

70937-2

70937-2

NO. 70937-2-1

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

STATE OF WASHINGTON

Respondent

v.

DANIEL T. LAVELY,

Appellant

BRIEF OF RESPONDENT

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A handwritten signature, possibly of Mark K. Roe, is written over a vertical stamp. The stamp contains the text "NO. 70937-2-1" and "2:04".

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I. ISSUES

1 In a prosecution for first degree custodial sexual misconduct was the evidence sufficient to prove the defendant detained the victim?

2. The defendant alleges the prosecutor committed misconduct in by vouching for the credibility of the victim, violating the advocate witness rule, and shifting the burden of proof.

a. Did the defendant waive any challenge to the prosecutor's conduct when he either did not object to the acts that he now alleges are improper, or did not object on the basis he now asserts the acts were improper?

b. Has the defendant failed to show that where he did not preserve the alleged errors for review that no instruction could have cured the prejudice, and that there is a substantial likelihood that the alleged misconduct had a substantial effect on the jury?

c. Did the prosecutor vouch for the victim's credibility and violate the advocate witness rule by asking the victim about whether she received any consideration for her own charges in exchange for testifying against the defendant and by eliciting testimony that the prosecutor told the victim to tell the truth after her credibility had been attacked?

d. Was it misconduct to argue that the defense had not poked holes in the victim's testimony when taken in context of the entire argument it did not shift the burden of proof but was a reference to how the victim had consistently told what happened?

3. Did cumulative effect of several instances of allegedly improper conduct by the prosecutor deprive the defendant of a fair trial?

II. STATEMENT OF THE CASE

On May 6, 2012 shortly after 1:00 p.m. Officer Iverson of the Lynnwood Police Department went to the Studio 6 Motel in Mount Lake Terrace to serve a warrant. While there he encountered M.M. Officer Iverson learned M.M. also had a warrant out for her arrest from the Seattle Police Department. M.M. resisted arrest and in the ensuing struggle she broke a tooth. Officer Iverson cited M.M. for resisting arrest and released her on that charge. He then took M.M. to the hospital to be cleared for booking on the warrant. While at the hospital he learned that SPD could not take custody of her. Officer Iverson then transported M.M. to the Home Depot located at 205th and Aurora Avenue where he dropped her off. 7/23/13 RP 186-194; 7/24/13 RP 317-322.

M.M. was a drug addict who had struggled with her addiction for many years. On May 6 M.M. was high on methamphetamine. She had no place to go when Officer Iverson dropped her off so she headed to Andy's Motel on Highway 99 because someone she knew had stayed there before. 7/24/13 RP 311-314, 319, 323.

Around 8:00 p.m. M.M. was stopped by the defendant, Daniel Lavelly, for jaywalking as she made her way to Andy's motel. The defendant was working as an Edmonds Police officer patrolling on Highway 99 at the time. M.M. told the defendant about her outstanding warrant, and that she was upset because she had her tooth broken by Officer Iverson. The defendant invited M.M. to sit in the back of his patrol car while he attempted to get SPD to take custody of M.M. M.M. was not able to get out of the patrol car while she sat there because the door was shut. Officer Robinson arrived to assist, but left a short time later. Ultimately the defendant could not get someone from SPD to serve the warrant on M.M., so he drove her to Top Foods on Highway 99 and dropped her off about 9:00 p.m. The defendant warned M.M. that if he saw her on Highway 99 again that he would arrest her. 7/24/13 RP 325-331; 7/25/13 RP 616, 619-121; 7/29/13 RP 903-913; 7/30/13 RP 1019-1021; Ex. 117.

Officer Lavelly believed that M.M. was a prostitute when he first saw her. He based that belief on her behavior and her clothing. He did not believe M.M.'s story about how her tooth got broken so he set up a meeting with Officer Iverson. They met about 11:15 p.m. During the conversation the defendant asked Officer Iverson whether M.M. was a prostitute. 7/23/13 RP 195-198; 7/29/13 RP 913-915.

M.M. went to the Traveler's Motel after the defendant dropped her off. She met an acquaintance there who gave her a sweatshirt. M.M. then went next door to Andy's Motel and found the woman she was looking for. That woman could not help her but directed M.M. to Larry Wheeler's room. The door to Mr. Wheeler's room was open and there were several people there drinking and watching a game on television. 7/23/13 RP 210-213, 233-237; 7/24/13 RP 331-333.

Mr. Wheeler was sharing the motel room with his son Derrick.¹ Derrick did not like M.M. so he left for a period of time. During that time M.M. and Mr. Wheeler had sexual intercourse. Afterwards Mr. Wheeler went to sleep. When Derrick returned Mr. Wheeler woke up. M.M. had taken a shower and was dancing

around the room unclothed. M.M. was so disruptive that the neighbors complained. Derrick decided to get M.M. to leave by inviting her to go to the store with him. Derrick recognized that M.M. was severely intoxicated by drugs. He used a ploy to get M.M. to go to the hospital with him by telling her he wanted to get a drink there. Derrick wanted the hospital to admit M.M. so he told the staff there that M.M. was very high and had threatened suicide, even though M.M. had not made that threat. When M.M. realized what was happening she ran out of the hospital. 7/23/13 RP 214-215, 239-241; 2/24/13 RP 332-337.

Derrick called 911 from the hospital to report that M.M. had left the hospital and was suicidal. The defendant heard the call on dispatch and responded to SNOCOM that he would do an area check. The defendant went to the hospital and got a description of the woman that was there. The defendant surmised that the woman was M.M. from the information hospital personnel gave him. He then went to Andy's Motel because he was told Derrick had gone in that direction. When the defendant arrived at Andy's Motel he confirmed that Derrick had called 911. The defendant then

¹ To avoid confusion Larry Wheeler is referred to as Mr. Wheeler and Derrick Wheeler is referred to as Derrick.

asked Derrick to see if M.M. was in his room. 7/23/13 RP 241-243; 7/26/13 RP 661-663; 7/29/13 RP 916-919, 922-923; Ex. 118.

