

NO. 37930-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDDIE LEE TRICE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 06-1-02168-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Whether the defendant’s conviction of first-degree burglary should be affirmed where, when viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the element of entering or remaining unlawfully beyond a reasonable doubt. 1

2. Whether the defendant’s conviction of first-degree burglary should be affirmed where his right to jury unanimity was properly safeguarded. 1

3. Whether the defendant has failed to meet his burden of showing prosecutorial misconduct or that the unchallenged argument was flagrant or ill-intentioned..... 1

4. Whether the trial court properly admitted the testimony of Detectives Turner and Holden and school counselor Ramm-Gramenz where such testimony did not constitute improper opinion testimony on the veracity of the victim or witnesses. 1

5. Whether the matter should be remanded for re-sentencing where, on the record as developed at sentencing, the court erred in finding the defendant to be a persistent offender. 2

6. Whether the matter should be remanded for re-sentencing where condition 14, as presently drafted, is unconstitutionally vague, and condition 25 is not statutorily authorized. 2

B. STATEMENT OF THE CASE..... 2

1. Procedure 2

2. Facts..... 5

| | | |
|----|---|----|
| C. | <u>ARGUMENT</u> | 14 |
| 1. | THE DEFENDANT’S CONVICTION OF FIRST- DEGREE BURGLARY SHOULD BE AFFIRMED BECAUSE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENT OF ENTERING OR REMAINING UNLAWFULLY BEYOND A REASONABLE DOUBT. | 14 |
| 2. | THE DEFENDANT’S CONVICTION OF FIRST- DEGREE BURGLARY SHOULD BE AFFIRMED BECAUSE HIS RIGHT TO JURY UNANIMITY WAS PROPERLY SAFEGUARDED..... | 21 |
| 3. | THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL- INTENTIONED. | 22 |
| 4. | THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF DETECTIVES TURNER AND HOLDEN AND COUNSELOR RAMM-GRAMENZ BECAUSE SUCH TESTIMONY DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY ON THE VERACITY OF THE VICTIM OR WITNESSES..... | 37 |
| 5. | THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE, ON THE RECORD AS DEVELOPED AT SENTENCING, THE COURT ERRED IN FINDING THE DEFENDANT TO BE A PERSISTENT OFFENDER..... | 48 |

6. THE MATTER SHOULD BE REMANDED FOR RE-
SENTENCING BECAUSE CONDITION 14, AS
PRESENTLY DRAFTED, IS UNCONSTITUTIONALLY
VAGUE, AND CONDITION 25 IS NOT STATUTORILY
AUTHORIZED..... 56

D. CONCLUSION..... 61-62

Table of Authorities

State Cases

| | |
|---|--|
| <i>In Re Lavery</i> , 154 Wn.2d 249, 255, 111 P.3d 837 (2005) | 49, 53 |
| <i>State v. Aguirre</i> , 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010)..... | 37, 38 |
| <i>State v. Allen</i> , 127 Wn. App. 125, 131, 110 P.3d 849 (2005)..... | 16, 19, 21 |
| <i>State v. Anderson</i> , 153 Wn. App. 417, 427, 220 P.3d 1273 (2009)..... | 22, 23, 26, 28, 29, 30, 31, 32, 33, 35 |
| <i>State v. Bahl</i> , 164 Wn.2d 739, 753, 193 P.3d 678 (2008)..... | 57, 59, 60 |
| <i>State v. Black</i> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987) | 38 |
| <i>State v. Brockob</i> , 159 Wn.2d 311, 336, P.3d 59 (2006)..... | 14, 15 |
| <i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997)..... | 23, 24 |
| <i>State v. Bunting</i> , 115 Wn. App. 135, 140-41, 61 P.3d 375 (2003).... | 53, 55 |
| <i>State v. Cannon</i> , 120 Wn. App. 86, 90, 84 P.3d 283 (2004)..... | 15 |
| <i>State v. Collins</i> , 110 Wn.2d 253, 256-61, 751 P.2d 837 (1988)... | 16, 19, 20 |
| <i>State v. Contreras</i> , 57 Wn. App. 471, 476, 788 P.2d 1114, <i>review denied</i> , 115 Wn.2d 1014, 797 P.2d 514 (1990)..... | 23, 25 |
| <i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004) | 38 |
| <i>State v. Curtiss</i> , ___ P.3d ___, 2011 WL 1743926 (2011)..... | 22, 29, 33, 35, 39, 40, 46, 47, 48 |
| <i>State v. Davis</i> , 90 Wn. App. 776, 954 P.2d 325 (1998)..... | 16 |
| <i>State v. Demery</i> , 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)..... | 38, 39, 40, 43, 44, 46, 48 |
| <i>State v. Emery</i> , ___ P.3d ___, 2011 WL 1402417 (2011) | 29, 31, 32 |
| <i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995)..... | 25, 27 |

| | |
|---|--------------------|
| <i>State v. Fisher</i> , 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009)..... | 23, 24 |
| <i>State v. George</i> , 150 Wn. App. 110, 117, 206 P.3d 697 (2009)..... | 37 |
| <i>State v. Gohl</i> , 109 Wn. App. 817, 823, 37 P.3d 293 (2001)..... | 16 |
| <i>State v. Graham</i> , 59 Wn. App. 418, 429, 798 P.2d 314 (1990)..... | 23, 25 |
| <i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)..... | 14 |
| <i>State v. Gregory</i> , 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) | 22, 26 |
| <i>State v. Heatley</i> , 70 Wn. App. 573, 579, 854 P.2d 658 (1993) | 39 |
| <i>State v. Hickman</i> , 135 Wn.2d 97, 101, 954 P.2d 900 (1997)..... | 16 |
| <i>State v. Hopson</i> , 113 Wn.2d 273, 287, 778 P.2d 1014 (1989)..... | 30 |
| <i>State v. Johnson</i> , 158 Wn. App. 677, 683, 243 P.3d 936 (2010)..... | 24, 28, 31 |
| <i>State v. Kirkman</i> , 159 Wn.2d 918, 934, 155 P.3d 125 (2007)..... | 37, 38, 46, 47, 48 |
| <i>State v. Kitchen</i> , 110 Wn.2d 403, 410, 756 P.2d 105 (1988)..... | 21 |
| <i>State v. Klimes</i> , 117 Wn. App. 758, 73 P.3d 416 (2003)..... | 16 |
| <i>State v. Larios-Lopez</i> , 156 Wn. App. 257, 260, 233 P.3d 899 (2010)..... | 22, 24, 25, 27, 35 |
| <i>State v. Lopez</i> , 107 Wn. App. 270, 276, 27 P.3d 237 (2001) | 14 |
| <i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006) | 23 |
| <i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998)..... | 49, 50, 53 |
| <i>State v. Myers</i> , 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)..... | 15 |
| <i>State v. O’Cain</i> , 144 Wn. App. 772, 774, 184 P.3d 1262 (2008)..... | 60, 61 |
| <i>State v. Pastrana</i> , 94 Wn. App. 463, 479, 972 P.2d 557 (1999) | 24 |
| <i>State v. Ramirez</i> , 49 Wn. App. 332, 336, 742 P.2d 726 (1987) | 25 |

| | |
|---|------------------------|
| <i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994)..... | 23, 24, 25, 26, 27, 35 |
| <i>State v. Salinas</i> , 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992)..... | 15, 18 |
| <i>State v. Sansone</i> , 127 Wn. App. 630, 642, 111 P.3d 1251 (2005)..... | 56, 57, 60 |
| <i>State v. Stenson</i> , 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)..... | 22 |
| <i>State v. Swan</i> , 114 Wn.2d 613, 661, 790 P.2d 610 (1990)..... | 22 |
| <i>State v. Thieffault</i> , 160 Wn.2d 409, 415, 158 P.3d 580 (2007)..... | 50 |
| <i>State v. Thomas</i> , 150 Wn.2d 821, 856, 83 P.3d 970 (2004), <i>review</i> <i>granted</i> in part, 163 Wn.2d 1033, 187 P.3d 269 (2008)..... | 38 |
| <i>State v. Venegas</i> , 155 Wn. App. 507, 228 P.3d 813 (2010)..... | 31 |
| <i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)..... | 24 |
| <i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007)..... | 23 |
| <i>State v. Young</i> , 158 Wn. App. 707, 243 P.3d, 172, 179 (2010)..... | 37 |
| <i>State v. Zimmer</i> , 146 Wn. App. 405, 413, 190 P.3d 121 (2008)..... | 56 |
| Federal and Other Jurisdictions | |
| <i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962)..... | 23 |
| <i>Durbia v. Smith</i> , 224 F.3d 995, 1001-02 (9 th Cir. 2000), <i>cert. den.</i> , 531 U.S. 1148, 121 S. Ct. 1089, 148 L.Ed 963 (2001)..... | 39 |
| Fla. Stat. 794.011(1)(g)..... | 51 |
| Fla. Stat. 794.011(1)(h)..... | 51 |
| Fla. Stat. 794.011(5)..... | 50, 51 |

| | |
|---|----|
| <i>Montgomery v. State</i> , 897 So.2d 1282 (Fla. 2005) | 50 |
| <i>Price v. State</i> , 43 So.3d 854 (Fla. 2010)..... | 50 |
| <i>Richards v. State</i> , 738 So.2d 415, 418 (Fla. 2d DCA 1999) | 51 |
| <i>Seagrave v. State</i> , 802 So.2d 281, 287 n.7 (Fla. 2001) | 51 |
| <i>Walker v. State of Florida</i> , 880 So.2d 1262 (2004), <i>rev. on other grounds</i> <i>State v. Walker</i> , 932 So.2d 1085 (Fla. 2006)..... | 55 |
| <i>Watkins v. State</i> , 48 So.3d 883 (Fla. 2010)..... | 51 |

Constitutional Provisions

| | |
|----------------------------|--------|
| Article I, section 3 | 57 |
| Article I, Section 9 | 25, 27 |
| Fifth Amendment..... | 27 |

Statutes

| | |
|-------------------------------|------------|
| RCW 9.94A.030(33)(2006) | 49 |
| RCW 9.94A.570 (2006)..... | 49 |
| RCW 9.94A.700(4)..... | 56 |
| RCW 9.94A.700(5)..... | 56 |
| RCW 9.94A.700(5)(c) | 58 |
| RCW 9.94A.712(6)(a)(i)..... | 58 |
| RCW 9.94A.715..... | 56 |
| RCW 9.94A.715(2)(a) | 56, 58, 59 |
| RCW 9A.44.010(1)..... | 52, 54 |
| RCW 9A.44.010(2)..... | 52, 54 |
| RCW 9A.44.010(6)..... | 53, 54 |

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant's conviction of first-degree burglary should be affirmed where, when viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have found the element of entering or remaining unlawfully beyond a reasonable doubt.

