviancy evaluations often disclosed greater or more abuse than their child victims. There was no testimony that Abitia had received a sexual deviancy evaluation or that Ms. Gaasland-Smith believed that Abitia couldn’t be believed. Ms. Gaasland-Smith’s testimony cannot be construed as a nearly explicit statement regarding Abitia’s guilt or credibility. Abitia cannot raise a claim of impermissible opinion testimony under ER 702 for the first time on appeal.

b. Ms. Gaasland-Smith’s testimony was not impermissible opinion testimony

A trial court’s decision to admit expert testimony is reviewed for abuse of discretion. Kirkman, 159 Wn.2d at 927. Opinion testimony

regarding a defendant's veracity is generally impermissible unless the defendant's affirmative testimony raises the issue of credibility. *Id.* at 927-28; *see also*, State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (witness may not testify as to their opinion regarding defendant's credibility because that determination falls exclusively within the province of the jury). Opinion testimony is testimony that is based on a witness's belief rather than direct knowledge of facts. Saunders, 120 Wn. App. at 811. In determining whether testimony constitutes impermissible opinion testimony, courts generally consider five factors: 1) the type of witness involved; 2) specific nature of testimony; 3) nature of the charges; 4) type of defense; and 5) other evidence before the jury. Demery, 144 Wn.2d at 759. "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *rev. den.*, 123 Wn.2d 1011 (1994). An expert witness may express an opinion on a proper subject even though in doing so he or she expresses an opinion as to an ultimate fact to be determined by the jury. Kirkman, 159 Wn.2d at 929.

Ms. Gaasland-Smith was testifying as an expert witness, her testimony did not relate to Abitia himself or to specifics of the facts of this case, but only as to the basis for her opinion that children frequently do not disclose abuse all at once. While Abitia's credibility was at issue since he testified and his testimony was that the abuse had not occurred, the expert's testimony did not directly comment on his guilt or veracity. Her testimony was helpful to the jury to explain the reasons that KMA may have disclosed in the manner that she did, initially denying it to everyone but her sister, and eventually admitting that the abuse did occur and had occurred over years. Ms. Gaasland-Smith's testimony that perpetrators are given lie detector tests in order to ensure that they're telling the truth about their sexual assaults on victims in the course of sexual deviancy evaluations, taken in context, was not impermissible opinion testimony.

3. WPIC 4.01 does not dilute the State's burden of proof.

Next, Abitia contends that the reasonable doubt instruction, WPIC 4.01, given in this case diluted the State's burden of proof. The Supreme Court has directed trial courts to use WPIC 4.01. The instruction has previously been challenged on numerous bases, including based on dilution of the burden of proof, and has been upheld. The instruction was a proper statement of the State's burden.

In State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), the Supreme Court directed trial courts to use the approved pattern instruction WPIC 4.01 in order to instruct the jury about the reasonable doubt standard. Prior to providing this direction to trial courts, the court noted that jury instructions “must define reasonable doubt and clearly communicate that the State carries the burden of proof.” Id. at 307. In choosing not to endorse the *Castle* instruction, the court also noted: “The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve.” Id. at 316. The court then directed the trial courts to use WPIC 4.01 to inform the jury of the State’s burden to prove the charges beyond a reasonable doubt. Id. at 318.

Abitia asserts though that the Bennett court did not address the bracketed “abiding belief” language, asserting that the “belief in the truth” phrase minimizes the State’s burden. As mentioned by Abitia, the Supreme Court in State v. Pirtle, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) did reference this language. Although it did not specifically address the phrase Abitia finds objectionable, the court found that the abiding belief language, evaluated in the context of the whole instruction, adequately conveyed the reasonable doubt standard. Id. at 656-58. It was

the last sentence⁹, a sentence that was added by the judge, that the court found unnecessary but not erroneous. *Id.* at 658. In fact, the court noted the U.S. Supreme Court had upheld the “abiding belief” language in Victor v. Nebraska, 511 U.S. 1, 14-15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). *Id.* Moreover, two other cases have specifically addressed the argument that WPIC 4.01, with the abiding belief language included, dilutes the State’s burden of proof and have held that the instruction taken as a whole does not. *See, State v. Lane*, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989); State v. Mabry, 51 Wn. App. 24, 751 P.2d 882 (1988) (when instruction is construed as a whole, abiding belief language in WPIC 4.01 adequately instructs jury regarding State’s burden to prove each element beyond a reasonable doubt).

The instruction given here, WPIC 4.01, adequately conveyed the State’s burden of proof. CP 44; WPIC 4.01. The instruction should be construed as a whole, without overemphasizing three isolated words in the instruction. The instruction has previously been upheld and did not dilute the State’s burden.

⁹ The last sentence read: “If, after such consideration[,], you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt.” Pirtle, 127 Wash. 2d at 656.