M.M. went back to the Wheeler's room at Andy's Motel after she left the hospital because she had no place else to go. Shortly after she arrived Derrick found her in the room. Derrick motioned the defendant to come up to the room. When the defendant got to the room he told M.M. that she needed to come with him. The defendant held M.M.'s upper arm as he escorted her to his patrol car. M.M. asked the defendant if she could leave but the defendant told her no. M.M. was seated with her legs out of the patrol car. The defendant shut the door causing M.M. to have to put her feet inside the car. 7/23/13 RP 243-246; 7/24/13 RP 337-340; 7/29/13 RP 923, 927, 931-932.

Once M.M. was in the patrol car the defendant drove to the Burlington Coat Factory. The defendant drove around to the back of the building. It was dark and nobody else was around there. The defendant stopped near the loading dock; he backed his car in close to some trees and brush so that he was facing the loading dock. The defendant opened the door to the patrol car and instructed M.M. to get out. 7/24/13 RP 340-345.

Once M.M. was out of the car the defendant told her to put her hands on the side of the car. Although the defendant had not patted M.M. down before she got in the patrol car at Andy's Motel, the defendant began to pat M.M. down once she was positioned with her hands on his car. The defendant then began rubbing M.M.'s breasts under her shirt. The defendant was so close to M.M. that she could feel a piece of equipment from the defendant's belt against her back. The defendant then put his hands down her pants and began rubbing her vagina. The defendant asked M.M. "can I make you cum?" M.M. was scared so she said yes. The defendant asked M.M. if she had a condom. M.M. got a condom from her purse, turned around and put it on the defendant's erect penis. M.M. turned around and pulled her pants down. The defendant then penetrated her vagina. When he was done M.M. turned around and tried to give the defendant a hug. The defendant held up his hands and said "just go." M.M. then fled.

7/24/13 RP 353, 351-360.

Ronnie Phillips was working at the Burlington Coat Factory as a parking lot sweeper on May 7, 2012 beginning at 2:57 a.m. When M.M. ran around the front of the building she encountered Mr. Phillips. M.M. was hysterical and crying. She asked Mr.

Phillips if he often saw police back behind the building. She also told him that about her tooth and that she had been raped. Mr. Phillips had his leaf blower running and earmuffs on so he did not hear the first things M.M. said, but he did hear that her say that her tooth had been broken. Mr. Phillips offered to help M.M, but she declined his help and instead started walking back toward Andy's Motel. 7/24/13 RP 360, 388-398.

A man driving by stopped and asked M.M. if she needed any help. The man drove M.M. to a 7-11 store and bought her some cigarettes. The receipt for that purchase was dated 3-7-12 at 3:12 a.m. She talked to the man for about 30 minutes before he dropped her off at the Traveler's Inn. As M.M. got out of the man's car she saw the defendant drive up in his police vehicle. The defendant looked at M.M. and then drove off. 7/24/13 RP 361-362; 7/26/13 RP 676-679.

When M.M. returned to Andy's Motel she told Derrick that she had been raped by a police officer. Derrick arranged for M.M. to stay with Joel Kennedy who was also staying at Andy's Motel. M.M. was still upset and crying when she met Mr. Kennedy. M.M. also told Mr. Kennedy that she had been raped by a police officer. 7/23/13 RP 246; 7/24/13 RP 362-364; 7/25/13 RP 592-598.

On May 9 M.M. returned to Studio 6 Motel to retrieve her belongings that were left behind when she was arrested from that location on May 6. Officer Osborne was investigating another complaint at Studio 6 when M.M. arrived. She told the officer that she wanted to report complaints against two officers; one officer used excessive force against her and the other officer raped her. Officer Osborn notified his supervisor about the rape complaint. He then took M.M. to the Mountlake Terrace Police Department to be interviewed. 7/24/13 RP 364-365; 7/25/13 RP 556-558.

Police went to the scene behind the Burlington Coat Factory on that same date. Police located one empty condom wrapper from the parking lot behind the building. It was located near a tree line. The wrapper matched condom wrappers Commander Duncan had collected from M.M. Police did not locate any other condom wrappers or a used condom at the scene. 7/24/13 RP 441-445, 449-452; 7/25/13 RP 516-521, 570-573, 576.

Detective Kowalchuk from the Everett Police Department was assigned the investigation. M.M. did not know the name of the officer who sexually assaulted her, but she did give the detective a description of him. M.M. picked the defendant's picture out of a photo montage. 7/29/13 RP 846.

Detective Kowlachyk arranged to interview the defendant on May 17, 2012. Detective Kowlachyk advised the defendant that there was a woman that made a sexual assault complaint against him. After the defendant completed his interview with Detective Kowlachyk he returned to the Edmonds Police Department where he met with Assistant Chief Lawless. The defendant appeared shaken; he told the assistant chief that he was sorry. 7/29/13 RP 841-842, 850-852.

The Edmonds Police Department has a number of policies related to officer safety and transporting citizens that the defendant violated when he contacted M.M. at Andy's Motel. Officers are required to notify dispatch anytime they arrive on scene or contact someone. The motels on Highway 99 are known to be high crime areas. For officer safety reasons two officers generally respond to those locations when there is a call from one of those motels or an officer is contacting someone at one of those motels. When an officer goes to a motel like Andy's Motel he is required to notify dispatch that he is en route, when he arrives, and his exact location such as a room number. When an officer is transporting someone of the opposite sex he or she is required to call dispatch and advise that transport has begun and the odometer reading at that time.

When the subject is dropped off the officer is required to notify dispatch that the transport has ended and the odometer reading at that time. The purpose of this policy is to protect officers from claims of improper conduct. When an officer encounters someone with a warrant that cannot be served, officers typically take the subject to the bus terminal behind Costco. Officers would not take a person behind the Burlington Coat Factory. If a person is reported to be suicidal an officer should take the person to a hospital for involuntary commitment. 7/26/13 RP 722 – 738.