2. Whether the defendant's conviction of first-degree burglary should be affirmed where his right to jury unanimity was properly safeguarded.

3. Whether the defendant has failed to meet his burden of showing prosecutorial misconduct or that the unchallenged argument was flagrant or ill-intentioned.

4. Whether the trial court properly admitted the testimony of Detectives Turner and Holden and school counselor Ramm-Gramenz where such testimony did not constitute improper opinion testimony on the veracity of the victim or witnesses.

5. Whether the matter should be remanded for re-sentencing where, on the record as developed at sentencing, the court erred in finding the defendant to be a persistent offender.

6. Whether the matter should be remanded for re-sentencing where condition 14, as presently drafted, is unconstitutionally vague, and condition 25 is not statutorily authorized.

B. STATEMENT OF THE CASE.

1. Procedure

On May 12, 2006, Appellant Eddie Lee Trice, hereinafter referred to as the “defendant,” was charged by information with first-degree child rape in counts I through III, first-degree child molestation in count IV, and first-degree burglary in count V. CP 1-3.

A hearing pursuant to Criminal Rule (CrR) 3.5 was held on June 4, 2007, during which the State called Detective Jeffrey Turner, 6/4/07 RP 14-35, and Detective Heath Holden, 6/25/07 RP 41-54. Detectives Turner and Holden testified that they met with the defendant at a jail at the 77th Street Station of the Los Angeles Police Department on May 13, 2006, read him the *Miranda* warnings, and interviewed him. 6/4/07 RP 17-25; 6/25/07 RP 42-44. The court ruled the defendant’s statements admissible. 6/25/07 RP 55.

After a recess due to several scheduling conflicts, *see, e.g.*, 6/25/07

RP 55-56, 8/1/07 RP 74-75, the parties argued motions in limine on April 7, 2008. 4/7/08 RP 102-06. *See* 4/8/08 RP 148.

The parties gave their opening statements, 4/7/08 RP 108, and the State called Carol Ramm-Gramenz, 4/7/08 RP 109-20, Tacoma Police Department forensic specialist Donovan Velez, 4/7/08 RP 121-42, A.L., 4/8/08 RP 149-200, Bill Luedke, 4/8/08 RP 200-19, 223-34, Sandra Vogt, 4/8/08 RP 235-55, Detective Jeffrey Turner, 4/8/08 RP 255-95, 4/9/08 RP 6-21, Detective Keith W. Holden, 4/9/08 RP 21-59, M.V., 4/14/08 RP 7-17, Jennifer Knight, 4/14/08 RP 18-38, Lynn Jorgenson, 4/15/08 RP 302-34, Jeremy Sanderson, 4/15/08 RP 335-60, Patrick Manza, 4/15/08 RP 361-71, and Lynn Berthiaume, 4/15/08 RP 372-77.

The State rested on April 15, 2008. 4/14/08 RP 378.

The defendant called Bill Luedke, 4/15/08 RP 378-83, and A.L., 4/15/08 RP 383-88.

The defendant moved for a mistrial, and that motion was denied. 4/15/08 RP 388-90. The defendant then rested. 4/15/08 RP 395.

The defendant moved to dismiss count V, first-degree burglary, and count IV, first-degree child molestation, and those motions were denied. 4/15/08 RP 395-406.

The trial court considered jury instructions, and the parties presented a set of proposed instructions to which they agreed and to which neither took exception or had objection. 4/16/08 RP 412-15; 4/14/08 RP 39-42. CP 75-104. The court read the instructions to the jury, 4/16/08 RP

416, CP 75-104, and the parties gave their closing arguments. 4/16/08 RP 416-29 (State's closing argument), 432-40 (Defendant's closing argument), 440-43 (State's rebuttal).

On April 17, 2008, the jury returned verdicts of guilty to first degree child rape as charged in counts I, II, and III, guilty to first-degree child molestation as charged in count IV, and guilty of first-degree burglary as charged in count V. 4/17/08 RP 448-52; CP 105-09.

On July 1, 2008, the court held a sentencing hearing. 7/1/08 RP 456-502. The State and defendant stipulated to the defendant's criminal history, including the defendant's Arkansas conviction for aggravated robbery and his Florida conviction for sexual battery. 7/1/08 RP 456-57, 486. The State argued that the Florida conviction was comparable to the Washington crimes of second-degree rape or indecent liberties with forcible compulsion, and that the Arkansas conviction was comparable to the Washington crime of second-degree robbery or to a most-serious offense because the defendant was armed with a firearm. 7/1/08 RP 486-91, 498. *See* CP 118-209. The court found that the Florida sexual battery conviction was comparable to the Washington crimes of second-degree rape or indecent liberties, 7/1/08 RP 494-97, but that the Arkansas conviction was not comparable to a Washington most serious offense. 7/1/08 RP 499.

The court therefore sentenced the defendant to life in total confinement without the possibility of early release on counts I through IV, and to 89 months in total confinement on count V, that time to be served concurrently. 7/1/08 RP 499-501; CP 237-52, 232-36. The defendant was also sentenced to community custody for the remainder of his life on counts I through IV, and to community custody for 18 to 36 months on count V, in addition to legal financial obligations totaling \$2,773.00. CP 238-52.

On July 1, 2008, the defendant filed a timely notice of appeal. CP 237-52. *See* 7/1/08 RP 501-02.

2. Facts

The defendant admitted to raping an 11-year-old girl named A.L., RP 291, *see* 4/9/08 RP 46, and his semen was found on the carpet of the little girl's room in the area where the rape occurred. 4/7/08 RP 130-31; 4/8/08 RP 262; 4/15/08 RP 348.

A.L. testified that she was born on October 14, 1994. 4/8/08 RP 150. She lived in an apartment located at 4028 South Lawrence in Tacoma, Washington, with her dad, his girlfriend Sandra, and her three children. 4/8/08 RP 151-52. 4/8/08 RP 152. Only one of her children, M.V., was a girl. *See, e.g.*, 4/14/08 RP 7-9. The other two were boys and both were older than A.L. 4/8/08 RP 152, 236. So, A.L. spent a lot of time with Sandra's daughter, M.V., who was two years younger than her. 4/8/08 RP 152.

A.L. testified that the defendant worked at the apartment building where she lived. 4/8/08 RP 154-55. The defendant seemed to like both her and M.V. and “was always saying that” when she and M.V. got older they “would be his wives and things.” 4/8/08 RP 156.

On May 8, 2006, A.L. went home early from school because she felt sick. 4/8/08 RP 156-57. A.L. testified that she was later alone at the apartment when she saw the defendant from a balcony window. 4/8/08 RP 157. The defendant then came to the door of the apartment and asked A.L. if he could use the apartment’s bathroom. 4/8/08 RP 158. A.L. told him he could. 4/8/08 RP 158. The defendant used the bathroom and left. 4/8/08 RP 158. When asked if the defendant had permission to be in his apartment, A.L.’s father Bill Luedke, testified, “Not by me, no.” 4/15/08 RP 382.

The defendant came back to the apartment’s front door and told A.L. that he had forgotten his keys somewhere by the bathroom. 4/8/08 RP 158. A.L. testified that she “let him in *so he could get his keys*, and that’s when he did what he did.” 4/8/08 RP 158 (emphasis added). Specifically, the defendant offered her money to put on a bathing suit, and when she refused, told her to put on two pairs of underwear. 4/8/08 RP 158, 189. A.L. testified that the defendant walked her to her room and closed the door behind her. 4/8/08 RP 159, 189. She thought about jumping out the bedroom window, but decided that it was too high to jump. 4/8/08 RP 159. She was, however, scared that the defendant would

do something to her if she did not put the underwear on as he had instructed. 4/8/08 RP 159. So, she put them on. 4/8/08 RP 159.

The defendant asked if she was done doing so, and walked into her room. 4/8/08 RP 160. He then asked her to take off one pair of underwear and A.L. did so. 4/8/08 RP 160. A.L. testified that the defendant then began “kissing and licking” her vagina despite the fact that she continued to tell him to stop doing so. 4/8/08 RP 160-61. The defendant told A.L. to get up and bend over. 4/8/08 RP 161-62. So, she stood up and bent over in front of him. 4/8/08 RP 162. The defendant then touched and rubbed her vagina and anus with his finger and inserted his finger in her vagina and anus. 4/8/08 RP 162. She stated that the defendant did this for about five minutes before leaving. 4/8/08 RP 163. She testified that she looked backward, between her legs, and saw the defendant ejaculate onto the floor behind her. 4/8/08 RP 163. *See* 4/8/08 RP 197-98.

After the defendant left, he called. 4/8/08 RP 164. He asked A.L. if she wanted food from McDonald’s, and told her not to tell anyone what had happened because he did not want to go to jail. 4/8/08 RP 164-65. She indicated that she wanted to eat and the defendant returned with the food. 4/8/08 RP 164. A.L. testified that she opened the door, took the food, and then locked the door behind him, shutting all of the apartment windows. 4/8/08 RP 164.

