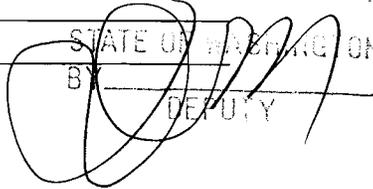


NO. 41239-0

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

AARON EDWARD OLSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan E. Chushcoff

No. 06-1-05952-4

BRIEF OF RESPONDENT

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

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3. Has defendant failed to demonstrate the existence of any prejudicial error in his trial much less an accumulation of it necessary for application of the cumulative error doctrine?

4. Did the trial court abuse its discretion when statutes and case law support the imposition of court costs and a substance abuse evaluation?

B. STATEMENT OF THE CASE.

1. Procedure

On December 18, 2006, the State charged defendant, Aaron Olson, with one count of kidnapping in the first degree, one count of robbery in the first degree, one count of rape in the first degree, and one count of attempted robbery in the first degree. CP 1-3. The first three counts

concerned victim G.C.¹ CP 4-5. The fourth count concerned Alyxandria McGriff. CP 4-5.

On July 19, 2007, the State amended the charges to add two counts of rape in the second degree. CP 6-9. These two new counts concerned victim K.B. CP 6-9. On September 12, 2007, an agreed order was entered severing the counts so that counts relating to each victim would be tried separately resulting in three trials.² CP Supp 151-52. On June 5, 2008, a second amended information was filed adding a second count of rape in the first degree for victim G.C. CP 10-13. The trial for the counts associated with victim G.C. proceeded first and defendant was convicted of all four counts as charged. CP 14-27.

On July 31, 2009, the State filed a motion for the admission of other sex offense under RCW 10.58.090 and ER 404(b). CP 28-52. The specific evidence the State sought to admit was the facts of the rape of G.C. CP 28-52. A hearing was held on January 8, 2010. 1/8/10 RP 4-43.³ Counsel for Emery filed a motion response while counsel for defendant did not file a separate response and adopted the arguments of Emery's counsel. 1/8/10 RP 4. The trial court issued a written ruling on January 15, 2010. CP 53-60. The trial court admitted the evidence under ER

¹ The State will refer to the two victims' in this case by their initials.

² Only an agreed order is in the record. There is no indication that any hearing was held on the record and defendant did not provide any transcript of such a hearing.

³ The State will refer to the ten sequentially paginated volumes as RP. The remaining volumes will be referred to with the date preceding RP.

404(b) and did not reach any decision on RCW 10.58.090. CP 53-60, page 5-6.

On July 29, 2010, Emery entered a guilty plea and defendant's case on the counts concerning K.B. was called for trial. RP 4, 16. On August 20, 2010, the jury found defendant guilty as charged of both counts. RP 565, CP 108-11.

Sentencing was held on September 24, 2010. RP 577, CP 132-147. Defendant had an offender score of 12 and his standard range was 210-280 months to life on each count. CP 132-147. The trial court sentenced defendant to the high end of the standard range. RP 595, CP 132-147.

Defendant filed this timely notice of appeal. CP 112-126.

2. Facts

K.B., a sixteen year old female, lived with her family in the 6100 block of I street. RP 83. On May 18, 2005, K.B. went to the Market Place store which was two blocks away to buy her boyfriend a birthday card. RP 84, 87-88. Two guys in a white truck started hollering at her when she got to the parking lot. RP 89. K.B. had never seen the truck or the men before. RP 90. K.B. accepted a ride from the men. RP 90. The driver was white, average height and about 17-18 years old. RP 91. The passenger was heavy set and not Caucasian. RP 92. The driver got out of the car to let her in. RP 93. The driver said his name was Aaron and the

passenger said he was Tony. RP 93. The truck drove behind the Market Place and stopped in the alley. RP 94-95. The driver started groping her. RP 95. She told them that she wanted to go home but the driver kept grabbing her and she tried to push his hands away. RP 95. The driver asked if she would give them head, which she took to mean oral sex, and she said no. RP 95-96. The driver touched her breasts over her clothes. RP 96. The passenger did not touch her at that point but did ask for oral sex. RP 97. K.B. was scared and did not know what to do. RP 98.