The defendant contacted dispatch to clear the call when he left the hospital. He did not tell dispatch that he was going to Andy's Motel from the hospital. Nor did he advise dispatch that he was going into the Wheeler's room when he contacted M.M. He did not advise dispatch that he was giving M.M. a public assist ride to some other location. The defendant did not pat M.M. down before putting her in his patrol car when he drove from Andy's Motel to the Burlington Coat Factory. The defendant did not advise dispatch that he was transporting M.M. when he drove from Andy's Motel to the Burlington Coat Factory. The defendant did call in and report he was transporting a female at 3:07 a.m., after M.M. had left the defendant. The location the defendant reported picking up the

female was in the 22200 block of Highway 99, which is in the vicinity of Andy's Motel, but it is not the motel address. The defendant reported that he dropped the female off at the bus station at 3:12 a.m. 7/24/13 RP 340-41, 353; 7/29/13 RP 838-839, 920-26, Ex. 119.

The defendant was charged with one count of custodial sexual misconduct first degree. 1 CP 207. A jury found him guilty of the charge. 1 CP 37.

III. ARGUMENT

A. THE EVIDENCE WAS SUFFICIENT TO PROVE THE DEFENDANT DETAINED M.M.

The State bears the burden to prove every essential element of the crime beyond a reasonable doubt. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). In order find the defendant guilty of the charge of custodial sexual misconduct first degree the State was required to show that the defendant engaged in sexual intercourse with M.M., that at the time M.M. was being detained by a law enforcement officer, that at the time the defendant was a law enforcement officer, and that the acts occurred in Washington. RCW 9A.44.160; 1 CP 49. The defendant challenges the sufficiency of the evidence to prove that M.M. was detained at the time he engaged in sexual intercourse with her.

Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

The legislature did not define the term "being detained" as it is used in RCW 9.94A.130. As an issue of first impression this

Court held that term meant “restraint on freedom to such a degree that a reasonable person would not have felt free to leave.” State v. Torres, 151 Wn. App. 378, 384, 212 P.3d 573 (2009), review denied, 167 Wn.2d 1019 (2010). This is the same standard employed by both the Washington and United States Supreme Courts in the context of investigative detentions. State v. Armenta, 134 Wn.2d 1, 10-11, 948 P.2d 1280 (1997), United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

A person is detained under Washington Constitution, Art.1, §7 only when, by means of physical force or show of authority her freedom of movement is restrained, and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) that she is free to decline an officer’s request and terminate the encounter. State v. O’Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). Whether a reasonable person would believe she is detained is based on the particular, objective facts surrounding the encounter. State v. Hansen, 99 Wn. App. 575, 578, 994 P.2d 855, review denied, 141 Wn.2d 1022 (2000). Circumstances which might constitute a detention include the threatening presence of several officers, when an officer displays a

weapon or physically touches a citizen, or when an officer uses language or a tone of voice indicating compliance with the officer's request might be compelled. Mendenhall, 466 U.S. at 554-555, State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998). Whether a person is detained does not depend on the officer's subjective intent. O'Neill, 148 Wn.2d at 575.

A person is not detained simply because an officer approaches and asks to speak with that person as long as the person is not required to answer and may walk away. State v. Nettles, 70 Wn. App. 706, 709, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010 (1994). Nor does a seizure necessarily occur because the officer asks for identification or request the person take his hands out of his pockets. O'Neill, 148 Wn.2d at 577-578, Nettles, 70 Wn. App. at 712.

A reasonable person may believe he is not free to leave when an officer's conduct acts to immobilize that person. An officer detained a person when he ordered the suspect to "wait right here" while the officer ran the person's identification for warrants. State v. Ellwood, 52 Wn. App. 70, 73, 757 P.2d 547 (1988). A person may also reasonably believe they are not free to discontinue the contact with an officer when the officer directs the person to get out

of his car. O'Neill, 148 Wn.2d at 583. In Nettles this Court reasoned that the defendant was not detained when the officer contacted him in part because the officer did not direct the defendant to put his hands on her patrol car “that would have implied a loss of freedom to a reasonable person.” Nettles, 70 Wn. App. at 711.

Prior contact with an officer may also be a circumstance which may factor into whether contact with that officer constitutes a seizure. State v. Barnes, 96 Wn. App. 217, 978 P.2d 1131 (1999). In Barnes an officer who had arrested the defendant on several prior occasions approached the defendant and informed him that the officer heard there was a warrant for the defendant’s arrest. The defendant’s prior contact with the officer was one factor that led the Court to conclude that a reasonable person in the defendant’s position would believe that he was not free to leave when the officer approached him, since the defendant and officer’s relationship “was hardly the kind that would generate the informal banter which characterizes most social encounters.” Id. at 223-224

An officer’s actions when viewed collectively may lead a reasonable person to believe he has been detained, even where each action taken by the officer viewed in isolation would not justify

that belief. State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009). In Harrington an officer saw the defendant walking down the sidewalk at 11:00 p.m. The officer did not activate his lights, but he stopped his patrol car, got out and he approached the defendant. The officer did not obstruct the defendant's progress, but he asked if he could talk to the defendant. The Court held that the initial encounter was not a seizure. Nor was the defendant detained when the officer asked him to remove his hands from his pockets and a second officer arrived, although these actions moved the encounter farther away from a social contact, and closer to a detention. Ultimately, considering the totality of the circumstances, the Court held the defendant was detained by the time the officer asked to frisk him. Id. at 665-669.