Later that day, A.L. told M.V. what the defendant had done to her, and the two decided that A.L. should tell her school counselor the next day at McCarver Elementary School. 4/8/08 RP 165, 151; 4/14/08 RP 10-12. A.L. testified that she told that counselor what happened, and that a police officer brought her home that day. 4/8/08 RP 166. She showed one of the police officers where she thought the defendant ejaculated on the floor. 4/8/08 RP 166, 199. A.L. later submitted to an interview with interviewer Jennifer Knight. 4/8/08 RP 167. A.L. testified that no one had ever asked or told her to lie about what happened or make anything up. 4/8/08 RP 167.

Carol Ramm-Gramenz was the school counselor at McCarver Elementary school in Tacoma, Washington in May, 2006. 4/7/08 RP 109-12. She testified that fifth-grader A.L. came to her office and disclosed an incident of sexual molestation. 4/7/08 RP 109-12. Ramm-Gramenz called the Tacoma Police and reported the incident to an officer. 4/7/08 RP 112-13.

On May 9, 2006, Tacoma Police Department Forensic Specialist Donovan Velez took photographs of the apartment in which A.L. lived, searched her bedroom floor for suspected semen, and collected that semen. 4/7/08 RP 123-38. A.L. pointed out to Velez a dark spot on the carpet she believed to be the semen stain from the defendant's ejaculation. RP 129. Using an ultraviolet light source, Velez was able to find a semen stain just six inches from the area to which the little girl had pointed. 4/7/08 RP

130-31; 4/8/08 RP 262. Valez cut out the portion of the carpet containing this stain, and it was admitted into evidence. RP 133-35.

Sandra Vogt testified that the defendant was “very friendly” with A.L. and her own daughter, M.V. 4/8/08 RP 251. She indicated that she did not remember A.L. being unhappy about the living arrangements in the apartment. 4/8/08 RP 254.

Jennifer Knight was a forensic interviewer, with a master’s degree in psychology and child development, who was trained in the “funnel technique” of interviewing children who may have been victims of abuse. 4/14/08 RP 19-24. The funnel technique involves starting out with general, non-leading questions and then asking more specific follow-up questions about what happened. 4/14/08 RP 22-25. Knight interviewed A.L. on May 9, 2006, the same day as her initial disclosure to Ramm-Gramenz. 4/14/08 RP 19, 27, 37.

Lynn Jorgenson was a nurse practitioner who worked at the Child Abuse Intervention Department of Mary Bridge Children’s Hospital, and did medical examination of children who were alleged to be victims of abuse. 4/15/08 RP 303-06. She testified that, prior to conducting an examination she makes sure the child knows they are going to be getting “a check up to make sure their body is healthy.” 4/15/08 RP 306-08. Jorgenson conducted a medical examination of A.L. on May 9, 2006. 4/15/08 RP 308. Although A.L.’s genital examination was normal, Jorgenson testified that this was consistent with A.L.’s version of events

and that “[t]he vast majority of children that have just had digital penetration would have normal findings.” 4/15/08 RP 314-15.

Detective Jeffrey Turner was a Tacoma Police Detective with 24 years of law enforcement experience, who had completed training in interviewing techniques. 4/8/08 RP 256-57. He testified that he observed the interview of A.L., went to the apartment complex to try to find the suspect, and went into the apartment itself, where A.L. pointed out where she believed the defendant’s semen landed on the carpet. 4/8/08 RP 259-61. Detective Turner observed Valez locate and then remove the stained portion of the carpeting. 4/8/08 RP 262.

Turner testified that the defendant did not come back to work after he and other police officers came to the apartment complex. 4/8/08 RP 265. In fact, the defendant left the State of Washington and went to Los Angeles, California. 4/8/08 RP 266. On May 6, 2006, Detective Turner obtained a warrant for the defendant’s arrest, a copy of which he forwarded to the Los Angeles Police Department (LAPD), and that agency located and arrested the defendant the same day. 4/8/08 RP 266-67.

On May 13, 2006, Detective Turner and his partner, Detective Heath Holden, flew to Los Angeles, and interviewed the defendant at the 77th Street Precinct jail. 4/8/08 RP 267-69; 4/9/08 RP 24-26. It was approximately 11:50 a.m., and the defendant indicated that he had not eaten and that he was hungry. 4/8/08 RP 267-69; 4/9/08 RP 26. So Detective Turner gave him orange juice, burritos, and an apple. 4/8/08 RP

269; 4/9/08 RP 26. Detective Turner then read the defendant the *Miranda* warnings, and interviewed him with the assistance of Detective Holden. 4/8/08 RP 270-71; 4/9/08 RP 26.

The defendant told detectives that he believed A.L. to be eight or nine years old. 4/8/08 RP 274; 4/9/08 RP 28. He then stated that her father, Bill, was a drug user and that he was doing inappropriate things with her, though he could not articulate what those things might be. 4/8/08 RP 275-76; 4/9/08 RP 29. The defendant told detectives that A.L.'s father and his girlfriend came to the defendant's apartment. 4/8/08 RP 276. The defendant said he wanted to have sexual intercourse with Sandra Vogt, but that he did not have a condom, and she refused to submit to intercourse without the use of one. 4/8/08 RP 276. So, the defendant stated that she pulled her pants down and bent forward while he masturbated, which resulted in him ejaculating on the carpet. 4/8/08 RP 276-77. The defendant stated that this occurred in the bedroom of unit A, located at 4024 South Lawrence, which was across the courtyard and downstairs from the apartment in which A.L. was living at the time, which was located at 4028 South Lawrence. 4/8/08 RP 277-78; 4/9/08 RP 30-32.

The defendant said he had been inside the apartment in which A.L. lived "only once," to get a key from her father Bill Ludke. 4/8/08 RP 278; 4/9/08 RP 31-32. Detective Turner asked the defendant, if that is true, why he left Tacoma. 4/8/08 RP 280. The defendant said that he got a call from Mike Wright, the owner of the apartments, who told him that there

was a warrant out for his arrest for penetrating and then masturbating next to a little girl at the apartment complex. 4/8/08 RP 261, 280; 4/9/08 RP 29, 32-35. However, detectives had not given this information to Mr. Wright. 4/9/08 RP 35. The defendant then stated, "If I put my stuff in that little girl, you would know it. I would have hurt it." 4/8/08 RP 280.

The defendant then completed a handwritten statement, in which Detective Holden wrote questions and the defendant wrote answers to those questions. 4/8/08 RP 281; 4/9/08 RP 37-43. In that written statement, the defendant indicated that although he had only been in the Ludke apartment once, he had been to the door twice. 4/8/08 RP 287-88.

The defendant asked if the handwritten statement would help or hurt him. 4/8/08 RP 288; 4/9/08 RP 43.

Detective Turner then told the defendant the allegations for the first time, including A.L.'s contention that the defendant entered the apartment to use the restroom, but then asked A.L. to change into a swimsuit, and ultimately followed her into her bedroom where he removed her underwear. 4/8/08 RP 288-89; 4/9/08 RP 43-44. The defendant responded by pushing back from the table. 4/8/08 RP 289; 4/9/08 RP 44-45. He looked off and tears began to well up in his eyes. 4/8/08 RP 289; 4/9/08 RP 44-45. Detective Turner told the defendant that he felt he was compassionate and not a monster because he had not put his penis inside the little girl. 4/8/08 RP 289; 4/9/08 RP 46. He stated that he probably would have injured her physically and that by only licking her vagina and

anus and inserting his fingers rather than his penis he was being compassionate. 4/8/08 RP 289.

The defendant began to sob and tears streamed down his face. 4/8/08 RP 290. Detective Turner told the defendant that it was only a matter of time before they compared his DNA to that of the suspected semen found on the carpet. 4/8/08 RP 291. The defendant then said,

I did it. I am sick. I did it. I did what you said I did, and you're right. I didn't want to hurt that little girl. I'm fucked.

4/8/08 RP 291; *See* 4/9/08 RP 46. The defendant again said, "I am fucked," and the interview was concluded. 4/8/08 RP 291.

Detective Turner later secured a court order to take blood samples from the defendant, and those samples were taken by registered nurse Lynn Berthiaume. 4/8/08 RP 292-94; 4/15/08 RP 375-77. .

Washington State Patrol Crime Laboratory Forensic Scientist Jeremy Sanderson was given these blood samples and the stained carpeting removed by Donovan Velez and asked to examine them. 4/15/08 RP 341. Sanderson found semen on the carpet, 4/15/08 RP 342-43, and compared its DNA profile to that of the defendant. 4/15/08 RP 344-47. He found that the DNA profile of the semen on the carpet matched that of the defendant. 4/15/08 RP 348. Sanderson concluded that the probability that an unrelated individual selected at random from the

U.S. population would have a profile matching that of the semen on the carpet is one in 1.5 quintillion. 4/15/08 RP 353.

C. ARGUMENT.

1. THE DEFENDANT'S CONVICTION OF FIRST-DEGREE BURGLARY SHOULD BE AFFIRMED BECAUSE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENT OF ENTERING OR REMAINING UNLAWFULLY BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt." *State v. Cannon*, 120

Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, in its instruction 24, the trial court instructed the jury that:

To convict the defendant of the crime of Burglary in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) ***That on or about the 8th day of May, 2006, the defendant entered or remained unlawfully in a building, 4028 S. Lawrence Street, Apt. D, Tacoma, WA;***
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person, A.L.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 101. *See* Appendix A.