Eventually, the driver started the car and drove to a residential intersection by her house. RP 95, 99. No one else was around and the driver turned the car off and started touching her again. RP 100. She asked to get out and the driver said that if she gave them head, he would let her out. RP 100. The driver kept telling her to calm down and then he put his hand under her shirt and tried to make her kiss him. RP 100. He grabbed her face when she turned away in order to make her kiss him. RP 100. The driver stuck his tongue inside her mouth. RP 101. K.B. kept asking him to stop and when she freaked out he told her to calm down. RP 101. The driver then pulled up her shirt and licked her breast. RP 100. The passenger then started to touch her. RP 102. She struggled and told them to stop. RP 102.

The driver started to take her pants off and K.B. told him to stop. RP 103. Each man then grabbed one of her hands and used the other hand to pull her pants off as well as her underwear. RP 103, 105, 164. She

tried to pull away but they were strong. RP 104. The driver then touched her vagina and tried to pull her onto his lap. RP 104. She kept trying to resist and push herself the other way. RP 105. She was very upset and freaked out. RP 105. Then men then forced her onto her stomach. RP 106. Her head was in the passenger's lap and the driver started raping her vagina from behind. RP 106-07. The passengers stuck his fingers in her mouth to pry it open because she would not open her mouth for him. RP 108. The passenger pushed her mouth down onto his penis. RP 108. While they were raping her, she was struggling and the passenger asked the driver if they should move the truck. RP 103, 108. She was scared they would take her somewhere else so she stopped struggling. RP 103, 161. She had no control over where the truck went and was not able to get out of the truck. RP 159.

Eventually the driver, who was not wearing a condom, ejaculated and started to pull her pants back up. RP 109-10. She was crying. RP 109. The men told her she was almost done and then the passenger ejaculated in her mouth and on her hair. RP 109-10. The rape probably lasted 10-15 minutes but seemed to take forever. RP 110. The men then let K.B. put her clothes on and the driver let her out of the truck and drove off. RP 110.

David Bennett, the victim's brother, testified that is sister came home very upset with stuff in her hair. RP 171, 173. The victim said she was raped and then started spitting up cum. RP 174, 178. The victim said

a white pickup truck with two men, one who was white and one who had dark skin came up to her. RP 176. The white guy raped her and the dark skinned guy forced her to give head. RP 176-77. The victim was crying and really upset. RP 177. Ken DeLost, the victim's step dad, testified that the victim was distraught, and crying and that her hair had something in it. RP 210, 216. Mr. Bennett called 911. RP 177.

On May 18, 2005, Tacoma Police Officer Henry Betts was dispatched to a reported rape in the 6100 block of Yakima. RP 52, 54, 55. When Officer Betts arrived, paramedics were already on the scene. RP 57. The victim, K.B., was very upset and appeared injured. RP 58-9. She was hunched over, grabbing her stomach and crying. RP 58. The victim was transported to Mary Bridge Hospital and reported that she had been raped. RP 60, 63. The victim told Officer Betts that she had been out for a walk when she was approached by several males in a vehicle. RP 63. They made her get in the vehicle and raped her. RP 63. The pickup truck was white and the driver was a white male 18-20 years old. RP 64. The passenger was a black male with Samoan features and was also 18-20 years old. RP 65. The victim said she was forced to give oral sex to the passenger and have vaginal intercourse with the driver. RP 65. The victim had not met either man before. RP 65. The rape occurred one house away from her house. RP 69. While the victim said the men did not threaten or yell at her, she did say that the men were very persistent and talked about moving locations to avoid being seen. RP 68, 70, 71.

Judy Henning, a sexual assault nurse at Tacoma General Hospital, examined the victim on May 18, 2005. RP 262-63, 269. The victim was in the fetal position during the exam and was withdrawn, crying, and speaking softly. RP 275. The victim described the attack and her attackers. RP 272-74, 276-77. The victim said that Aaron was the white guy and Tony was the black guy with Samoan features. RP 276-77. The white guy put his fingers and penis inside her and the black guy forced her to give him a blow job. RP 277-78. The black guy ejaculated in her mouth and the white guy ejaculated in her vagina. RP 279. Both men licked her breasts. RP 280. The white guy forced her to kiss him and used his tongue. RP 280. K.B. said she was hurting at the time of the assault and that she gagged but did not actually vomit. RP 281. Both men held her down in order to pull up her shirt and pull down her pants. RP 282. K.B. had a bruise on her left knee, a contusion on her left shin and a contusion on her right leg. RP 285-86. The injuries were consistent with what K.B. said had occurred. RP 286. The nurse took several swabs from the victim's mouth, breasts, vagina, anus and cervix. RP 288, 289, 290, 298. She also took a cutting of K.B.'s hair. RP 290. K.B. had injuries on her vagina including a laceration and redness around her perianal area. RP 294, 295, 296. There was also a white milky discharge in her vaginal vault. RP 297.