The evidence in this case parallels some of the facts and circumstances of those cases where the court has found police detained a person. The defendant did not give M.M. the choice of leaving the motel with or without him. When the defendant contacted M.M. in the Wheeler's motel room he told M.M. that she had to come with him, even though M.M. specifically asked if she could leave on her own. The defendant touched M.M.'s arm or shoulder as he escorted her downstairs to his patrol car. M.M. was

directed into his car. M.M. did not fully sit in the patrol car at first, but she was compelled to put her feet in the patrol car when the defendant went to shut the door. There were no handles in the back seat of the patrol car where the defendant put M.M.; she was unable to leave the car without his assistance. At that point M.M. thought that she was in custody being transported either to the hospital or the precinct. M.M. clearly did not want to go to the hospital because she had run away from the hospital shortly before the defendant escorted her to his car. The defendant's conduct toward M.M. would leave a reasonable person to conclude that she had no choice in the matter. 7/23/13 RP 244; 7/24/13 RP 337, 339-340, 353.

There was disputed evidence regarding who picked the Burlington Coat Factory parking lot as the place to stop. M.M.'s testimony established that she did not know where they were going. 7/24/13 RP 353. The defendant testified that she directed him to drop her off at the Burlington Coat Factory parking lot. 7/29/13 RP 937. The jury was entitled to believe M.M. on this point over the defendant. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The inference from this evidence is that no reasonable

person would believe that M.M. would be released if she had asked the defendant to let her go.

Once they got to the parking lot the defendant's continued show of authority toward M.M. led to the reasonable conclusion that M.M. was not permitted to just walk away. The defendant parked in a dark, secluded spot behind the business. He decided when to open the door to the car, and then directed M.M. to get out and put her hands on the car. Only then did he pat her down before he began fondling her, ultimately having intercourse with her. 7/23/13 RP 353; 7/26/13 RP 737.

M.M.'s experience with police and with the defendant in particular was further evidence that someone in her position would believe they were being detained by the defendant. M.M. knew that when she sat in the back of a patrol car with the door shut she could not get out absent the officer's assistance. She had spent some time in the back of the defendant's patrol car earlier in the evening while he tried to have her outstanding warrant from King County served. The defendant threatened M.M. that if he saw her again on Highway 99 that he would arrest her. A reasonable inference from the evidence was that M.M. did not expect to see the defendant when he showed up at Andy's Motel. When he did

show up she could reasonably believe he was going to arrest her, particularly when he did not give her the option of simply vacating the premises.

When considering the totality of the circumstances there was overwhelming evidence that a reasonable person in M.M.'s position would not have believed that she was free to leave the defendant's presence or refuse his commands from the moment that he directed her out of the hotel room until the moment that he released her after sexually assaulting her. The defendant contends however that there was insufficient evidence that M.M. was being detained at the time the defendant has sexual intercourse with her.

The defendant's arguments fail to take into account the standard for assessing the sufficiency of the evidence. He argues that his conduct at Andy's Motel was consistent with his duty to remove an unwanted guest. He characterizes touching M.M. as "briefly holding her arm so that she did not fall" which he argues was not the equivalent to handcuffing or other physical force used to restrain a person.

His argument does not account for all the other facts and circumstances surrounding the encounter. When considering the evidence in the light most favorable to the State the defendant was

not just removing an unwanted guest. He could have done that without escorting M.M. downstairs and locking her in the back of his patrol car. There was no evidence M.M. needed help navigating the steps downstairs. Touching her in any manner would lead a reasonable person to believe the defendant, and not M.M. was in control of her fate. Moreover, touching a person is just one factor to be considered when determining whether one is in custody. Courts have found a detention occurred even in the absence of any physical force. Armenta, 134 Wn.2d at 10-11 (Officer took custody of the defendant's property), Barnes, 96 Wn. App at 223 (Officer tells defendant the officer thought there was a warrant for the defendant's arrest), Ellwood, 52 Wn. App. at 73 (Officer makes verbal command to defendant remain where he is standing).

Similarly it is immaterial that the defendant did not take custody of M.M.'s purse or other belongings or that the defendant did not pat M.M. down before putting her in his patrol car. Failure to perform these tasks did not neutralize the coercive effect of the defendant's other acts.

The defendant argues that since he was not investigating any criminal activity at the time he directed M.M. out of the motel room and into his patrol car there was no intent to detain her for law

enforcement purposes. The defendant's subjective intent is not a factor when determining whether M.M. was detained. Ellwood, 52 Wn. App. at 73.

The defendant acknowledges that the Court of Appeals has found that a person is detained when she is locked in the back of a patrol car in State v. Avila-Avina, 99 Wn. App. 9, 991 P.2d 720 (2000), abrogated on other grounds, State v. Winterstein, 167 Wn.2d 620, 220 P.3d 126 (2009), State v. Barron, 170 Wn. App. 742, 285 P.3d 231 (2012). He argues these cases do not support the conclusion that M.M. was detained when he placed her in his patrol car because the facts in those cases differ from the facts here. Here he was not investigating any specific crime, he did not keep her in his car for an extended period of time, no other officers were involved, he did not take her property, M.M. did not attempt to terminate her encounter with the defendant and according to his testimony M.M. was free to leave at any time.

The court should reject each of these arguments. The cases cited by both parties demonstrate that no single set of circumstances is necessary in order to find a reasonable person would not feel free to leave, decline the officer's requests or terminate the encounter. M.M. did attempt to terminate her contact

with the defendant when, at the motel, she asked him if she could leave. When considered in light of her earlier experience with the defendant M.M.'s decision not to seek to terminate the contact after that point was strong evidence that she did not believe that she had any control over the situation, and that she was not free to leave the defendant's custody. The defendant's testimony that she could leave any time is of no moment; the jury was free to reject that testimony and accept other evidence that showed the defendant had detained M.M. at the time he sexually assaulted her.

The defendant also points to a jury question indicating that the jury focused on the question of whether M.M. was "being detained." A jury question says nothing about the sufficiency of the evidence. State v. Linton, 156 Wn.2d 777, 788, 132 Wn.3d 137 (2006) (jury questions are not final determinations and the decision of the jury is contained exclusively in the verdict).