The defendant did not object to this instruction, *see* 4/16/08 RP 412-15; 4/14/08 RP 39-42, and it therefore, became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

“A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.” CP 98. *See* Appendix A, RCW 9A.52.010(3) (“Entry is unlawful if made without invitation, license, or privilege”), *State v. Gohl*, 109 Wn. App. 817, 823, 37 P.3d 293 (2001). “Limitation or revocation of such a license may be inferred from the particular facts and circumstances of a case,” *Gohl*, 109 Wn. App. at 823, and fraud may vitiate consent to enter. *State v. Collins*, 110 Wn.2d 253, 256-61, 751 P.2d 837 (1988). However, “[t]he implied revocation of license should apply only in cases where the license to enter was limited to a specific purpose.” *State v. Davis*, 90 Wn. App. 776, 954 P.2d 325 (1998).

Division 1 has found “that ‘enters unlawfully’ and ‘remains unlawfully’ describe separate acts, and concluded they are alternative means of committing burglary.” *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005) (citing *State v. Klimes*, 117 Wn. App. 758, 73 P.3d 416 (2003)).

In the present case, although the defendant argues that there was insufficient evidence to show either that he entered or remained unlawfully in apartment in question, there was sufficient evidence of both.

First, there was sufficient evidence from which a rational trier of fact could find that, although the defendant obtained a limited license to enter the apartment from A.L., he did so by fraud, and that, as a result, his subsequent entry was unlawful.

Specifically, the jury could infer from the defendant's multiple statements to A.L. that when she got older she could be his wife "and things," that the defendant had a sexual interest in A.L. 4/8/08 RP 156.

The jury could infer from the fact that A.L. saw the defendant from her apartment's balcony window just after her father and his girlfriend left, 4/8/08 RP 157-58, that the defendant knew A.L. was alone in that apartment.

Last, the jury could infer from the fact that the defendant was the maintenance person for the apartment complex and "the right-hand" of the owner, 4/8/08 RP 203, and the fact that the defendant had his own apartment on site, "kitty-corner" from that in which A.L. lived, 4/8/08 RP 208-09, that he had no need to use A.L.'s bathroom. He could have simply used his own bathroom. *See* 4/8/08 RP 208-09.

Because the jury knew (1) that the defendant had a sexual interest in A.L., *see* 4/8/08 RP 156, (2) that the defendant knew A.L. was home alone, *see* 4/8/08 RP 157-58, and (3) that the defendant had no need to use A.L.'s bathroom, *see* 4/8/08 RP 208-09, it could infer that when the defendant entered A.L.'s apartment, *see* 4/8/08 RP 203, he did so with the intent to engage in sexual intercourse with A.L., rather than to use her bathroom. Moreover, given that he entered the apartment to engage in sexual intercourse with her one time, the jury could have inferred that when he came back shortly thereafter, it was still for sexual intercourse, rather than to look for any forgotten keys. This seems especially likely given that he was the maintenance person for the apartment complex and "the right-hand" of the owner, 4/8/08 RP 203, and could have obtained his keys from that owner or from A.L.'s father when he arrived home.

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, all of these inferences must be drawn for purposes of this analysis. *See Salinas*, 119 Wn.2d at 201.

When they are, it becomes clear that when the defendant told A.L. that he needed to use her bathroom or that he subsequently needed to look for his keys, 4/8/08 RP 158, he was engaging in a ruse, and that his true reason for seeking entry into her apartment was to engage in sexual

intercourse. Therefore, the limited license he obtained from A.L. to enter her apartment was obtained by fraud. Because fraud vitiates consent to enter, *see Collins*, 110 Wn.2d at 256-61, the entry made by the defendant thereafter was unlawful.

As a result, viewing the evidence in the light most favorable to the State, a rational fact finder could find that the defendant entered unlawfully into A.L.'s apartment beyond a reasonable doubt. Therefore, there was sufficient evidence of unlawful entry and of element (1), and the defendant's conviction of first-degree burglary should be affirmed.

There was also sufficient evidence that the defendant remained unlawfully in the apartment.

Preliminarily, it should be noted that because the license to enter was obtained fraudulently, it was invalid. *See Collins*, 110 Wn.2d at 256-61. Therefore, any time the defendant remained in the apartment thereafter, he remained unlawfully. *See Allen*, 127 Wn. App. at 135-36.

Further, the testimony made clear that the defendant exceeded the scope of even this fraudulently-obtained license. A.L. testified that, after the defendant used the bathroom, he told her that he forgot his keys. 4/8/08 RP 158. She therefore, "let him in *so he could get his keys.*" 4/8/08 RP 158 (emphasis added). In short, the defendant fraudulently obtained a license to enter A.L.'s apartment to 1) use the bathroom, and 2)

look for his keys. *See* 4/8/08 RP 158. This license limited him geographically to the apartment's bathroom, and the area of the apartment necessary to travel to and from that bathroom. *See Collins*, 110 Wn.2d at 259-62. It also limited him to the specific purpose of using the bathroom and looking for his keys. *See Id.* Once the defendant was done using the bathroom and retrieving his keys, any license he had to remain in the apartment expired. *See Id.* Once he opened A.L.'s closed bedroom door to observe her in her panties, *see* 4/8/08 RP 159-60, he exceeded the scope of that license. Because the defendant did both of these things, he exceeded the scope of the fraudulently-obtained license, and remained in the apartment unlawfully.

In other words, viewing the evidence in the light most favorable to the State, a rational fact finder could find beyond a reasonable doubt that the defendant remained unlawfully in A.L.'s apartment. Therefore, there was sufficient evidence of unlawful remaining and thus of element (1), and the defendant's conviction of first-degree burglary should be affirmed.

Therefore, the defendant's right to jury unanimity was not violated and his conviction of first-degree burglary should be affirmed.

3. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

“Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice.” *State v. Curtiss*, ___ P.3d ___, 2011 WL 1743926 (2011); *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v.*

Fisher, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. *Anderson*, 153 Wn. App. at 427. "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *Anderson*, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)

(quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546; *Fisher*, 165 Wn.2d at 747. “A reviewing court does not assess ‘[t]he prejudicial effect of a prosecutor’s improper comments... by looking at the comments in isolation but by placing the remarks ‘in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.’” *Id.* (quoting *Brown*, 132 Wn.2d at 561; *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010).

“[R]emarks must be read in context.” *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court’s instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, although the defendant argues that the deputy prosecutor committed misconduct in three ways, he is incorrect.

The defendant first challenges the following argument made by the deputy prosecutor during closing:

Is it reasonable that Bill and Sandra would put this whole conspiracy in the hands of their 11-year-old? Is it reasonable to conclude that if the defendant had done nothing he would have fled to L.A.? Is it reasonable to conclude any of these things? No. And it’s because those doubts aren’t reasonable doubts. There is no reasonable doubt as to what happened here. There is no explanation, other than the one that A[. L.] gave you for the Defendant’s sperm being on her bedroom floor, and because of that, you know, you have one choice here: Convict the defendant of

rape of a child in the first degree. Convict him for child molest in the first degree and burglary first degree.

Thank you.

4/16/08 RP 428-29. *See* Brief of Appellant, p. 33-35.

The defendant did not object to this argument when it was made during the trial below. *See* 4/16/08 RP 428-29. Consequently, he cannot raise the issue on appeal unless this argument was misconduct and was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” *State v. Larios-Lopez*, 156 Wn. App. 257, 260. However, this argument was neither flagrant and ill-intentioned, nor improper.

Although “[a] prosecutor violates a defendant’s Fifth Amendment rights [to silence and against self-incrimination] if the prosecutor makes a statement ‘of such character that the jury would ‘naturally and necessarily accept it as a comment on the defendant’s failure to testify,’” *State v. Fiallo-Lopez*, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995)(citing *State v. Ramirez*, 49 Wn. App. 332, 336, 742 P.2d 726 (1987)); *see* Wn. Const. Article I, Section 9, “[i]t is not misconduct... for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *rev. den.*, 115 Wn.2d 1014, 797 P.2d 514 (1990)). “The prosecutor, as an advocate, is entitled to make a fair

response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87. Moreover, “[t]he State is entitled to comment on the quality and quantity of evidence the defense presents. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009)(citing *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). “Such argument does not necessarily suggest that the burden of proof rests with the defense.” *Id.*

In the present case, the challenged statements do no more than argue that the evidence did not support the defense theory. The defense theory in this case was that A.L. and her family were “living in a slum,” and that they fabricated the story regarding the rape as a basis for a lawsuit against the apartment complex that hired the defendant. *See, e.g.*, 4/7/08 RP 103-05; 4/16/08 RP 433-34. Thus, when the deputy prosecutor argued that “[t]here is no explanation, other than the one that A[. L.] gave you for the Defendant’s sperm being on her bedroom floor,” he was not arguing that the jury should convict because the defendant did not testify, but simply “that the evidence does not support the defense theory,” *State v. Russell*, 125 Wn.2d at 87.

Although the defendant now argues that he was “the only person who could have disputed A.L.’s claim and thus given the other ‘explanation,’” Brief of Appellant, p. 35, to which the prosecutor referred, this is incorrect and inconsistent with his argument at trial. Indeed, during

closing argument, the defendant argued that all A.L.'s father and his girlfriend "need[ed] to do [wa]s offer to trade sex for drugs," and then "[c]ollect the semen and dab it on ... the carpet in A[L.]'s room in their apartment." 4/16/08 RP 434. He was able to argue this based on testimony elicited from Bill Luedke, 4/15/08 RP 378-83, 4/8/08 RP 200-19, 223-34, and Sandra Vogt, 4/8/08 RP 235-55. Given that the defendant's testimony was not needed to make this alternative argument, the prosecutor's statement cannot be "of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify," *Fiallo-Lopez*, 78 Wn. App. at 728-29. Therefore, the challenged statements did not violate the defendant's Fifth Amendment or Article I, Section 9 rights to silence and against self-incrimination.