Detective Jeffrey Turner had been working on a different rape involving victim G.C. RP 312. In that rape, there had been two

perpetrators. RP 313. Detective Turner got a lead that defendant was involved in the G.C. rape and was able to link him to Emery. RP 328. Detective Turner created two photo montages to show G.C. RP 330. G.C. picked out Emery from the photo montage but was not able to identify defendant. RP 333-34. Detective Turner collected DNA samples from both defendant and Emery. RP 338.

G.C. had been working at the Walgreen's on 56th and Pacific on February 27, 2006 when she was abducted and raped. RP 342-44. Defendant and man she described as a Pacific Islander were the two men who had raped her. RP 344. The two of them confronted her in the parking lot with a gun. RP 347. Defendant had the gun and asked her for money. RP 349. They then had her get in the driver's seat of her car and then they got in the car. RP 349. The men made her drive to the Market Place. RP 350. The told her to drive behind the Market Place but a chain was blocking the alley. RP 351-52. They then had her drive to front of the lot where there were no cars. RP 352. They told her to get in the backseat and that they were going to rape her. RP 353. She told them she was pregnant and they then talked to each other and said she would have to give them both oral sex. RP 353. They told her if she did not do it, they would kill her. RP 353. G.C. went to the backseat because she was scared. RP 354. Defendant made her give him oral sex and then ejaculated in her mouth. RP 354-55. G.C. wiped his semen on her pants. RP 355. The other guy asked if he could fuck her and defendant said no.

RP 356. The other guy was rough and mad because he could not ejaculate. RP 356. He eventually ejaculated in her mouth and she wiped his semen on her vest. RP 357. They then drove to Safeway, got out and told her not to tell anyone because they knew where she worked. RP 358. G.C. drove to a friend's house and threw up. RP 360. G.C. had never seen either man before. RP 363.

Detective Brad Graham interviewed K.B and worked on her case. RP 381. The case initially went cold. RP 386. However, the case was reopened when a DNA match came from the case Detective Turner was working on. RP 386-87. Defendant and Emery were identified as suspects and it was determined that they lived within the proximity of the Market Place. RP 387. In May of 2007, K.B. was contacted to come for a photomontage. RP 138, 388. K.B. was not able to pick the driver out of the photomontage. RP 141, 391. She was able to pick the passenger out of the montage. RP 143, 393. K.B. identified defendant in court as the driver of the vehicle. RP 144, 147.

Defendant's mother testified that the Market Place is two and half to three miles from her house. RP 184-85. She owned a white, two door, Dodge pickup with a bench seat. RP 188. Defendant and Tony Emery were good friends and did everything together. RP 187.

Jeremy Sanderson, a forensic scientist with the Washington State Patrol, examined K.S.'s rape kit. RP 415, 419-20. The swab from K.B.'s

left breast matched defendant's DNA 1 in 7.3 million. RP 433-34. The sample from K.B.'s underpants matched defendant 1 in 2.4 quintillion. RP 435.

Defendant took the stand and testified that he was good friends with Emery. RP 444. On May 18, 2005, defendant was driving his truck with a bench seat and headed to the Market Place. RP 445, 473. At the Market Place, defendant contacted the victim. RP 445-46. Defendant told Emery to roll down the window and defendant asked K.B. if she wanted a ride. RP 447. Defendant testified that she was an attractive young lady and he wanted to introduce himself. RP 448. Defendant put his hand on the victim's leg while he was driving. RP 452. Defendant stopped the truck close to the victim's house and began to touch her breasts. RP 453. The victim seemed uncomfortable but he then took her shirt off. RP 454. Defendant asked the victim to give him head and then started to lick her breast. RP 455. The victim shook her head no when he asked for head. RP 481. The victim just sat there but seemed like she was uncomfortable with the whole situation. RP 456, 483. There was no discussion but it was clear the victim did not want this. RP 491. The victim then helped him remove her pants and underwear. RP 457. The victim got on top of him but it was too cramped so she got on her knees and he helped guide her into that position. RP 457. Defendant said he began to see if she was

wet down there with fingers and then had vaginal sex with her. RP 458. Defendant saw the victim's head going down on Emery but no words were spoken and no threats were made. RP 459. Defendant and Emery were raping the victim at the same time. RP 471. Defendant acknowledged that the victim did not consent to sex and said "technically, yes, it was a rape." RP 460, 470, 497. Defendant denied holding the victim down. RP 469. Defendant claimed that the victim helped do everything. RP 493. Defendant did admit he was focused on his own agenda and was focused on having sex. RP 492.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S RAPE OF G.C. AS THE COURT FOLLOWED THE ANALYSIS REQUIRED BY CASE LAW AND ADMITTED THE EVIDENCE FOR A PROPER PURPOSE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 843 P.2d 651 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Id.* at 162.

ER 404(b) provides that evidence of “other crimes, wrongs, or acts” is inadmissible to prove “action in conformity therewith” on a particular occasion. However, that rule also provides a non-exhaustive list of purposes for which such evidence can be admissible: “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). While a trial court’s interpretation of ER 404(b) is reviewed de novo, once that the trial court correctly interprets the rule, the trial court’s decision to admit or exclude the evidence is reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009).

Before admitting evidence of other crimes or wrongs under ER 404(b), a trial court must: (1) establish by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine the evidence is relevant; and (4) find that its probative value outweighs its prejudicial effect. *State v. Hernandez*, 99 Wn. App. 312, 321-322, 997 P.2d 923 (1999), *review denied*, 140 Wn.2d 1015 (2000), *citing State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. *State v. Boot*, 89 Wn. App. 780, 788, 950 P.2d 964 (1998), *citing State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence

to the action and makes the existence of the identified act more probable. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). On appeal, if any substantial evidence in the record supports a finding that the prior act occurred, the evidence has met the standard of proof. *State v. Roth*, 75 Wn. App. 808, 816, 881 P.2d 268 (1994). The appellate court may, “consider bases mentioned by the trial court as well as other proper bases on which the trial court’s admission of evidence may be sustained.” *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

“The common scheme or plan exception applies when the defendant had devised a plan and used it repeatedly to perpetuate separate but similar crimes.” *State v. Burkins*, 94 Wn. App. 677, 973 P.2d 15 (1999), citing *State v. Krause*, 82 Wn. App. 688, 693-4, 919 P.2d 126 (1996), review denied, 131 Wn.2d 1007, 932 P.2d 644 (1997), see also *Lough*, 125 Wn.2d at 852. “When the very doing of the act charged is still to be proved, one of the facts which may be introduced into evidence is the person’s design or plan to do it. If the evidence is offered for a legitimate purpose, then the exclusion provision of rule 404(b) does not apply.” *Lough*, 125 Wn.2d at 853.

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P. 3d 119 (2003), the Supreme Court held that the admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. *Id.* at 21. The Court found that such evidence is relevant when the existence of the crime is at issue. *Id.*

In *DeVincentis*, the defendant was charged with rape of a child and child molestation in the second degree. The defendant hired a neighborhood girl to do work around his house. As she worked, he walked around in his underwear. He eventually talked the girl into having sex with him. At the trial, the State moved to introduce evidence of the defendant's similar sexual misconduct in New York several years before. The facts were very similar. The defendant had used a similar approach to the young girl, who was a friend of the defendant's daughter. The trial court found the prior act was admissible under ER 404(b) as part of a common scheme or plan. The Supreme Court agreed.

In *State v. Kennealy*, 151 Wn. App. 861, 214 P. 3d 200 (2009), the defendant was charged with child rape and molestation of neighborhood children. *Id.* at 869. At the trial, evidence that the defendant had molested his own children years before was admitted under the common scheme or plan exception of ER 404(b). Although the prior misconduct was not as similar as in *DeVincentis*, the Court held that it was properly admitted. *Kennealy*, 151 Wn. App. at 889.

In the instant case, the trial engaged in analysis both under ER 404(b) and ER 403. The trial court went through the four factors outlined above and found that the evidence of the other act, the rape of G.C., was proven when defendant was convicted after jury trial. CP 53-60, page 3. The court also found that the evidence of the rape of G.C., which was only nine months after the rape of K.B. in the current case, was relevant to

show a common scheme or plan and “may also tend to demonstrate intent and motive.” CP 53-60, page 3. The trial court expounded on the similarities between the two incidents in that they were both in the evening, both occurred in a car and both occurred in the same part of town. CP 53-60, page 3. In addition, the trial court noted that in both rapes, there was no significant prior contact between the victim and defendants. CP 53-60, page 4. The trial court also found it exceptionally similar that two men were involved in each rape. CP 53-60, page 3. The trial court found that two men involved in both incidents was of significant probative value. CP 53-60, page 4. In addition, the trial court noted that in both rapes, there was no significant prior contact between the victim and defendants. CP 53-60, page 4. Finally the trial court found that the rape of G.C. went, “a long way to explain the State’s theory of the case and is not merely to put the defendants in a bad light. Its probative value outweighs its prejudicial effect.” CP 53-60, page 5. In addition, the trial court noted that in both rapes, there was no significant prior contact between the victim and defendants. CP 53-60, page 5. The trial court engaged in the proper analysis as dictated by case law.

The trial court did not abuse its discretion in admitting the evidence of G.C.’s rape under ER 404(b) and ER 403. The trial court engaged in the appropriate analysis after listening to argument from both parties as well as reading their briefing. 1/8/10RP 4-43. The trial court found a proper purpose for the evidence in that it was relevant to show

common scheme or plan. CP 53-60, page 3. The two crimes were separate incidents but very similar. The evidence was properly admitted to show that defendant committed similar acts against similar victims under similar circumstance. *See Lough*, 125 Wn.2d 847.⁴ The trial court did not abuse its discretion in finding that the evidence was admissible to show a scheme or plan.

Further, the trial court specifically limited the testimony throughout the trial. The trial court was clear as to the scope of the testimony and limited what other witnesses, such as the detective, could testify to. RP 314-19. The trial court also did not allow the State to cross examine defendant as to the rape of G.C. RP 468. The evidence was admitted for the limited purpose it was intended. The trial court also gave the jury a limiting instruction concerning the evidence of the rape of G.C. CP 83-107, Instruction 6. The jury is presumed to follow the court's instruction. *Lough*, 125 Wn.2d at 864. There is absolutely no evidence in the record that they did not follow that instruction.

Defendant argues that the fact that the jury convicted defendant of rape in the second degree and not rape in the third degree is evidence that

⁴ Defendant cites to *State v. Bowen*, 48 Wn. App. 187, 738 P.2d 316 (1987) to argue that the evidence was improperly admitted. However, *Bowen* was disfavored by the Supreme Court in the *Lough* decision. 125 Wn.2d at 854. "*Bowen*, clearly, is no longer a useful precedent in determining the admissibility of proper sexual misconduct to prove a common scheme or plan." *State v. DeVincentis*, 112 Wn. App. 152, 161, 47 P.3d 606 (2002).

the jury used the evidence for another purpose. However, defendant's argument is based on the incorrect conclusion that the victim's testimony supported defendant's theory of the case and that the rape of K.B. in this case was not horrific since it happened near the safety of the victim's house and that, in contrast, the rape of G.C. was horrific. Brief of Appellant, page 10, 15. Neither of these conclusions is supported by the record. The victim, K.B. testified that she struggled with both defendants and that they held her arms down while they removed her clothes. RP 95, 100, 102, 103, 105, 106, 108, 164. Defendant also forced her onto her stomach in order to have intercourse with her while Emery forced her mouth open in order to force her to perform oral sex on him. RP 106, 108. Defendant's testimony that K.B. was uncomfortable with having her breast touched over clothes but readily helped him remove her shirt, pants and underwear and climbed on top of him in order to facilitate her own rape does not make sense. RP 454, 456, 483, 491, 457, 493. The jury is the sole judge of credibility; their verdict reflects that they did not believe defendant's illogical story and those determinations are not subject to appeal. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, to argue that K.B.'s rape by defendant and Emery at the same time, mere feet from her house when she could not get out of the car to the safety of her home and was afraid that defendant would drive away from her house if she kept struggling, is a shocking and irrelevant argument.

K.B. and G.C both experienced horrific rapes at the hands of two men whom they did not know. To say that one is more horrific than the other simply because of where it took place is an illogical and offensive argument. The similarities are what the trial court focused on in terms of making its ruling as dictated by the case law. The jury was properly instructed and is presumed to have followed that instruction. There is no evidence that they did not follow that instruction. The trial court did not error in admitting the evidence.

2. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court

determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) *citing State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks 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.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Defendant alleges prosecutorial misconduct in two arguments made in the State’s initial closing and three arguments made in the State’s rebuttal closing. As defendant did not object to any of these arguments, defendant must show that the arguments are flagrant and ill-intentioned. Defendant cannot meet this burden.

- a. The State did not misstate the role of the jury, shift the burden of proof or make improper argument about defendant’s choice to testify.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant’s arguments. See *Russell*, 125 Wn.2d at 85-86.

A prosecutor does not shift the burden of proof when they argue that a defendant’s version of events is not corroborated by the evidence. *Gregory*, 158 Wn.2d at 860. “The State is entitled to comment upon

quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by defense does not necessarily suggest that the burden of proof rests with the defense.” *Id.*

A jury is presumed to follow the court’s instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006). A jury is presumed to follow the trial court’s instructions. *Lough*, 125 Wn.2d at 864.

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

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. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

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, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 83-107, Instruction 3, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer’s 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 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.

CP 83-107, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

In the instant case, the State was very clear as to what their burden of proof was. The State talked to the jury about the presumption of innocence, the burden of proof and the jury's role. RP 510-11. The State's argument made clear that the State had to prove the charges beyond a reasonable doubt, that the jury was the sole judge of credibility and that jury was to make their decision based on the facts and the law. RP 510-11. The State also told the jury that they must be convinced beyond a reasonable doubt. RP 512. The State then proceeded to go through the evidence in the case, detail what elements were not contested and show how the State had met their burden. RP 512-522. The State again reiterated the jury's role and that burden of proof.

The law requires that you go back there, and you evaluate the evidence and you determine whether the State has proven each element beyond a reasonable doubt, and I submit to you that the State has satisfied each and every one of those elements of the crime.

When you go back there and you find that the State has satisfied each element of the crime, you will return a verdict that represents the truth of the matter. The truth is that Aaron Olson raped [K.B.] on May 18th. He didn't care about her because he was focused on his agenda. He didn't

care objection and over her resistance. But for his presence and but for his actions, Tony Emery would not have been able to rape her either. For that reason, Aaron Olson is guilty of Rape in the Second Degree as an accomplice as well.

I ask you to return a verdict that represents the truth and find him guilty of both counts and hold him accountable.

RP 528-29.

There is nothing improper about the State's argument. The State's argument told the jury that their job was to evaluate the evidence and determine whether the State had proven each element beyond a reasonable doubt. It was the State's position that they had satisfied their burden meaning that if the jury agreed that what happened that day was that defendant raped K.B. then the verdict would reflect the truth of that statement. The State's arguments were in line with the burden of proof and the jury instructions. The State did not misstate the jury's role. There was no error.

The State did not misstate defendant's presumption of innocence. Defendant cites to *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010) and says the State in this case made the same flagrant argument. In *Venegas*, the State argued that:

.... but that presumption of innocence ... erodes each and every time you hear evidence that the defendant is guilty.... Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all of the evidence, including the defendant's witnesses and the

defendant, herself, and that presumption no longer exists, then that's when the State has proven the case beyond a reasonable doubt.

Venegas, 155 Wn. App. at 524. The court found such an argument flagrant misconduct since the presumption of innocence continues throughout the entire trial. *Id.* In the instant case, the State did not make any argument similar to the one in *Venegas*. After addressing how the State had proven the crimes, the State made the following argument to which defendant now takes issue:

Ladies and gentlemen, it is no longer reasonable to doubt any of the elements in Count I and Count II. It is no longer reasonable to doubt that Aaron Olson is guilty of Rape in the Second Degree for vaginally raping [K.B.]. It is no longer reasonable to doubt that Aaron Olson is guilty of Rape in the Second Degree for facilitating the rape of [K.B.] at the hands of Tony Emery.

RP 558. This argument does not tell the jury that the presumption of innocence has eroded. Rather, the argument is that the State had proven the elements beyond a reasonable doubt. This argument is not the same as the argument in *Venegas* and does not misstate or run afoul of any of the court's instructions to the jury. Further, if defendant had objected and if there had been any issue with this statement, any potential problems could have been cured with a timely instruction from the court. Defendant cannot show that this statement is flagrant or ill-intentioned. There is no error.

Finally, the State did not comment on defendant's right to testify. Defendant did testify at trial. As such, the State is permitted to comment on the quality and quantity of that evidence. Defendant cannot argue, and has cited no case law to support such an argument, that he is allowed to testify but that such testimony is insulated and the State cannot comment on that testimony. Such an argument defies common sense and is in direct opposition to the case law cited above. In rebuttal closing, the State evaluated the quality of the evidence presented by defendant.

Apply your common sense to this situation.
Evaluate Mr. Olson's credibility.

When Mr. Olson, under cross-examination, was being asked about rape, he said, I read the definition of rape. What is the inference from that, that he read the definition of rape? Mr. Olson knows exactly what he needed to say on that stand to convince you or to try to convince you, I'm only guilty of Rape 3. I'm not guilty of Rape 2. He is trying to manipulate the outcome of this trial in the same way he was trying to manipulate your feelings by feigning crying.

RP 558. The State did nothing more than argue the facts in evidence and the reasonable inferences from those facts. The State's argument pointed out the deficiencies in defendant's testimony. Such argument is permitted by case law. There is no error.

- b. The State did not express an improper opinion as to defendant's credibility or guilt and did not misstate the role of the jury.

It is improper for a prosecutor to express his opinion about the credibility of a witness and the guilt or innocence of the accused in jury argument. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984).

“Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983); *see also State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (“I believe Jerry Lee Brown” is improper assertion of personal opinion).

In the instant case, the jury was instructed that they were the sole judges of credibility. CP 83-107, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. As noted above, the jury is presumed to follow the court's instructions.

The State did not express a personal opinion as to defendant's guilt. Defendant takes issue with the statement emphasized below.

On May 28th, 2005, [K.B.] was raped by Aaron Olson, the defendant, and she was raped by Tony Emery. The defendant is accountable for both of those as a principal and as an accomplice.

The law requires that you go back there, and you evaluate the evidence and you determine whether the State has proven each element beyond a reasonable doubt, and I submit to you that the State has satisfied each and every one of those elements of the crime.

When you go back there and you find that the State has satisfied each element of the crime, you will return a verdict that represents the truth of the matter. *The truth is that Aaron Olson raped [K.B.] on May 18th.*

RP 528. (emphasis added). The sole statement challenged does not represent a personal opinion. Looking at the entire argument in context, the State argued what the evidence showed and argued that the State has proven the elements of the crimes charged beyond a reasonable doubt. The State did not say, "I believe defendant is guilty." The statement was not a personal opinion as to defendant's guilt but was part of a larger argument that showed how the State had met their burden. The statement was not flagrant or ill-intentioned. There is no error.

The State also did not state a personal opinion as to defendant's demeanor on the stand. The jury is instructed by the court that they may consider, among other things, "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." CP 83-107, Instruction 1, *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02. In the instant case, the State argued:

Then, what happens next? They go downstairs, and David Bennett holds her hair back, her semen covered hair, as she spits into the sink, as she spits Anthony Emery's semen into the sink. That's what David Bennett told you on the stand, and you saw his demeanor. You saw the way in which that affected him and contrast that with his outbursts, covering his face in his hands because there were no tears. He is manipulating you; he is manipulating the truth; and he is distorting the truth in an effort to avoid responsibility.

What is appropriate in this case is Rape in the Second Degree.

RP 553. Defendant now argues that this statement improperly expresses a personal opinion. However, again, the State does not say anything to the effect of, "I believe defendant is lying" or call defendant a liar. The State merely reviews the observations of defendant's demeanor on the stand as compared to the demeanor of the victim's brother. The jury is allowed and is told to consider such observations. Further, earlier, the State had talked to the jury about the victim and defendant's demeanor on the stand and had reminded the jury that they were the ones who got to decide if they agreed with the observations. RP 525. The State told the jury they would be able to evaluate defendant's demeanor and decide whether or not he was credible. RP 525. The State's arguments were in line with the jury instructions and were not flagrant or ill-intentioned.

Even assuming that the prosecutor committed any error in any of these statements, it was not so flagrant and ill-intentioned that a timely objection and curative instruction would have failed to cure the error. If a timely objection was made, the court could have simply referred the jury to instruction number one which provides that credibility determinations are for the jury. CP 83-107. There is no error.

3. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE WHERE HE IS UNABLE TO SHOW
PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not

prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see*

e.g., *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g.*, *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING DEFENDANT TO PAY COSTS OR TO OBTAIN A SUBSTANCE ABUSE EVALUATION.

- a. The trial court did not error in ordering defendant to pay costs.

Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. While the statute requires the sentencing court to determine if the defendant can pay the costs, no formal findings are required.

Defendant argues present and future poverty. A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997), quoting *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992). Courts should not speculate on an offender's future earning ability. *Blank*, 131 Wn.2d at 242. After release, defendant remains under the court's jurisdiction for collection of his legal financial obligations until the amounts are fully paid. The time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

It is axiomatic that persons ordered to obey conditions imposed under a Judgment and Sentence must do so. While a court may not incarcerate an offender who truly cannot pay LFO's (*Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976)), every offender must make a good faith effort to satisfy those obligations. Offenders must seek

employment, borrow money, or raise money in any other lawful manner to pay the LFO's. *State v. Woodward*, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). ““A defendant who claims indigency must do more than simply plead poverty in general terms....”” *Woodward*, at 704, quoting *State v. Bower*, 64 Wn. App. 227, 233, 823 P.2d 1171 (1992).

Further, the time to challenge the fines is when the State seeks to collect the fines. “The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay. RCW 10.01.160(3). Because this determination is clearly somewhat “speculative,” the time to examine a defendant's ability to pay is when the government seeks to collect the obligation.” *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009), citing *State v. Baldwin*, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991).

In the instant case, the trial court did not error in ordering defendant to pay costs associated with bringing his case to trial. While defendant may not have assets at this time, the future ability to pay is speculative. The time to challenge the costs is at the time that the State seeks to collect them and not at the present time. Further, RCW 10.01.160 contains provisions for defendant to challenge such costs at the time the State seeks to collect them. Defendant's challenge to the court costs is not proper at this time and defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs.

- b. The trial court did not error in ordering defendant to obtain a substance abuse evaluation and follow-up treatment.

When sentencing a defendant to community custody, RCW 9.94A.703 provides guidance for what restrictions the court may include as part of community custody. Elements mandatory for the court to include in the order of community custody appear in RCW 9.94A.703(1). RCW 9.94A.703(2) lists conditions that the court may choose to waive but shall otherwise impose. Further discretionary elements appear in RCW 9.94A.703(3).

When a court imposes a sentence that falls outside of its statutory authority, defendant can raise the issue for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (citing *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 831 (2000)). The Washington Supreme Court has generally reviewed matters of sentencing conditions for abuse of discretion. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

The authority for the court to sentence a convicted person to community custody comes from RCW 9.94A.703. Amongst the mandatory conditions, the court will “[r]equire the offender to comply with any conditions imposed by the department under RCW 9.94A.704.” RCW 9.94A.703(1)(b). The Department of Corrections “may require the

offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4).

The court “shall order an offender” to act in accordance with the conditions of RCW 9.94A.703(2) unless the court chooses to waive them. “As part of any term of community custody, the court may order an offender to: ... (c) Participate in crime-related treatment or counseling; (d) 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[.]” RCW 9.94A.703(3). RCW 9.94A.704(4) grants the department the authority to make an offender participate in a rehabilitative program. Specifically, “[t]he department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” RCW 9.94A.704(4). Although RCW 9.94A.030 does not define “rehabilitative program,” this Court has previously considered substance abuse programs as viable rehabilitative programs. *See State v. Motter*, 139 Wn. App. 797, 162 P.3d 1190 (2007).

Defendant only takes issue with the provision in Appendix H that directs defendant to obtain a substance abuse evaluation and follow-up treatment. However, the pre-sentence report clearly shows that defendant uses marijuana and indeed used it on the day of his arrest. Evaluation and treatment for defendant’s substance abuse problem is conduct reasonably

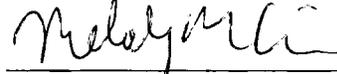
related to defendant's risk of reoffending and the safety of the community.
The trial court did not abuse its discretion in ordering such a provision.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

DATED: August 22, 2011

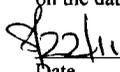
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STATE OF WASHINGTON
BY  DEFENDANT
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COURT OF APPEALS
DIVISION II

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.

 
Date Signature