Finally the defendant points to three recent cases where the Court has clarified a statutory term, and then assessed the evidence presented in light of that clarified term. State v. Zeferino-Lopez, 179 Wn. App. 592, 319 P.3d 94 (2014) (second degree identity theft), State v. Hendrickson, 177 Wn. App. 67, 311 P.3d 41 (2013) (intimidating a public servant), State v. Mau, 178 Wn.2d 308,

308 P.3d 629 (2013) (making a false insurance claim). None of these cases support the conclusion that the evidence was insufficient in this case. None of these cases changed this Court's decision in Torres regarding what "being detained" meant in the context of the custodial sexual misconduct first degree statute.

Contrary to the defendant's claim the State's case did not rest on M.M.'s subjective belief that she was not free to leave. When all of the evidence is considered together, the defendant's conduct would lead a reasonable person in M.M.'s position to believe that she was detained from the moment the defendant told her that she had to come with him at Andy's Motel to the moment he told her to "just go" at the Burlington Coat Factory parking lot.

B. THE DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ON THE BASIS OF PROSECUTOR MISCONDUCT.

The defendant contends that three instances of prosecutor misconduct entitle him to a new trial. A defendant who alleges prosecutor misconduct bears the burden to prove the prosecutor's conduct was both improper and that he suffered prejudice. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137 (2007). An allegedly improper argument is considered in the context of the total argument, the issues in the

case, the evidence addressed in the argument, and the court's instructions to the jury. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Even if a prosecutor's remarks are improper, they are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. Id. at 86.

1. The Prosecutor Did Not Vouch For M.M.'s Credibility.

The defendant argues that the prosecutor improperly vouched for M.M.'s credibility in two instances. First the prosecutor asked M.M. about her criminal history and her present incarceration. The prosecutor then asked M.M. if she received any kind of deal on her own charges in exchange for her testimony. Second, in rebuttal closing argument the prosecutor referenced the testimony that M.M. had not asked for a deal on her own charges.

It is improper for a prosecutor to personally vouch for the credibility of a witness. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). A prosecutor improperly vouches for a witness when he expresses a personal belief in the veracity of a witness or indicates that evidence not

presented at trial supports the testimony of a witness. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). However, a prosecutor may properly argue reasonable inferences from the facts concerning witness credibility. State v. Warren, 165 Wn.2d 17, 31, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009).

No prejudicial error from an allegedly improper argument occurs unless it is “clear and unmistakable” that the prosecutor is expressing a personal opinion. Brett, 126 Wn.2d at 175. An argument that “I believe” a particular witness meets this standard. State v. Sargent, 40 Wn. App. 340, 343-344, 698 P.2d 598 (1995). An argument that the witness’s testimony had “the ring of truth” made in the context of discussing facts supporting the conclusion the witness was credible did not constitute prejudicial misconduct. Warren, 165 Wn.2d at 30. This Court recently held that an argument that the defendant was “just trying to pull the wool over your eyes” was an argument explaining the evidence and not a “clear and unmistakable expression of personal opinion. State v. Calvin, 176 Wn. App. 1, 19, 316 P.3d 496 (2013).

a. Direct Examination

M.M. testified about her lengthy criminal history toward the end of direct examination. She admitted that she was currently serving time on a charge. The prosecutor then asked M.M.

Q: You understand the importance of telling the truth on the witness stand?

A: Yes

Q: Have you ever asked me or anyone in my office for any kind of deal on any of your other cases with respect to this case?

A: no.

Q: Or any case?

A: No.

Q: Is it hard for you to be here today?

A: Yes

7/24/13 RP 369-370.

The testimony was properly admitted because M.M.'s credibility was a central issue in the case. Evidence relating to bias or motive is relevant to the witnesses' credibility. State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996). It was difficult for M.M. to testify regarding her own drug abuse and the assault. 7/24/13 RP 368-370. The non-existence of a plea deal was circumstantial evidence that M.M. did

not have any external pressure influencing her to testify in any particular way.

A party may not introduce evidence supporting the credibility of a witness unless the witness's credibility has been attacked. State v. Hakimi, 125 Wn. App. 15, 24, 98 P.3d 809 (2004), review denied, 154 Wn.2d 1004 (2005). However, when a party reasonably anticipates an attack on the witnesses' credibility, evidence rehabilitating the witness may be introduced even before she has been attacked. State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997). A party may reasonably anticipate an attack on the witnesses' credibility when it is an inevitable, central issue in the case. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 178 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403, 405, 756 P.2d 105 (1988).

Here the prosecutor reasonably could anticipate the defense would use M.M.'s extensive criminal history to impeach her credibility. Although most aspects of M.M.'s testimony were corroborated by other evidence, only M.M. and the defendant could testify regarding whether they had sexual intercourse behind the Burlington Coat Factory. In opening statements defense counsel said:

Mr. Lavelly is accused by someone who was seeking to further her self-interest during the course of a multi-day drug binge. Mr. Lavelly is accused of someone – by someone with convictions for felony theft, felony possession of stolen property, multiple counts of felony identity theft, multiple counts of misdemeanor theft, attempted second degree theft, theft of property and criminal making of false statement, all convicted of crimes. And you are here because ultimately it is up to you, the jury, to keep an open mind throughout the course of this trial and decide at the end of your deliberations what you believe the truth is in this case.

7/23/13 RP 158.

This opening statement gave a clear indication that the defense intended to attack M.M.'s credibility in part by reference to her history for crimes of dishonesty. Since M.M. was serving a sentence at the time she testified, it was reasonable to anticipate that the defense would attempt to show that M.M. was "seeking to further her self-interest" by testifying against the defendant in exchange for leniency on her charges. Testimony that M.M. did not seek any consideration on her charges was permissible to "pull the string" on this kind of attack.