Moreover, because the prosecutor here did no more than argue that "the evidence does not support a defense theory," *State v. Russell*, 125 Wn.2d at 87, his argument was proper, and certainly not "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." *State v. Larios-Lopez*, 156 Wn. App. at 260. Therefore, this issue, which was not raised below, should not be considered on appeal, and the defendant's convictions should be affirmed.

Second, the defendant argues that the deputy prosecutor minimized the reasonable doubt standard by repeatedly comparing the certainty jurors

need to convict to that required to “do everyday things,” such as completing a jigsaw puzzle or crossing a street. Brief of Appellant, p. 35-39.

“A prosecutor’s comments discussing the reasonable doubt standard in the context of everyday decision making may also be improper if they minimize the importance of that standard.” *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). In *Anderson*, the deputy prosecutor discussed the reasonable doubt standard in the context of making decisions about which breakfast cereal to eat, whether to have elective dental surgery, choosing a babysitter, and changing lanes on the freeway. This Court held that “[b]y comparing the certainty required to convict with the certainty people often require when they make everyday decisions –both important decisions and relatively minor ones- the prosecutor trivialized and ultimately failed to convey the gravity of the State’s burden and the jury’s role in assessing its case against [the defendant].” *Anderson*, 153 Wn. App. at 431; *State v. Johnson*, 158 Wn. App. 677, 684. It also held that such statements were improper because they implied, by “focusing on the degree of certainty the jurors would have to have to be willing to act, rather than that which would cause them to *hesitate* to act,” that the jury should convict the defendant unless it found a reason not to do so. *Id.* at 432.

Nevertheless, this Court concluded that these comments were not so flagrant and ill intentioned that an instruction could not have cured the prejudice, and that, even if they were, “any error was harmless under both the ‘substantial likelihood’ standard and the constitutional harmless error standard,” because the untainted evidence against the defendant was overwhelming. *Id.* at 432. See *State v. Emery*, ___ P.3d ___, 2011 WL 1402417 (2011).

Moreover, this Court recently held that a prosecutor’s “comments about *identifying* the puzzle with certainty before it is complete are not analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives.” *State v. Curtiss*, ___ P.3d ___, 2011 WL 1743926 (2011)(emphasis in the original).

In the present case, the defendant challenges the deputy prosecutor’s comments discussing the reasonable doubt standard in the context of a jigsaw puzzle, 4/16/08 RP 426-27, and the decision to cross a street. 4/16/08 RP 427-28.

With respect to the jigsaw puzzle, the deputy prosecutor in the present case, like the prosecutor in *Curtiss*, made “comments about *identifying* the puzzle with certainty before it is complete,” which were “not analogous to the weighing of competing interests inherent in a *choice* that individuals make in their everyday lives” found to be improper in

Anderson. Therefore, the deputy prosecutor's comments in this regard were proper, and neither flagrant nor ill-intentioned.

Therefore, this argument, to which the defendant did not object below, should not form the basis for an issue on appeal, and the defendant's convictions should be affirmed.

With respect to the deputy prosecutor's comments regarding crossing the street, even assuming their impropriety, the defendant here, as in *Anderson*, has failed to demonstrate that these comments were so flagrant or ill-intentioned that an instruction could not have cured the prejudice." *Anderson*, 153 Wn. App. at 432.

In *Anderson*, this Court held that "[t]he trial court's instructions regarding the presumption of innocence minimized any negative impact on the jury." *Id.*

The same can be said about the present case. In this case, the trial court properly instructed the jury on the presumption of innocence and the reasonable doubt standard, and also instructed the jury to disregard any statement made by an attorney that is not supported by the law. CP 75-104; 4/16/08 RP 416. The jury is presumed to follow the trial court's instructions. *Anderson*, 153 Wn. App. at 432 (citing *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989)). Moreover, just before making the comments challenged here, the deputy prosecutor pointed the jury to

the reasonable doubt instruction and then read verbatim from it:

The Court has given you an instruction, and part of Instruction 2 says beyond a reasonable doubt is one – a reasonable doubt is one for which a reason exists, and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence, or lack of evidence. If after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

4/16/08 RP 425-26.

The deputy prosecutor later told the jury:

The State has the burden of proving every element of the crime. Let me make that perfectly clear, if it isn't already. The State accepts that burden. No problem.

4/16/08 RP 442.

As in *Anderson*, the trial court's instructions and the context of the prosecutor's comments were sufficient to cure any prejudice, and thus, the comments were not so flagrant and ill-intentioned as to justify review of this issue here. See *Anderson*, 153 Wn. App. at 432.

However, even if they were to be considered flagrant and ill-intentioned, the defendant has not demonstrated prejudice. In this regard, this case is much closer to *Anderson* and *Emery* than to *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010), and *Johnson*. Like *Emery*, and “[u]nlike *Venegas* and *Johnson*, this case was *not* largely a credibility contest in which the prosecutor's improper arguments could easily serve

as the deciding factor.” *Emery*, ___ P.3d ___, 2011 WL 1402417 (2011) (emphasis added). Rather, as in *Anderson*, overwhelming evidence corroborated the victim’s version of events that the defendant engaged in sexual intercourse with her, including the fact that his semen was found on her bedroom floor where the rape occurred, 4/7/08 RP 130-31; 4/8/08 RP 262; 4/15/08 RP 348, and the fact that the defendant confessed to the rape. RP 291; *See* 4/9/08 RP 46. In this context, there is no “substantial likelihood” that the deputy prosecutor’s comments regarding crossing the street affected the jury’s verdict. Consequently, even were the prosecutor’s remarks regarding crossing the street considered to be flagrant and ill-intentioned, they were not prejudicial to the defendant. *See Emery*, ___ P.3d___.

Therefore, the defendant has failed to establish prosecutorial misconduct, and his convictions should be affirmed.

Third, although the defendant argues that the deputy prosecutor “minimized his burden by repeatedly telling the jury it had to decide the ‘truth’ and declare that ‘truth’ with their verdict,” Brief of Appellant, p. 39-41, he is mistaken.

This Court has held that a “prosecutor’s repeated requests that the jury ‘declare the truth’ were... improper” because the jury’s duty is not to declare the truth of what happened, but to determine “whether the State has proved its allegations against a defendant beyond a reasonable doubt.”

Anderson, 153 Wn. App. at 429. Nevertheless, “courts frequently state that a criminal trial’s purpose is a search for truth and justice,” and “[u]rging the jury to render a just verdict that is supported by evidence is not misconduct.” *Curtiss*, ___ P.3d ___ (2011 WL 1743936).

In the present case, defendant challenges the following comments:

The whole element of abiding belief is, do you still believe that it was the proper verdict? Do you still believe that it was the truth, that your verdict was the truth, that it spoke the truth?

4/16/08 RP 426.

However, these comments were made after the prosecutor pointed the jury to the court’s proper instruction on the presumption of innocence and proof beyond a reasonable doubt. Moreover, they were made in an attempt to elucidate the concept of “abiding belief.” They, therefore, differ significantly from an improper request that the jury ‘declare the truth’ because they do not instruct the jury to declare the truth of what happened, but simply seek to explain to the jury how it is to determine “whether the State has proved its allegations against a defendant beyond a reasonable doubt.” *Anderson*, 153 Wn. App. at 429. Because these comments, unlike that in *Anderson*, do not misstate the jury’s duty, they are not improper.

The defendant also challenges the following statements made in rebuttal:

If you found what [the defense attorney] just told you, that A[. L.] basically lied about maybe the most horrific events in her entire life, came in and told that story, if you found that pitch disgusting, there is a reason. You know it's not true. Because you know it is true.

If that sounded offensive, it's because you know in your heart the truth.

4/16/08 RP 440-41.

The State has the burden to prove it, but there is nothing that says you got to believe that garbage [i.e., the defense theory], because there is no evidence to back it up. And that's why you should be disgusted with it, because you know the truth of this case.

They put their nest egg on an 11 year old girl. M[.] remembers the conversation. We didn't hear about that, did we, in closing. You are not afraid to tell your dad if your dad is the one that set this up. That doesn't make any sense. There is only one truth here. You know it. Simply return verdicts that reflect it.

Thank you.

4/16/08 RP 443.

It can be discerned from the context of these arguments that when the deputy prosecutor spoke about truth, he was speaking about what the evidence elicited at trial demonstrated. Indeed, he reminded the jury that the burden of proof rested with the State, 4/16/08 RP 442-43, and argued that there was no evidence to support the defense theory. 4/16/08 RP 443.

Because it is not misconduct to argue “that the evidence does not support the defense theory,” *State v. Russell*, 125 Wn.2d at 87, this argument was proper. The deputy prosecutor went on to argue that, because the evidence admitted at trial only supported A.L.’s version of events, “[t]here is only one truth here,” and that the jury should “[s]imply return verdicts that reflect it.” 4/16/08 RP 443. In so doing, the deputy prosecutor was “[u]rging the jury to render a just verdict that is supported by evidence,” which *Curtiss* held was “not misconduct.” *Curtiss*, ___ P.3d ___ (2011 WL 1743936). Because these comments were not improper, they certainly were not “so flagrant and ill-intentioned” that any resulting prejudice was “incurable by a jury instruction.” *State v. Larios-Lopez*, 156 Wn. App. at 260. Therefore, this issue, which was not raised below, should not be considered on appeal, and the defendant’s convictions should be affirmed.

However, even if these comments were to be considered improper and flagrant and ill-intentioned, the defendant has failed to show that they were prejudicial.

In *Anderson*, unlike here, see 4/16/08 426, 440-43, the defendant objected to the comments regarding declaring the truth at trial. *Anderson*, 153 Wn. App. at 423-24, 429. Nevertheless, the Court found that when these comments were examined “in the context of jury instructions that clearly lay out the jury’s actual duties” and counsel’s other argument, the

defendant could not demonstrate that there was a substantial likelihood that this misconduct affected the verdict. *Id.* At 429.