4. **The prosecutor did not commit misconduct in referencing the “abiding belief” language in rebuttal because he was referring to the court’s instruction and did not comment as to any “truth seeking” role of the jury.**

Along the same vein, Abitia contends that the prosecutor committed misconduct in closing argument when he referenced the “abiding belief” language of WPIC 4.01, thereby diminishing the State’s burden of proof. As argued above, courts have found that the “abiding belief” language does not dilute the State’s burden when the instruction is taken as a whole. Abitia attempts to characterize the prosecutor’s argument as an argument directing the jury of its “truth-seeking” function, based on a line of cases critiquing arguments instructing the jury to “declare the truth.” The prosecutor’s argument did not tell the jury to “declare the truth,” and was permissible argument based on a valid jury instruction.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Absent an objection, a claim of misconduct is waived unless it is so flagrant or ill-intentioned that it creates an incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); State v. Echevarria, 71 Wn. App. 595, 597, 860 P.2d 420 (1993). Misconduct does not create an incurable prejudice unless: (1) there is a substantial likelihood that it affected the jury's verdict, and (2) a properly timed curative instruction could not have prevented the potential prejudice. State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996).

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. Russell, 125 Wn.2d at 85-86. Defense counsel's decision not to object or move for a mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

Here, at the end of rebuttal, the prosecutor stated:

I'm going to leave you with one thought¹⁰, oh, yeah, beyond a reasonable doubt, there is an instruction here. You know, it's pretty simple if you folks end up having an abiding belief that

¹⁰ The last thought the prosecutor left the jury with was why KMA would make it up. RP 343.

these things happened, that the defendant sexually abused [KMA], if you have an abiding belief, abiding, continuing belief, you believe it and it continues on, this is what happened you have an abiding belief that the defendant gave [KMA] methamphetamine, that you are satisfied beyond a reasonable doubt, that's that. You have a broad range of time to look at. ...

RP 342-43. The prosecutor made no statement asking the jury to declare the truth as the prosecutor in State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), *rev. den.*, 170 Wn.2d 1002 (2010), referenced by Abitia, did. The prosecutor didn't make any "truth-seeking" argument whatsoever. He argued from the reasonable doubt instruction the "abiding belief" language. In his initial closing argument, he reminded the jury that the State carried the burden of proof. RP 319-20. Prior to closing arguments, the court had reminded the jury that the State bore the burden of proof. RP 310. The prosecutor's argument wasn't improper, and the jury had the complete instruction and is presumed to follow the instructions given. The prosecutor's reference to the "abiding belief" language in the approved reasonable doubt instruction certainly wasn't "flagrant and ill-intentioned."

5. The sexual assault protection order regarding Kerry Abitia should be vacated since the charges related to her were dismissed.

The State concedes that the lifetime protection order entered with respect to the charged victim's sister, Kerry Abitia, was unlawfully imposed, but on grounds other than that asserted in the appeal. The protection order that was entered regarding Kerry was a sexual assault protection order, which order requires a conviction in order to be entered. As the charges relating to Kerry were dismissed before trial and no conviction entered with respect to her, no sexual assault protection order should have been imposed regarding her.

RCW 7.90.150 provides in relevant part:

A sexual assault protection order issued by the court in conjunction with criminal charges shall terminate if the defendant is acquitted or the charges are dismissed, unless the victim files an independent action for a sexual assault protection order. If the victim files an independent action for a sexual assault protection order, the order may be continued by the court until a full hearing is conducted pursuant to RCW 7.90.050.

RCW 7.90.150(2)(b). The State initially charged Abitia with two counts of child rape: rape of a child in the first degree regarding Kerry and rape of child in the second degree regarding KMA. CP 4-5. Pre-trial the court ordered sexual assault protection orders to be entered with respect to both victims. Supp CP __; Sub Nom. 4, 5. The State amended the information

twice and ultimately proceeded to trial only on counts regarding KMA. CP 8-10, 38-39. As the charges relating to Kerry were dismissed and did not result in a conviction, no sexual protection order should have been entered as part of the judgment and sentence on Abitia's convictions regarding KMA. The State concedes the protection order regarding Kerry should be vacated.

6. The court did not err in imposing the court costs and attorney fees, and there is sufficient evidence in the record for the court's finding that Abitia has the current or future ability to pay.

Abitia alleges that the trial court erred in imposing discretionary court costs and in finding that he has either the present ability or likely future ability to pay his legal financial obligations. To the extent that he relies on a statutory basis, RCW 10.01.160, for his argument regarding imposition of the fees, he waived the issue by failing to raise it at sentencing. Moreover, the court did not err in finding that Abitia has the current or future ability to pay the discretionary fees because Abitia informed the Department of Corrections ("DOC") that he earned \$30,000 annually as a painter and there is nothing in the record to show that Abitia does *not* have the ability to pay his legal financial obligations *in the future*, particularly given the length of the time Abitia has to satisfy the judgment.

Abitia bears the burden of showing that the trial court's imposition of court costs based on the court's failure to consider his inability to pay under RCW 10.01.160 is error that he may raise for the first time on appeal. RAP 2.5(a). A defendant may not raise an issue regarding the court's imposition of legal financial obligations where he did not object below. State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). To the extent that Abitia relies upon a statutory basis, RCW 10.01.160(3)¹¹, to allege trial court error at sentencing, Abitia had an obligation to bring the statute, and the underlying factual basis, to the court's attention. Abitia waived any statutory error and any error regarding failure to consider underlying facts in deciding how much to impose in fees and court costs by failing to bring those matters to the court's attention at the time of sentencing.

Moreover, the statutory sentencing scheme under RCW 9.94A.760 contemplates that an offender shall have reported to DOC to inform DOC, under oath, regarding his financial status and ability to pay and that DOC shall report this information to the court. RCW 9.94A.760(1), (5), (6).

¹¹ RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

According to the Pre-Sentence Investigation (“PSI”), Abitia failed to complete the income and expense form despite DOC’s request that he do so. Supp. CP ___, Sub Nom. 68A at 8.¹² During the interview, Abitia provided minimal information to DOC about his financial status. Id. A judge should not be required to reduce legal financial obligations based merely on speculation about a defendant’s inability to pay, particularly given the lengthy time period within which a defendant has to meet the obligations and where the defendant has not provided the court with the necessary information about his inability to pay.

Abitia specifically contends that the court costs he challenges were discretionary. One of the fees was the \$200 criminal filing fee. Under RCW 36.18.020 the criminal filing fee “shall” be paid upon conviction, and the clerks “shall” collect the fee. RCW 36.18.020(2)(h). The clerk’s filing fee is not discretionary and therefore must be imposed at sentencing. State v. Kuster, ___ Wn. App. ___, ¶ 10-11 (2013) 2013WL 3498241; *accord*, State v. Lundy, ___ Wn. App. ___, ¶9-10 (2013), 2013WL 4104978.

Abitia also asserts that there was insufficient evidence in the record for the court to make a finding that he has the ability to pay the legal

¹² The PSI was apparently sealed at the time Appellant filed his brief, however, it now appears in the court’s docket not sealed.

financial obligations imposed. A court need only consider a defendant's ability to pay and does not have to make a specific finding regarding a defendant's ability to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). If a finding regarding a defendant's ability to pay is made, though, such a finding is reviewed under the clearly erroneous standard. Lundy, 2013WL 4104978 at ¶12; *accord*, State v. Calvin, ___ Wn. App. ___, 302 P.3d 509, 521 (2013). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" Lundy at ¶12. The State's burden to show that a defendant has the present or future ability to pay is a low one. *Id.* at ¶13. The showing of defendant's indigence is the defendant's burden. *Id.* at ¶17.

The court has jurisdiction over Abitia's judgment and sentence for collection of the legal financial obligations until the judgment is satisfied. RCW 9.94A.760(4). The judgment and sentence reflects that the court made a finding that the Abitia "has the ability or likely future ability to pay the legal financial obligations imposed." CP 66 (section 2.5), Supp CP ___, Sub Nom. 82. Although Abitia failed to fill out the required financial forms, he informed DOC during his interview that he earned about \$30,000 annually as a painter, although he also stated he received food

stamps and had other outstanding legal financial obligations. Supp CP ___, Sub Nom. 68A (at 8). Abitia was 48 at the time of sentence and was sentenced to a minimum term of 136 months, so at the time he is scheduled to be released from prison, he would still be capable of working. Id. There is nothing in the record that indicates that Abitia would not have the future ability to pay the fees imposed.

While Abitia was represented by a public defender, that in and of itself is an insufficient basis to not impose court costs. As noted in Curry:

[Defendants] argue additionally that the orders of indigency entered for purposes of appeal are sufficient to show that they cannot, in fact, pay the financial obligations imposed. We disagree. The costs involved here are on a different scale than the costs involved in obtaining counsel and mounting an appeal. Moreover, in both cases, recoupment of attorney fees was waived. *It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date.*

Curry, 118 Wn.2d at 915 n.2 (emphasis added in italics). A defendant's indigent status at the time of sentencing does not preclude the imposition of court costs, and a defendant's inability to pay is best addressed at the time the State attempts to enforce collection. State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008), *rev. den.*, 165 Wn.2d 1044 (2009); *see also*, State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (the time to

address the defendant's ability to pay is at the time the State seeks to enforce collection as court's determination at sentencing is speculative).

Even if Abitia could raise the imposition of court costs and the attorney fee for the first time on appeal, the clerk filing fee is mandatory. Second, the trial court's finding that Abitia had the likely future ability to pay the legal financial obligations was not clearly erroneous where Abitia had previously earned \$30,000 a year and where the statute provides a lengthy period of time within which to pay the costs.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm Appellant Raymond Abitia's convictions for Rape of a Child in the Second Degree and Delivery of a Controlled Substance to a Minor and his sentence regarding his legal financial obligations.

Respectfully submitted this 11th day of September, 2013.

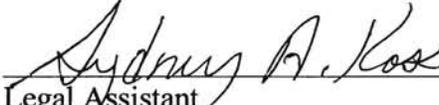


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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Marla L. Zink
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101-3647



Legal Assistant



Date