The defendant contends that this line of questioning was improper because it suggested that the prosecutor knew that M.M. was testifying truthfully. He compares the testimony in this case to the testimony at issue in State v. Ish, 170 Wn.2d 189, 241 P.3d 389

(2010). The testimony at issue in Ish involved a witnesses' plea agreement that included a provision to testify truthfully in the defendant's case. Four members of the court found that this process was not relevant and "may amount to vouching." Id. at 394. The lead opinion concluded that kind of evidence should not be admitted in the State's case in chief unless on cross examination the defendant uses the plea agreement to attack the witnesses' credibility. Id.

Evidence that a witness has agreed to testify truthfully as part of a plea deal may imply that the prosecutor can verify the witnesses' testimony and thereby enforce the truthfulness condition of the plea agreement. United States v. Brooks, 508 F.3d 1205, 1210 (9th Cir. 2007). Since the jury is the sole judge of the credibility of the witness it not proper to communicate that the prosecutor knows whether the witness has been truthful. Id.

The testimony at issue is fundamentally different from the testimony in Ish for two reasons. First there was no agreement to testify truthfully in this case. Testimony that there is no plea agreement does not carry with it that same implied verification that the witness is telling the truth. Whether the witness is telling the truth remains a jury question based on the typical considerations

included in the jury instructions. 1 CP 40. Second, there was reason to believe that the defense would attack M.M.'s credibility by referring to her criminal history. Because this case presents different facts and circumstances from those in Ish that case does not control the outcome here.

b. Closing argument

The defense attorney attacked M.M.'s credibility during his closing argument. He recounted her chronic drug abuse and her string of criminal convictions and suggested that a person with her history was not credible. He then argued that M.M. made false statements about the defendant at Andy's Motel to get sympathy. She repeated the statements to police at Motel 6 when police ignored her complaint that Officer Iverson broke her tooth. Having told the story she had to stick with it. "And the State would have you believe that's credibility, you make up a big lie, and then you just stick to it come hell or high water." Defense counsel also argued that M.M. made up the allegation because she had a financial motive to see the defendant convicted. He claimed M.M. planted evidence to support her story when she accompanied police back to the Burlington Coat Factory parking lot. 7/30/13 RP 1062-1065, 1067.

In rebuttal closing the prosecutor addressed the arguments that challenged M.M.'s credibility. The prosecutor responded to arguments that M.M. made up a story about the defendant for her own self-interest. He argued:

Prosecutor: But I remind you all, because you have to consider this case in the context of the evidence that is presented in this trial, and I want you to consider [M.M.] told you she is serving a sentence. She is so desperate she never asked me for anything.

Defense counsel: objection. Your Honor.

Prosecutor: She never asked for testimony in this case.

Court: Basis?

Defense Counsel: Vouching.

Court: The jury will recall the testimony. Counsel, please proceed.

Prosecutor: You heard testimony from [M.M.] about counsel has argued that she had some kind of interest. Well, don't you think that her liberty is a lot more important than a few bucks?

7/30/13 RP 1077-1078.

This argument was not a clear statement that the prosecutor believed M.M. as the statement "I believe" the witness in Sargent was. Taken in context, the prosecutor's argument was a fair response to defense counsel's argument that M.M. had a motive to lie about the defendant raping her while she was in his custody.

Because a financial motive had been suggested it was pertinent to suggest that something else might have given M.M. an even more compelling motive to testify. Yet that motive did not exist because M.M. had not sought nor received any reduction in her sentence. What was left was the implication that M.M. was telling the truth. The prosecutor's argument therefore did not constitute impermissible vouching for M.M.'s credibility.

2. The Prosecutor Did Not Act As A Witness By Inferring Evidence Not Otherwise Properly Before The Jury Through Questioning M.M.

The defendant next argues that in two instances the prosecutor violated the advocate witness rule. He first argues the rule was violated by eliciting testimony that M.M. had not sought or received any consideration on her own charges for testifying in the defendant's trial. Secondly, he argues that it was violated when the prosecutor asked M.M. about a conversation she had with the prosecutor in which the prosecutor told M.M. to tell the truth.

An attorney may not impart to the jury his own personal knowledge about an issue in the case under the guise of either direct or cross examination when that information is not otherwise admitted as evidence. State v. Denton, 58 Wn. App. 251, 257, 792 P.2d 537 (1990). Thus when the prosecutor asks questions that

imply a prejudicial fact the prosecutor must be able to prove that fact. State v. Ruiz, 176 Wn. App. 623, 641, 309 P.3d 700 (2013), review denied, 179 Wn.2d 1015 (2014). The focus is on whether the prosecutor is imparting his own knowledge without testifying. State v. Miles, 139 Wn. App. 879, 887, 162 P.3d 1169 (2007).

Defense counsel was properly prohibited from questioning a witness about his statements to another witness who refused to testify in Denton. There a witness allegedly told his cell mate that he would testify in a particular manner in the defendant's trial. The cellmate refused to testify in order to impeach the witnesses' testimony. The defense attorney sought to question the witness about what he told the cell mate. The Court held defense counsel was properly precluded from doing so because the questions would have allowed defense counsel to testify to facts that were not already in evidence. Denton, 58 Wn. App. at 257.

A prosecutor's cross examination of defense witnesses also improperly imparted information to the jury that was not otherwise properly introduced in Miles, 139 Wn. App. at 887. There the critical question at trial was whether the defendant was driving a vehicle when a confidential informant bought controlled substances from the vehicle. The defendant claimed that he was unable to

drive during the relevant time period as a result of an injury. The defendant had been a boxer before he was injured. The prosecutor asked the witnesses whether the defendant had participated in several boxing matches after the injury, providing specific details as to each match. The prosecutor did not introduce any rebuttal evidence to show the defendant had boxed in those matches. Without the rebuttal evidence the court found the prosecutor's questions were an improper attempt to place evidence before the jury that was apparently otherwise unavailable. Id. at 888-889.

Unlike Denton and Miles, the challenged questions here did not put before the jury evidence that was not otherwise properly admitted. M.M. did not deny that she had not asked for any consideration in her own case in exchange for her testimony. She did not deny that the prosecutor told her to tell the truth. Thus this situation did not involve an attempt to introduce rebuttal evidence that was not otherwise unavailable through the questions asked during the witness examination.