In the present case, the court properly instructed the jury, in each of the to-convict instructions, that its duty was to determine “from the evidence,” whether each of the elements of each of the charged crimes had been proven beyond a reasonable doubt, that if it found that each were so proven its duty was to return a verdict of guilty, and that if it found that any element had not been so proven, its duty was to return a verdict of not guilty. CP 89-91, 95, 101. The court also properly instructed the jury as to the standard of proof beyond a reasonable doubt. CP 79. The deputy prosecutor pointed the jury to this instruction and read a portion to the jury. 4/16/08 RP 425-26. He also specifically told the jury that “[t]he State has the burden to prove it [i.e., the charges].” 4/16/08 RP 443. In this context, there is no substantial likelihood that the challenged comments affected the verdict. Therefore, the defendant has failed to demonstrate prejudice, and even if the comments at issue were improper and flagrant and ill-intentioned, the defendant’s convictions should be affirmed.

4. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF DETECTIVES TURNER AND HOLDEN AND COUNSELOR RAMM-GRAMENZ BECAUSE SUCH TESTIMONY DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY ON THE VERACITY OF THE VICTIM OR WITNESSES.

This Court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Moreover, RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of constitutional magnitude.” *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *Id.* at 936. Rather, “[m]anifest error” in this context, “requires a nearly explicit statement by the witness that the witness believed the accusing victim.” *Id.*

If properly preserved for appeal, a trial court’s decision regarding the admissibility of testimonial evidence, including opinion testimony, will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); *State v. Young*, 158 Wn. App. 707, 243 P.3d, 172, 179 (2010); *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The trial court abuses its discretion “if no reasonable person would have decided the matter as the trial court did.”

State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *review granted in part*, 163 Wn.2d 1033, 187 P.3d 269 (2008). “Where reasonable persons could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). “That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds.” *Aguirre*, 168 Wn.2d at 359. However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The burden is on the appellant to “establish that the trial court abused its discretion.” *Demery*, 144 Wn.2d at 758.

“Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant,” or “the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial.” *Demery*, 144 Wn.2d at 759-65; *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In determining whether properly preserved statements “are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: ‘(1) ‘the type of witness involved’, (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense,’ and (5) ‘the other evidence before the trier of fact.’” *Kirkman*, 159 Wn. App. at 928 (quoting *Demery*,

144 Wn.2d at 759, 30 P.3d 1278 (quoting *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993))).

However, this Court has recently held that a detective's testimony recounting statements made during a defendant's interrogation about his or her veracity and guilt were a proper "explanation of interrogation tactics and not an expression of personal beliefs." *State v. Curtiss*, ___ P.3d ___, 2011 WL 1743926 (2011)(citing *State v. Demery*, 144 Wn.2d 753, 763-65, 30 P.3d 1278 (2001)(plurality opinion)(citing *Durbia v. Smith*, 224 F.3d 995, 1001-02 (9th Cir. 2000), *cert. den.*, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed 963 (2001)).

"Moreover, opinion testimony does not constitute reversible error where the trial court properly instructs the jury... that it is the sole judge of witness credibility and not bound by witness opinions." *Id.*

In the present case, the defendant argues that seven pieces of improper opinion testimony were admitted, five over the objection of defense counsel.

First, he challenges the admissibility of the following testimony of Detective Holden:

Q What happened -- I'll take that [i.e., the defendant's handwritten statement] back from you.

What happened when you were done, when you were finished with that handwritten statement?

A ***I remember him asking us if this handwritten statement was going to help him or hurt him. And I said --told him that I knew that this handwritten statement wasn't the truth and we could prove that***

it wasn't the truth and –

[DEFENSE ATTORNEY]: Objection, Your Honor.

THE COURT: The objection is...?

[DEFENSE ATTORNEY]: It's a comment on credibility.

[DEPUTY PROSECUTOR]: I'll move on, Your Honor.

THE COURT: All right. Your next question. Okay.

Q Did you – up until this point, had you told him what the accusations against him were?

A No.

Q At this point did you do that?

A Detective Turner did.

4/9/089 RP 43(emphasis added). *See* Brief of Appellant, p. 48-51.

This exchange is legally indistinguishable from that in *Curtiss*.

Because Detective Holden's testimony recounting statements made during the defendant's interrogation about his veracity were an "explanation of interrogation tactics and not an expression of personal beliefs," *State v. Curtiss*, ___ P.3d ___, 2011 WL 1743926 (2011)(citing *State v. Demery*, 144 Wn.2d 753, 763-65, 30 P.3d 1278 (2001), such testimony cannot be improper opinion testimony. Therefore, the trial court did not abuse its discretion in admitting such testimony and the defendant's convictions should be affirmed.

The defendant next challenges the following exchange, which occurred during the State's direct examination of Detective Holden:

Q Okay. In May –excuse me. In May of 2006, were you assigned to do some follow-up with Detective Turner on case 061290535?

A Yes, I was.

Q And what were your primary duties in that case?

A Jeff [Turner] was the lead detective on this, and my job was just basically to assist him in any way, shape, form that he –that he needed help with. ***He is a very good detective.***

[DEFENSE ATTORNEY]: Move to strike; objection.

THE COURT: Pardon?

[DEFENSE ATTORNEY]: Objection; nonresponsive, move to strike.

THE COURT: ***The objection is sustained. You should ignore the comment given.***

4/9/08 RP 24 (emphasis added). See Brief of Appellant, p. 48-54.

Here, the trial court sustained the defendant’s objection at trial and granted his motion to strike by instructing the jury to disregard the challenged comment. Consequently, even if Detective Holden’s comment were considered to be improper, a point which the State does not concede, it was not admitted into evidence. Therefore, the trial court could not have abused its discretion and the defendant’s convictions should be affirmed.

Third, the defendant challenges two comments made during the defense attorney’s cross-examination of Detective Holden. These comments occurred when the defense attorney asked several questions about how accurately Detective Turner’s report incorporated Detective Holden’s notes of their interview of the defendant, 4/9/08 RP 51-54:

Q Now, who typed the [police] report?
A Detective Turner did.
Q From your notes?
A From our notes, yes.
Q So who's – you took the majority of them?
A Yes.
Q Okay. So when the typing is being done, there's sometimes choices between word use. Who's responsible for the choices of word use?

....
A Jeff. Directive [sic] Turner wrote out the initial report using our notes. Prior to it being submitted, *I reviewed those, made sure that it was an accurate statement that he utilized, that he didn't leave anything out, and that it was accurate. And I reread this thing, and it was an accurate and well-written report. He did a great job.*

[DEFENSE ATTORNEY]: Move to strike, Your Honor. Not responsive.

[DEPUTY PROSCUTOR]: He was responsive to counsel's question.

THE COURT: All right. The objection is overruled. Next question.

[DEFENSE ATTORNEY]: It also comments on the credibility of the witness, Your Honor.

THE COURT: All right.

[DEPUTY PROSECUTOR]: *It's simply a comment on this witness's belief as to whether or not that report was accurate.*

THE COURT: All right. The objection is overruled. Next question, please.

4/9/08 RP 52-53(emphasis added). See Brief of Appellant, p. 48-54.

Given this context it is clear that when Detective Holden testified that Detective Turner's report was "accurate" and "accurate and well-written," he was indicating that Detective Turner's report accurately incorporated Detective Holden's own notes, not that it was accurate in any objective sense, or that what the defendant had told the detectives was necessarily true. As a result, Detective Holden's testimony was not in the form of an opinion regarding the guilt or veracity of the defendant, or "the veracity of another witness." *Demery*, 144 Wn.2d at 759-65. Therefore, the trial court did not admit improper opinion testimony, and the defendant's convictions should be affirmed.

The fourth and fifth pieces of testimony about which the defendant now complains were admitted during the defendant's own cross-examination of Ms. Ramm-Gramenz:

- Q I am handing you what's been marked as Exhibit 15. Do you recognize that?
- A Yes, I do.
- Q And what is that?
- A It's the notes I took when A[. L.] talked to me.
- Q Okay. And these are the only notes that you took when A[. L.] talked to you?
- A Correct.
- Q And you heard A[. L.] re-tell this story to the police?
- A Correct.
- Q And is it fair to characterize that [i.e., Ramm-Gramenz's notes, marked as exhibit 15] as basically verbatim of what she [i.e., A.L.] told you, what she

told the police?

A I don't know about verbatim, because I don't know about every little word, but *certainly it was a – matched what she told me, I thought quite well, and correctly, and credibly.*

Q Isn't that the phrase that you used when you were interviewed almost a year ago by Susan Watts, it was basically verbatim?

A *I don't recall whether I said verbatim. I thought it was very credible.*

[Defense attorney]: Move to strike, Your Honor, as nonresponsive.

THE COURT: The jurors should ignore the last response, as there was no question pending.

THE WITNESS: Okay.

4/7/08 RP 115-16 (emphasis added). See Brief of Appellant, p. 48-54.

In this exchange, when Ramm-Gramenz testified that she thought “it” was “credible” and that “it matched what she told me I thought quite well, and correctly, and credibly,” the “it” to which she was referring was exhibit 15, her own handwritten notes. Therefore, the import of her testimony was that such notes accurately reflected what A.L. had told her, not that anything that A.L. had said was actually accurate or credible in itself. As a result, this testimony was not in the form of an opinion regarding the guilt or veracity of the defendant, or “the veracity of another witness.” *Demery*, 144 Wn.2d at 759-65. Therefore, the trial court did not admit improper opinion testimony, and the defendant's convictions should be affirmed.

The sixth piece of challenged testimony was admitted during the direct examination of Detective Turner regarding his interview of the defendant:

A He expressed to us that Mike [Wright] told him, being Mr. Trice, that there was a warrant out for his arrest for raping a little girl at the apartment complex. He went on to describe, stating what you're telling me, telling me that he was accused of masturbating, or excuse me, penetrating the little girl, then masturbating.

Q What did?

A He made a spontaneous statement at that point.

Q Who did?

A Mr. Trice.

Q What did he tell you?

A He said, "If I had put my stuff in that little girl, you would know it. I would have hurt it."

....

Q Now you didn't go right after that statement and talk to him about that, it doesn't sound like it.

A I did not.

Q Why not?

A ***Well, at that point, you know, he is giving information that I am fairly confident that Mr. Wright wouldn't have that information, so I just wanted to wait to see what direction the interview would go at that point.***

4/8/08 RP 280-81 (emphasis added). See Brief of Appellant, p. 48-54.

The defendant did not object to this testimony. See 4/8/08 RP 280-81. Therefore, any issue inherent in its admission was not preserved for appeal unless such testimony included "a nearly explicit statement by the

witness that the witness believed the accusing victim,” *Kirkman*, 159 Wn.2d a 934, or as to the guilt or veracity of the defendant.

No such explicit statement is contained in this testimony.

Assuming the jury believed that Mr. Wright did not have the information the defendant cited as his reason for fleeing Washington, the jury could infer that the defendant was not being truthful when he told detectives that Wright communicated this information to him. It would not, of course, necessarily follow that the defendant was actually guilty of the crimes at issue or lying about his innocence of them. He could, consistent with his own theory, have been told of the facts of the crime from Mr. Ludke, who he had allegedly set him up.

Moreover, Detective Turner never testified that Mr. Wright did not have the information communicated by the defendant, he simply testified that he was “fairly confident” that he did not, and he gave this testimony in response to a question asking why he did not ask follow-up questions during his interview of the defendant. In this context, Detective Turner’s comment was an “explanation of interrogation tactics and not an expression of personal beliefs,” *State v. Curtiss*, ___ P.3d ___, 2011 WL 1743926 (2011)(citing *Demery*, 144 Wn.2d 753, 763-65, 30 P.3d 1278 (2001)). As a result, Turner’s testimony was not improper opinion testimony, and certainly not “a nearly explicit statement” that Turner

“believed the accusing victim,” *Kirkman*, 159 Wn.2d a 934, or disbelieved the defendant. Therefore, the trial court did not abuse its discretion in admitting such testimony and the defendant’s convictions should be affirmed.

Finally, the defendant then challenges testimony admitted during the direct examination of Detective Turner regarding his interview of the defendant:

A This was all in part – I may have skipped that when I was describing the event. I wasn’t taking verbatim what I had from the victim, and all. I was just going with it to see what his response would be, and part of my description was that he didn’t utilize his penis in her, rather he masturbated and ejaculated on the floor, rather than in her, or on her.

Q And you explained to him that that was part of the accusation?

A That is exactly what I told him. ***This is what –the way I worded it is we had information to believe, and we were directly confronting him with what we felt was the facts,*** and as I explained, again, I could see a major change in his demeanor, his body language.

4/8/08 RP 290. See Brief of Appellant, p. 48-54.

The defendant did not object to this testimony. See 4/8/08 RP 290. Given that the challenged comment was one in which Detective Turner was explaining how he conducted his interview of the defendant, it is clear that this comment was an “explanation of interrogation tactics and not an expression of personal beliefs,” *State v. Curtiss*, ___ P.3d ___, 2011 WL

1743926 (2011)(citing *State v. Demery*, 144 Wn.2d 753, 763-65, 30 P.3d 1278 (2001). As a result, Turner’s testimony was not improper opinion testimony, and certainly not “a nearly explicit statement” that Turner “believed the accusing victim,” *Kirkman*, 159 Wn.2d a 934, or disbelieved the defendant. Therefore, the trial court did not abuse its discretion in admitting such testimony and the defendant’s convictions should be affirmed.

Moreover, because “opinion testimony does not constitute reversible error where the trial court properly instructs the jury... that it is the sole judge of witness credibility and not bound by witness opinions,” *State v. Curtiss*, ___ P.3d ___ (2011), and the trial court gave such an instruction here, *see* CP 77, 81, Appendix A, there could be no reversible error in this case.

Indeed, the trial court admitted no improper opinion testimony. Therefore, it did not abuse its discretion and the defendant’s convictions should be affirmed.

5. THE MATTER SHOULD BE REMANDED FOR RESENTENCING BECAUSE, ON THE RECORD AS DEVELOPED AT SENTENCING, THE COURT ERRED IN FINDING THE DEFENDANT TO BE A PERSISTENT OFFENDER.

“[A] persistent offender shall be sentenced to a term of total confinement for life without the possibility of release.” RCW 9.94A.570

(2006). A

‘[p]ersistent offender’ is an offender who:

(b)(i) Has been convicted of: (A) Rape in the first degree, ***rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion...*** and

(b)(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or ***out-of-state offense*** or offense under prior Washington law ***that is comparable to the offenses listed in (b)(i) of this subsection.***

RCW 9.94A.030(33)(2006)(emphasis added).

The Washington State Supreme Court has “devised a two part test for comparability.” *In Re Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005)(citing *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998)).

First, “the elements of the out of state crime must be compared to the elements of a Washington criminal statute in effect when the foreign crime was committed.” *Id.* “If the elements of the foreign conviction are comparable to the elements of a Washington strike offense on their face, the foreign crime counts toward the offender score as if it were the comparable Washington offense.” *Id.* This part of the analysis has been termed “legal comparability.” *Id.*

However, “[i]n cases in which the elements of the Washington crime and the foreign crime are not substantially similar, we have held that

the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute." *Id.*; ***State v. Thiefault***, 160 Wn.2d 409, 415, 158 P.3d 580 (2007) (citing ***Morley***, 134 Wn.2d at 606). This part of the analysis has been termed "factual comparability." *Id.* at 256.

In the present case, the defendant argues that his sentences for counts I through IV should be reversed because he asserts that the sentencing court "erred in concluding that [the 1995] Florida conviction was comparable to a Washington felony and a 'strike' crime." Brief of Appellant, p. 54-64.

On June 5, 1996, in the circuit court, sixth judicial circuit in and for Pinellas County, Florida, the defendant was "adjudicated guilty" after a plea of *nolo contendere* to second-degree "sexual battery" under Fla. Stat. 794.011(5) for an incident that occurred on August 30, 1995. CP 118-209. See ***Montgomery v. State***, 897 So.2d 1282 (Fla. 2005)(holding that a plea of no contest, even where adjudication is withheld, is to be included as a conviction in a defendant's criminal history); ***Price v. State***, 43 So.3d 854 (Fla. 2010)(holding that the defendant was convicted of a sex offense for purposes of Florida's sex offense registry, even though he pleaded *nolo contendere* to the offense and adjudication was withheld).

The version of Fla. Stat. 794.011(5) in effect at the time of the defendant's offense provided, in relevant part, that

[a] person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree.

Fla. Stat. 794.011(5)(1995).

“Sexual battery” was, and currently is, defined as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.” Fla. Stat. 794.011(1)(h). The term “[u]nion permits a conviction based on contact with the relevant portion of anatomy, whereas penetration requires some entry into the relevant part, however slight.” *Watkins v. State*, 48 So.3d 883 (Fla. 2010)(citing *Seagrave v. State*, 802 So.2d 281, 287 n.7 (Fla. 2001)(quoting *Richards v. State*, 738 So.2d 415, 418 (Fla. 2d DCA 1999))).

“Serious physical injury” was defined as “great bodily harm or pain, permanent disability, or permanent disfigurement.” Fla. Stat. 794.011(1)(g).

In 1995, RCW 9A.44.050 provided, in relevant part, that

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion.

In 1995, RCW 9A.44.100 provided, in relevant part, that

(1) A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another

(a) By forcible compulsion.

“Sexual intercourse”

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are the same or opposite sex.

RCW 9A.44.010(1)(1995).

“Sexual Contact” was defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2)(1995).

“Forcible compulsion” was defined as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6)(1995).

Hence, both second-degree rape and indecent liberties by forcible compulsion include an element of “forcible compulsion,” whereas Florida’s sexual battery statute does not seem to require proof of any force at all. As a result, the elements of the Florida conviction do not appear to be “comparable to the elements of a Washington strike offense on their face.” *Lavery*, 154 Wn.2d at 255. Rather, they appear to be more broad.

Therefore, the court must “look at the defendant’s conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.” *State v. Bunting*, 115 Wn. App. 135, 140-41, 61 P.3d 375 (2003). *Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). *Lavery*, 154 Wn.2d at 255

In the present case, the information filed in the Florida matter read, in relevant part, as follows:

EDDIE LEE TRICE... did commit a sexual battery upon [the victim], to wit: the penis of EDDIE LEE TRICE in contact or union with the vagina of [the victim], without the consent of [the victim] and in the process thereof used physical force and violence not likely to cause serious

personal injury, to wit: holding down, thereby causing [the victim] to submit to said sexual battery.

CP 118-209.

Thus, the defendant (1) placed his penis in contact with the vagina of the victim (2) by “physical force or violence” that included holding the victim down and thereby causing her to submit to that contact. In other words, he subjected the victim to sexual contact, *see* RCW 9A.44.010(2)(1995), by “physical force which overcomes resistance,” or “forcible compulsion.” RCW 9A.44.010(6)(1995).

Nevertheless, there is no proof in the information that the victim of such contact was not married to the defendant, as is required for a conviction of indecent liberties by forcible compulsion. *See* RCW 9A.44.100(1995). Therefore, the conduct alleged in the information would not have violated Washington’s statute against indecent liberties by forcible compulsion.

Moreover, that conduct, as described in the information, cannot be second-degree rape, because the penile “contact or union” with the vagina described therein did not meet Washington’s definition of “sexual intercourse,” as required for conviction of second-degree rape. *See* RCW 9A.44.010(1)(1995), 9A.44.050 (1995).

While the police reports do indicate that the defendant actually engaged in sexual intercourse with a woman who was not his spouse, *see* CP 118-209, “[w]hen a defendant enters a plea of *nolo contendere*, the allegations of the charge are not admitted in a technical sense,” *Walker v. State of Florida*, 880 So.2d 1262 (2004), *rev. on other grounds State v. Walker*, 932 So.2d 1085 (Fla. 2006), and there is no evidence that the defendant adopted the facts contained in the police reports. *See* CP 118-209, 7/1/08 RP 456-502. Consequently, it does not seem that these documents can be considered in determining factual comparability in this case. *See State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003).

Therefore, the Florida conviction was not, on the record before the sentencing court, comparable to a Washington State most serious offense, and the sentencing court erred in concluding that the defendant was a persistent offender. Therefore, the matter should be remanded for re-sentencing.

6. THE MATTER SHOULD BE REMANDED FOR RE-SENTENCING BECAUSE CONDITION 14, AS PRESENTLY DRAFTED, IS UNCONSTITUTIONALLY VAGUE, AND CONDITION 25 IS NOT STATUTORILY AUTHORIZED.

When a defendant is sentenced under RCW 9.94A.715 (2006), the sentencing court must sentence the defendant to community custody, and must sentence that defendant to conditions of community custody listed in former RCW 9.94A.700(4) (2006). RCW 9.94A.715(2)(a) (2006). The court may also order those conditions provided in RCW 9.94A.700(5) (2006). RCW 9.94A.715(2)(a)(2006).

In addition to the conditions listed in RCW 9.94A.700(4) and (5), “[t]he court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” *Id.*

“A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). “Sentencing courts have the power to delegate some aspects of community placement to the D[e]partment of Corrections.” *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

“Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). “Imposition of an unconstitutional condition would... be manifestly unreasonable.” *Id.*

Under the federal due process clause and Article I, section 3 of the Washington State constitution, “a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” *State v. Sansone*, 127 Wn. App. at 638-39; *Bahl*, 1164 Wn.2d at 752-53.

In the present case, the court imposed conditions of community custody in its judgment and sentence and in appendix H, *see* CP 238-52, 232-36, including two which are now challenged by the defendant. Brief of Appellant, p. 64-68.

The defendant argues that conditions 14 and 25 of Appendix H were not statutorily authorized and violated his first-amendment and due process rights. Brief of Appellant, p. 64-68.

1. Condition 14

Condition 14 states: “[d]o not possess or peruse pornographic materials. Your Community Corrections Officer will define pornographic material.” CP 232-36.

This condition was authorized by former RCW 9.94A.715(2)(a) (2006), which allowed the court to “order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Indeed, it was necessary to the completion of the psychosexual treatment, a “rehabilitative program” ordered by the court, *see* CP 232-36, and was otherwise reasonably necessary to reduce the defendant’s risk of reoffending and to increase the safety of the community.

This condition was also consistent with RCW 9.94A.700(5)(c)(2006), which allows the court to order a defendant to “participate in crime-related treatment or counseling services.” Both the judgment and sentence itself, CP 238-52, and Condition 11 of Appendix H, CP 232-36, did this explicitly, by ordering the defendant to “Enter and complete a state approved sexual deviancy treatment program through a certified sexual deviancy counselor.” CP 238-52. Neither of these

provisions is challenged. Condition 14 is a necessary component of the treatment ordered in Condition 11. Because this condition is a necessary component of the “crime-related treatment or counseling services” ordered in Condition 11, it was authorized by former RCW 9.94A.715(2)(a), which allowed the court to “order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.”

Therefore, condition 14 was statutorily authorized.

Nevertheless, the defendant argues, relying on *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), that condition 14 was unconstitutionally vague and violative of the first amendment. Brief of Appellant, p. 64-68

The Supreme Court in *Bahl* considered a condition that ordered the defendant not to “possess or access pornographic materials, as directed by the supervising Community Corrections Officer.” *Bahl*, 164 Wn.2d at 743. The Court held that such a condition “is unconstitutionally vague,” and “[t]he fact that the condition provides that Bahl's community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” *Id.*

The condition in the present case, that the defendant’s “Community Corrections Officer will define pornographic material,” CP 232-36, does not seem appreciably different. Therefore, under *Bahl* it is probably unconstitutionally vague and, on remand for re-sentencing, should be modified. Cf. *State v. Sansone*, 127 Wn. App. 630, 6743, 111 P.3d 1251 (2005)(suggesting that a definition of pornography set in advance by both the community corrections officer and the defendant’s Sexual Deviancy Treatment Provider may be proper).

2. Condition 25

Condition 25 states, “[y]ou shall not have access to the internet unless the computer has child blocks in place and active.” CP 232-36.

The Court in *O’Cain* considered a similar condition that required the defendant not to “access the Internet without the prior approval of [his] supervising Community Corrections Officer and sex offender treatment provider,” *State v. O’Cain*, 144 Wn. App. 772, 774, 184 P.3d 1262 (2008), and held that it was “not crime-related and therefore [that] the trial court erred in imposing it.” *Id.* at 774. Specifically, the Court found that

There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O’Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape. Under

RCW 9.94A.700(5)(e), the prohibition on internet access without pre-approval must be crime-related in order to be valid. Because the prohibition in this case is not crime-related, we conclude it must be stricken. Our holding does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation.

O’Cain, 144 Wn. App. at 775.

In the present case, as in *O’Cain*, there is no evidence that the defendant accessed the internet before the rapes or that internet use contributed in any way to the crimes. Therefore, as in *O’Cain*, it is not crime-related and, on remand for re-sentencing, should be stricken. Of course, *O’Cain* “does not preclude control over internet access being imposed as part of sex offender treatment if recommended after a sexual deviancy evaluation.” *Id.*

Because condition 14, although statutorily authorized, is, as presently drafted unconstitutionally vague, and because condition 25 does not appear to be statutorily authorized, this matter should be remanded for re-sentencing so that condition 14 may be re-drafted and condition 25 stricken.

D. CONCLUSION.

The defendant’s conviction of first-degree burglary should be affirmed because, when viewed in the light most favorable to the State, there was sufficient evidence from which a rational trier of fact could have

found the element of entering or remaining unlawfully beyond a reasonable doubt.

The defendant's conviction of first-degree burglary should be affirmed because his right to jury unanimity was properly safeguarded.

The defendant has failed to meet his burden of showing prosecutorial misconduct or that the unchallenged argument was flagrant or ill-intentioned.

The trial court properly admitted the testimony of Detectives Turner and Holden and school counselor Ramm-Gramenz because such testimony did not constitute improper opinion testimony on the veracity of the victim or witnesses.

Therefore, the defendant's convictions should be affirmed.

However, the matter should be remanded for re-sentencing because, on the record as developed at sentencing, the court erred in finding the defendant to be a persistent offender, and in imposing conditions 14 and 25, as presently drafted.

DATED: June 3, 2011

MARK LINDQUIST
Pierce County
Prosecuting Attorney


BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

03.11 _____
Date Signature

11-20-08
BY: [Signature]

APPENDIX A



06-1-02168-3 29619012 CTINJY 04-23-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-02168-3

vs.

EDDIE LEE TRICE,

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 16th day of April, 2008.

Beverly To Grant
JUDGE

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff, and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

You have heard testimony that the defendant was in custody in the Pierce County Jail at the time of the blood draw. The fact that the defendant may have been in custody at the time of the blood draw has no bearing whatsoever on the issue of his guilt or innocence.

INSTRUCTION NO. 6

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 7

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

INSTRUCTION NO. 8

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 9

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

INSTRUCTION NO. 10

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

INSTRUCTION NO. 11

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; or any penetration of the vagina or anus however slight, by an object, including a finger, when committed on one person by another; or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.

INSTRUCTION NO. 12

To convict the defendant of the crime of Rape of a Child in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 8th, 2006, the defendant had sexual intercourse with A.L.;
- (2) That A.L. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than A.L.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

To convict the defendant of the crime of Rape of a Child in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 8, 2006, the defendant had sexual intercourse with A.L.;
- (2) That A.L. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than A.L.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 14

To convict the defendant of the crime of Rape of a Child in the First Degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 8, 2006, the defendant had sexual intercourse with A.L.;
- (2) That A.L. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than A.L; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

You have heard allegations that the defendant initially contacted A.L.'s vagina with his tongue and/or mouth. These allegations are the basis for the crime charged in Count I

You have heard allegations that the defendant then penetrated A.L.'s vagina with his finger. These allegations are the basis for the crime charged in Count II

You have heard allegations that the defendant then penetrated A.L.'s anus with his finger. These allegations are the basis for the crime charged in Count III

INSTRUCTION NO. 16

A person commits the crime of child molestation in the first degree when that person has sexual contact with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

INSTRUCTION NO. 17

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

INSTRUCTION NO. 18

To convict the defendant of the crime of Child Molestation in the First Degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 8, 2006, the defendant had sexual contact with A.L.;
- (2) That A.L. was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than A.L.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19

A person commits the crime of Burglary in the First Degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime assaults any person.

INSTRUCTION NO. 20

The term enter includes the entrance of the person, or the insertion of any part of the person's body, or any instrument or weapon held in the person's hand and used or intended to be used to threaten or intimidate another person, or to detach or remove property.

INSTRUCTION NO. 21

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 22

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 23

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 24

To convict the defendant of the crime of Burglary in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 8th day of May, 2006, the defendant entered or remained unlawfully in a building, 4028 S. Lawrence Street, Apt. D, Tacoma, WA;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person, A.L.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 26

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given these instructions and five verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the Judicial Assistant. The Judicial Assistant will bring you into court to declare your verdict.