As discussed above evidence that was designed to rehabilitate M.M.'s credibility was properly introduced. The prosecutor could reasonably anticipate that M.M.'s credibility would be attacked from the defense attorney's opening statement. The

defense directly attacked M.M.'s credibility during cross examination when counsel asked M.M. about whether Detective Kowalchuk told M.M. any of the details of the case or if she talked to M.M. about testifying. 7/24/13 RP 381-382. This line of questioning suggested M.M. was testifying from information she had been told, and not about what happened. It was therefore reasonable to explore what M.M. had been told by any member of the prosecution team, including whether she had been told to tell the truth.

The defendant argues that asking M.M. what the prosecutor told her only introduced evidence of what the prosecutor said and did. Therefore the prosecutor acted as a witness to M.M.'s credibility by assuring the jury that M.M. was telling the truth. BOA at 41. The question was "what did I tell you" conveyed only that M.M. had a discussion with the prosecutor. It did not suggest any evidence outside the record. M.M. gave the answer "tell the truth" on which she could have been cross examined. Her answer did not suggest that the prosecutor knew she was actually telling the truth.

3. The Prosecutor Did Not Shift The Burden Of Proof To The Defendant In His Closing Argument.

The defendant next argues that the prosecutor impermissibly shifted the burden of proof to the defense by arguing:

You can believe what happened to [M.M.] because cross examination by Counsel really didn't put holes in her story. After an hour plus interview with Detective Kowalchuk, after a two-plus hour interview with the defense team, after an hour of direct examination, after at least half an hour of cross examination, what did that get the Defense? What holes were so poked in what she said about the elements that I have to prove to you after all of those hours of talking about this, what did that reveal?

7/30/13 RP 1049.

The prosecutor has wide latitude to draw reasonable inferences from the evidence, including evidence relating to the credibility of witnesses and express those inferences to the jury. Thorgerson, 172 Wn.2d at 558. However the prosecutor may not argue that the defendant failed to present evidence because the defendant does not have a duty to do so. Id. at 453. Taken in the context of the evidence, the arguments made by the prosecutor, and the instructions to the jury, the argument did not improperly shift the burden of proof.

The overarching theme of the prosecutor's closing argument was that there was every reason to find M.M. credible and no

reason to find the defendant credible. The prosecutor began by comparing a series of lies that are difficult to keep straight with the truth which he described as a straight, verifiable, consistent line. 7/30/13 RP 1039-1040. The prosecutor then discussed M.M.'s testimony and the eight reasons the jury should find her credible. He discussed her lack of motive to lie, the reasonableness of her testimony in light of other evidence, and the evidence that corroborated her testimony. 7/30/13 RP 1042-1049. The challenged argument was the last reason the prosecutor gave to find M.M. credible. The prosecutor followed this argument by discussing the defendant's explanations for the many department policy violations that he committed during his contact with M.M., and suggested that they were not reasonable in light of other evidence. 7/30/13 RP 1050-1054.

When considered in context of the entire argument, the challenged argument was a reference to the evidence that M.M. had told a consistent story from the moment she first reported the sexual assault until the time she testified at trial. From interviews with detectives and attorneys, through direct and cross examination, M.M. told a "straight, consistent" account of what happened. The logical inference from that was she told the truth.

The defendant compares the argument here with the arguments made in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) and Miles, 139 Wn. App. at 889. In Emery the prosecutor argued that in order to find the defendant not guilty the jury had to say “I doubt the defendant is guilty, and my reason is blank...” Emery, 174 Wn.2d at 750. This argument was improper because it implied the jury had to articulate its reasonable doubt by filling in the blank and subtly shifted the burden of proof. Id. at 760. In Miles the prosecutor argued that the jurors had no choice because they had two conflicting versions of events. Miles, 139 Wn. App. at 889-890. To the extent the argument presented the false choice that jurors could acquit the defendant only if they believed his evidence it was improper. Id. at 890.

The argument here is unlike that in either Emery or Miles. The argument did not shift the burden of proof by suggesting that the defendant was required to poke holes in M.M.’s story. The prosecutor specifically said he bore the burden of proving the elements of the offense. Instead the argument was that cross examination was another opportunity to see if M.M. told a “straight, consistent” story or not. Because what she reported had been consistent throughout each telling it was the truth. Nor did the

argument present a false choice. No part of the argument suggested that the jury could acquit the defendant only if they found his evidence credible.

4. The Defendant Waived A Challenge To Some Of The Alleged Errors. He Was Not Prejudiced By Other Alleged Errors.

Whether the defendant satisfies the prejudice prong of prosecutorial misconduct claim depends on whether or not he objected at trial. If the defendant did object then he satisfies his burden to show prejudice if he shows that there is a substantial likelihood that the prosecutor's conduct affected the verdict. In re Pirtle, 136 Wn.2d 467, 481-482, 965 P.2d 593 (1998), Emery, 174 Wn.2d at 760. If the defendant did not object the alleged error is waived unless the defendant can show that the remark is so flagrant and ill-intentioned that evinces an enduring and resulting prejudice. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008 (1998), Emery, 174 Wn.2d at 760-761. Under this standard the defendant bears the burden to show that (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial effect on the jury. Emery, 174 Wn.2d at 761. The focus on this analysis is more on whether an

instruction could have cured any prejudice. Emery, 174 Wn.2d at 762. Even if the defendant has shown that the prosecutor's examination of M.M. and closing argument was improper he has failed to show prejudice.

The defendant did not object when the prosecutor questioned M.M. about whether she received any consideration on her own charges in exchange for testifying in the defendant's trial. 7/24/13 RP 367-370. The defendant did object when the prosecutor asked M.M. to clarify what he told her when he told her to tell the truth on the ground that it had been asked and answered. 7/24/13 RP 385-386. Because the defendant did not object on the basis that it violated the attorney advocate rule as he now argues the issue is waived. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1187 (1985), cert denied, 475 U.S. 1020 (1986), State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

If the defendant had lodged a timely objection the court could have instructed the jurors to disregard the questions and answers. Jurors were instructed to disregard any evidence stricken from the record. 1 CP 39. Jurors are presumed to follow the courts instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

Further it is not likely that evidence M.M. did not get a deal on her own charges or that the prosecutor told her to tell the truth was so prejudicial that it had a substantial effect on the jury. M.M. swore to tell the truth before she testified. 7/24/13 RP 310. That act likely had more impact on how M.M.'s testimony was perceived than any admonition from the prosecutor.

In addition it is not likely that the examination and argument that the defendant did not preserve for review affected the jury because every aspect of M.M.'s testimony was corroborated by other evidence. Officer Iverson corroborated M.M.'s claim that she had been in a scuffle with him and broke her tooth. CAD logs and testimony from the defendant and Officer Robinson corroborated her account of her first encounter with the defendant. The Wheelers and Mr. Kennedy corroborated her testimony about being at Andy's Motel both before and after the sexual assault. CAD logs and Derrick Wheeler corroborated M.M.'s account of running away from the hospital when she figured out Derrick was trying to get her involuntarily committed. Mr. Phillips corroborated M.M.'s testimony that she was behind the Burlington Coat Factory around 3:00 a.m. on May 7. He further corroborated her testimony that she was hysterical and crying when she came out from behind there. Video

surveillance and a receipt corroborated M.M.'s testimony that after the sexual assault she went to 7-11. Both police witnesses and civilian witnesses corroborated M.M.'s testimony that she was high on methamphetamine during and the relevant time period. Finally, a single condom wrapper found behind the Burlington Coat Factory that matched the kind of condoms M.M. had in her purse corroborated her testimony that the defendant had her put a condom on him before he sexually assaulted her. Any prejudice resulting from the unpreserved errors was not likely to affect the jury in the face of this substantial evidence.

For the same reason it is not likely that the prosecutor's argument in rebuttal closing affected the verdict. The defendant did object to the argument in rebuttal closing referencing evidence M.M. did not ask or receive any deal for her testimony on the basis that it constituted improper vouching. 7/30/13 RP 1077-1078. Even if this argument could be construed as a personal opinion that M.M. was telling the truth, it added little if anything to the substantial evidence that supported every aspect of M.M.'s testimony. Given the evidence presented, the verdict did not hinge on that argument.

The defendant compares the "poke holes" argument to which he did not object to the one made in State v. Johnson, 158

Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 103 (2011). There the prosecutor argued the phrase “a doubt for which a reason exists” contained in the court’s reasonable doubt instruction meant the jury had to say “I doubt the defendant is guilty and my reason is... to be able to find reason to doubt, you have to fill in the blank, that’s your job.” Id. at 682. The prosecutor then compared the abiding belief portion of the instruction to constructing a jigsaw puzzle. Id. The court found these arguments improper because they subverted the presumption of innocence by suggesting the jury had a duty to convict unless there was some reason not to. Id. In light of conflicting evidence the court could not conclude that the misstatement of the reasonable doubt standard did not affect the verdict. Id.

The argument at issue here is substantially different from the argument in Johnson. The prosecutor was not discussing the reasonable doubt instruction and did not focus on attempting to explain what reasonable doubt and abiding belief meant. If the argument could be construed to shift the burden of proof it did so in a much more subtle way. It was last reason given to find M.M. credible. The defendant does not argue that any of the other seven

reasons given were improper. Thus the impact of the challenged argument was far less than that in Johnson.

Although the defendant disputed M.M.'s testimony that he had sexual intercourse with her, unlike Johnson the conflicting evidence in this case was not equally strong. There was much evidence that corroborated M.M.'s account. In contrast there was evidence that the defendant had violated many department policies and then lied about when he gave M.M. a ride and where he dropped her off. He reported to dispatch that he picked her up and dropped her off after he actually did that. He reported dropping her off at the bus station, a place that officers commonly dropped people off when giving them public assist rides. 7/26/13 RP 651-657, 664-665; 7/29/13 RP 839; Ex. 119, 128. But he admitted when he testified that he actually dropped her off behind the Burlington Coat Factory. 7/29/13 RP 937. Taking all of this evidence into account, and considering the nature of the argument now challenged, if it was improper it did not likely affect the jury.

5. Cumulative Error Does Not Warrant A New Trial.

The defendant argues that the cumulative effect of the alleged instances of prosecutor misconduct warrant a new trial. Under the cumulative error doctrine a defendant may be entitled to

a new trial when there are several errors that alone may not be sufficient to justify reversal, but when combined deny the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 389 (2000). Where there is no error, or where there are few errors that had little or no effect on the verdict, a defendant has not been deprived of a fair trial. Id.

Here neither the direct examination or redirect examination of M.M., nor the arguments made in closing were improper for the reasons discussed above. Each of the alleged errors relate to the same thing; whether M.M. was credible. Because there was evidence that corroborated every part of M.M.'s testimony, even if the prosecutor's examination of M.M. and his closing argument was improper, it is not likely that the combined effect of those two things affected the verdict. For that reason the cumulative error doctrine does not warrant a new trial.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to find that there was sufficient evidence to support the verdict, and that the prosecutor did not commit misconduct warranting a new trial. The State asks the Court to affirm the defendant's conviction for custodial sexual misconduct first degree.

Respectfully submitted on August 21, 2014.

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2014 AUG 22 PM 2:03

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

THE STATE OF WASHINGTON,

Respondent.

v.

DANIEL T. LAVELY,

Appellant.

No. 70937-2-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 21st day of August, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

RYAN B. ROBERTSON
ATTORNEY AT LAW
1000 SECOND AVENUE, SUITE 3670
SEATTLE, WA 98104

containing an original and one copy to the Court of Appeals, and one copy to the attorney(s) for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 21st day of August, 2014.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit