

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

NO. 41990-4-II

STATE OF WASHINGTON,

Respondent,

vs.

JOEL WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00331-8

BRIEF OF RESPONDENT

BRIAN PATRICK WENDT, WSBA # 40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Respondent

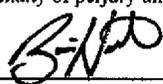
SERVICE	MS. Jodi Backlund Backlund & Mistry PO Box 6490 Olympia, WA 98507	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: December 23, 2011, at Port Angeles, WA 
----------------	--	--

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. COUNTERSTATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	2
III. ARGUMENT.....	13
A. THE COURT’S POLICY ALLOWING THE BAILIFF TO EXCUSE JURORS THAT WERE ILL OR INTOXICATED DID NOT VIOLATE WILSON’S RIGHT TO A PUBLIC TRIAL OR HIS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDING ...	13
B. THE COURT PROPERLY ADMITTED THE EXPERT’S TESTIMONY.....	18
C. THE COURT CORRECTLY ALLOWED THE STATE TO AMEND THE INFORMATION AFTER FINDING THE AMENDMENT DID NOT PREJUDICE THE DEFENSE.....	24
D. THE DEFENSE PROVIDED EFFECTIVE ASSISTANCE BECAUSE IT INTRODUCED COMPETENT EVIDENCE TO REFUTE THE INFERENCE THAT WILSON WAS GUILTY BECAUSE THE VICTIM HAD PRECOCIOUS SEXUAL KNOWLEDGE AND AN INJURED HYMEN.....	26
E. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING ITS CROSS EXAMINATION OR CLOSING ARGUMENT.....	29
1. <u>The trial deputy’s cross examination of the defendant did not imply facts not in evidence</u>	

<u>and any potential harm was averted when the trial court sustained a defense objection.</u>	30
2. <u>The trial deputy's closing argument did not shift the burden of proof when she highlighted the absence of any independent evidence to corroborate the defendant's self-serving claims.</u>	32
F. THE STATE CONCEDES THE SPECIAL VERDICT INSTRUCTION MISSTATED THE LAW, BUT (1) THE ISSUE IS NOT PROPERLY BEFORE THIS COURT, AND (2) THE ERROR WAS HARMLESS.	37
IV. CONCLUSION	40

TABLE OF AUTHORITIES

<u>U.S. Supreme Court:</u>	<u>Page(s)</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	26
<u>Washington Cases:</u>	<u>Page(s)</u>
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.3d 857 (2011)	18
<i>In re Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	26
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	13
<i>In re Taylor</i> , 132 Wn. App. 827, 134 P.3d 254 (2006)	19
<i>In re Thorell</i> , 149 Wn.2d 724, 72 P.3d 708 (2003).....	19
<hr/>	
<i>Jones v. Hoagan</i> , 56 Wn.2d 23, 351 P.2d 153 (1960).....	30
<i>State v. Bashaw</i> , 169 Wn.2d 133, 234 P.3d 195 (2010).....	38
<i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991)	33-34, 36
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	13-14
<i>State v. Borboa</i> , 157 Wn.2d 108, 135 P.3d 469 (2006).....	29
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995).....	25
<i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)	13-14
<i>State v. Brisebois</i> , 39 Wn. App. 156, 692 P.2d 842 (1984).....	24
<i>State v. Brown</i> , 74 Wn.2d 799, 447 P.2d 82 (1968).....	24
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	39
<i>State v. Carver</i> , 37 Wn. App. 122, 678 P.2d 842 (1984)	28

State v. Wilson, COA No. 41990-4-II
Brief of Respondent

<i>State v. Cheatam</i> , 150 Wn.2d 626, 81 P.3d 830 (2003)	35
<i>State v. Contreras</i> , 57 Wn. App. 471, 788 P.2d 1114 (1990)	33
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	22-23
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	32
<i>State v. Goldberg</i> , 149 Wn.2d 888, 72 P.3d 1083 (2003)	38
<i>State v. Haner</i> , 95 Wn.2d 858, 631 P.2d 381 (1981)	25
<i>State v. Hayward</i> , 152 Wn. App. 632, 217 P.3d 354 (2009).....	22-23
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	26
<i>State v. Jackson</i> , 150 Wn. App. 877, 209 P.3d 553 (2009).....	33
<i>State v. Langford</i> , 67 Wn. App. 572, 837 P.2d 1037 (1992).....	15, 17
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	27
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	27
<i>State v. Miles</i> , 139 Wn. App. 879, 162 P.3d 1169 (2007).....	31
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	32, 34-35
<i>State v. Morgan</i> , 163 Wn. App. 341, 261 P.3d 167 (2011).....	38-39
<i>State v. Nunez</i> , 160 Wn. App. 150, 248 P.3d 103 (2001).....	38-39
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992)	19-20
<i>State v. Powell</i> , 166 Wn.2d 73, 206 P.3d 321 (2009)	37
<i>State v. Rice</i> , 120 Wn.2d 549, 844 P.2d 416 (1993)	15, 17
<i>State v. Rivera</i> , 108 Wn. App. 645, 322 P.3d 292 (2001)	14, 17

<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2001)	18-21
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)	30-32, 36
<i>State v. Sadler</i> , 147 Wn. App. 97, 193 P.3d 1108 (2008)	14
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	37
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	20-21, 29
<i>State v. Strode</i> , 167 Wn.2d 222, 217 P.3d 310 (2009)	14
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	30-32
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006)	30
<i>State v. Young</i> , 62 Wn. App. 895, 802 P.2d 829, 817 P.2d 412 (1991)	19, 24
<i>State v. Ziegler</i> , 138 Wn. App. 804, 158 P.3d 647 (2007).....	24

<u>Other Jurisdictions:</u>	<u>Page(s)</u>
------------------------------------	-----------------------

<i>Frye v. United States</i> , 293 F. 1013 (D.C. 1923).....	7
---	---

<u>Statutes:</u>	<u>Page(s)</u>
-------------------------	-----------------------

RCW 2.36.100(1)	14
-----------------------	----

<u>Court Rules:</u>	<u>Page(s)</u>
----------------------------	-----------------------

CrR 2.1(d).....	24
-----------------	----

CrR 6.15(c).....	37
------------------	----

ER 702	22
--------------	----

ER 704	23
--------------	----

GR 28	15
-------------	----

RAP 2.5(a)(3) 37

I. Counter Statement of the Issues:

1. Did the trial court commit reversible error after its bailiff excused two individuals from the jury pool outside the defendant's presence and a public voir dire when (1) the first individual was too ill to participate in the venire, and (2) the second individual was experiencing debilitating pain and was under the influence of prescribed narcotics?
2. Did the trial court err by admitting expert testimony regarding the possible presence of "deep notches" on the victim's hymen when (1) the defendant's only challenge to the opinion was that it was not a definitive diagnosis, (2) the opinion did not embrace novel scientific theories, (3) the opinion's lack of certainty went to its weight and not its admissibility, and (4) the opinion did not invade the province of the jury?
3. Did the trial court err by allowing the State to amend the information before a jury verdict when (1) the prosecution had not concluded its case, and (2) the defendant failed to show any prejudice to his defense?
4. Did the defendant receive effective assistance of counsel when (1) his attorney refused to inquire into unsubstantiated allegations that a young neighbor girl once fondled the victim when she was three years old, and (2) his attorney introduced competent testimony to support the inference that the victim's injured hymen and precocious sexual knowledge were derived from sources other than the accused?
5. Did the prosecutor commit reversible error when (1) during cross examination, she asked the defendant if his first marriage ended because he stopped having sex with his wife, and (2) during closing arguments, she highlighted the absence of any independent evidence to corroborate the defendant's self-serving claim that he was impotent and could not commit the crimes alleged?
6. Does the trial court's failure to inform the jury that it did not have to be unanimous to answer "no" on the special verdict

form require the appellate court to vacate the sentencing enhancement when (1) the defense never objected to the given instruction, and (2) the resulting error was harmless?

II. Statement of the Case:

Under the pretext of needing a firm mattress, Joel Wilson would often leave his girlfriend's bed to sleep with her daughter, A.H. RP (2/15/2011) at 31, 76; RP (2/16/2011) at 19-20, 118; RP (2/17/2011) at 31. During these visits, Wilson forced A.H. to perform fellatio and he would vaginally penetrate the young girl with his penis and/or a vibrator. CP 25-33; RP (2/15/2011) at 31-35, 47-50, 63-64. A jury convicted Joel Wilson of thirteen counts of first-degree child rape. CP T.B.D. – Verdict Form A. Wilson appeals his conviction on several grounds.

Jury Venire

On the first day of trial, 82 citizens from Clallam County reported for jury duty. CP T.B.D. – Jury Selection Documents. Before voir dire, Mr. Hoffman approached the bailiff and informed her that he was too ill to serve. RP (2/14/2011) at 25-26. Shortly thereafter, the bailiff noticed that Mr. Pruden was experiencing great physical distress. Mr. Pruden disclosed he had a serious back injury and was presently taking prescribed medication to alleviate his pain. RP (2/14/2011) at 25-26. The bailiff

excused these individuals from the venire pursuant to the trial court's written policy. RP (2/14/2011) at 25-28.

After the two jurors were excused, the trial court subsequently presided over a voir dire that was open to the public. RP (2/14/2011) at 27-28. Wilson was present throughout the selection process, and he accepted the 14 jurors (including two alternates) that were ultimately impaneled. RP (2/14/2011) at 29.

Pretrial Motions

The State moved *in limine* to preclude the defense from inquiring into unsubstantiated allegations that A.H. was sexually abused when she was three years old. CP 55-56. The State argued the unproven claims were inadmissible because (1) the victim had no independent recollection of the alleged abuse, and (2) the allegations were irrelevant to the pending charges. CP 55-56; RP (2/14/2011) at 8-9. The State disclosed the prior accusation involved a young neighbor girl who allegedly touched A.H.'s private area over her clothing. CP 56. However, the report never involved claims of vaginal penetration. CP 56. The trial court granted the motion, but allowed the defense to readdress the matter outside the presence of jury if necessary. RP (2/14/2011) at 9.

The defense moved *in limine* to preclude the State from introducing the medical opinion of its expert witness, Dr. Naomi Sugar.

RP (2/14/2011) at 11-12. The defense explained its objection pertained to the expert's ultimate conclusion that the victim's genital exam was "most consistent" with vaginal penetration and "highly concerning" for sexual abuse. RP (2/14/2011) at 12. The defense argued that the terms "most consistent" and "highly concerning" were too vague and had no legal or medical significance. RP (2/14/2011) at 12-14. The trial court ruled the expert was free to testify what the examination revealed and whether any injury was consistent with vaginal penetration. RP (2/14/2011) at 13.

Lay Witnesses

A.H. testified in graphic detail regarding the abuse she endured during the years she lived with Wilson in Port Angeles, Washington. She explained Wilson would often come to her room at night, approximately three or four times a week. RP (2/15/2011) at 31-32, 39, 48-50, 76. Wilson would undress the two, open her legs so they formed a "V", slip his penis inside her vagina, and then move up and down at progressively faster speeds until he stopped. RP (2/15/2011) at 31, 33, 35. According to A.H., Wilson usually wore a condom, and he would flush it down the toilet after sex. RP (2/15/2011) at 32, 57-58. A.H. also testified Wilson forced her to perform fellatio and placed one of her mother's vibrators in her vagina on one occasion. RP (2/15/2011) at 33, 34, 63-64.

A.H.'s mother testified she dated Wilson for several years, and during most of that time she and her children lived with the defendant. RP (2/16/2011) at 15-16. She explained that she had a healthy sexual relationship with Wilson until he injured his back in 2005. RP (2/16/2011) at 22. After 2005, the pair stopped having sex. RP (2/16/2011) at 22. Around this same time the mother often caught A.H. masturbating. RP (2/16/2011) at 28, 49. She even found one of her vibrators in A.H.'s room on two separate occasions. RP (2/16/2011) at 24. The mother refused to accept her daughter's claims of sexual abuse. RP (2/16/2011) at 25-26, 52. However, she affirmed that Wilson often slept with her daughter, but that it occurred only twice a week for about one and a half years. RP (2/16/2011) at 19-20.

Several witnesses testified that A.H. never appeared to be afraid of the defendant. RP (2/16/2011) at 48, 94, 100, 105, 110, 119-20. Two defense witness affirmed they observed Wilson sleeping in A.H.'s bedroom on at least one occasion, but they explained he had slept in his clothes. RP (2/16/2011) at 111, 118. Additionally, the witnesses revealed A.H. had exposure to pornographic materials via her brother and a young boy who lived next door. RP (2/16/2011) at 50-51; RP (2/17/2011) at 27-28. *See also* RP (2/15/2011) at 36-38, 64, 66-67, 110, 130, 136-37.

///

Expert Opinion

Two experts testified in the present case: Dr. Naomi Sugar and Dr. Karen Griest.¹ Both experts reviewed a video that documented A.H.'s genital examination that was performed by Margaret Jahn, RN. RP (2/15/2011) at 156-57, 166, 177; RP (2/16/2011) at 63-64, 74-75. Due to the discomfort A.H. experienced during the exam, Jahn was unable to lift or unfurl the hymen to confirm the presence of "deep notches." RP (2/15/2011) at 157, 164-65, 173. Jahn concluded the exam did not reveal a traumatic injury. RP (2/15/2011) at 177-78; RP (2/16/2011) at 75. However, Jahn asked Dr. Sugar to review the examination because she had limited experience performing genital evaluations on adolescent girls. RP (2/15/2011) at 165-66, 177, 183-184.

Dr. Sugar explained the difficulty that hymen examinations present:

¹ Dr. Sugar is a practicing medical physician at Harborview Medical Center and Seattle Children's Hospital. She is also the director of Harborview's Center for Sexual Assault. Since 2002, she has performed two genital exams on live patients each week, and in her career she has examined approximately 3000 hymens. *See* RP (2/15/2011) at 145-46, 158.

Dr. Griest is a forensic pathologist, who is engaged in private practice in New Mexico. She primarily performs genital exams on deceased individuals, or reviews the exams that another practitioner performs on a live patient. She estimates she has performed more than 1000 genital exams on deceased individuals, but this figure includes males and women over the age of 18. She has performed a couple dozen genital exams on live patients, the most recent being four years ago.

For adolescents we know they can experience intercourse and not have any tears in the hymen because the hymen by its anatomy is very stretchy. So a lot of girls will have intercourse without any tears in the hymen ... On the other hand, there can be tears, there can be what we call normal notches ... much less commonly are notches in the bottom half of the hymen, so that would be uncommon to have notches here.

RP (2/15/2011) at 148-51. Dr. Sugar explained the presence of symmetrical “deep notches” in the posterior portion of an adolescent’s hymen occur more frequently in children who have had intercourse. RP (2/15/2011) at 152-53, 159. However, she clarified that “deep notches” could also be present in children who never had intercourse. RP (2/15/2011) at 152-53.

After reviewing the genital exam in question, Dr. Sugar opined (1) “deep notches” were present on A.H.’s hymen, and (2) these notches were consistent with repeat vaginal penetration. RP (2/15/2011) at 156-60, 163-66, 171, 180, 191. However, she testified that she could not determine when A.H. sustained injury, nor could she explain how often the vaginal penetration occurred. RP (2/15/2011) at 181.

The defense objected to this testimony. RP (2/15/2011) at 170. The defense argued that *Frye v. United States*² required the expert to give a

² 293 F. 1013, A.L.R. 145 (D.C. Cir. 1923).

“diagnostic” opinion.³ RP (2/15/2011) at 162, 170-71. The trial court overruled the objection, and allowed the testimony. RP (2/15/2011) at 170-71.

Dr. Sugar explained her conclusions were based on her personal observations, her extensive clinical experience, and the research/findings of Dr. Joyce Adams. RP (2/15/2011) at 153-56, 159, 166, 172-74. However, Dr. Sugar admitted that (1) she could not conclusively determine whether “deep notches” were in fact present, and (2) other experts might disagree with her medical opinion. RP (2/15/2011) at 157-59, 169, 173, 176, 178-79. Dr. Sugar testified that it was possible that something other than penetration caused the “deep notches” she observed on the victim’s hymen. RP (2/15/2011) at 152-53, 162, 181-82.

Dr. Sugar resisted the State’s efforts to provide a percentage regarding the likelihood that vaginal penetration caused A.H.’s injury because such a figure would be “arbitrary”:

It is substantially more likely than not, but it’s not a hundred percent by any means. ... In my medical opinion the likelihood that this particular finding on this girl was due to past penetration is something like ... 60 to 85 percent, there’s obviously [a] range in there.

³ The defense argued Dr Sugar’s opinion did not satisfy the *Frye* test because “the opinion does not say anything other than it could be [consistent with penetration], that’s all it says and that’s not good enough.” RP (2/15/2011) at 170-71. *See also* RP (2/15/2011) at 161.

RP (2/15/2011) at 192.

Dr. Griest affirmed it was possible “deep notches” were present on the victim’s hymen and that experts in the field accepted the principle that such notches were consistent with vaginal penetration.⁴ RP (2/16/2011) at 67, 70-71, 80-82. However, she opined that A.H.’s genital exam was normal and atraumatic in appearance because it was impossible to establish the presence of “deep notches” without a more thorough examination. RP (2/16/2011) at 65, 71-72, 75, 82-83. Despite this conclusion, Dr. Griest refused to rule out the possibility that A.H. suffered sexual abuse. RP (2/16/2011) at 84, 86.

Amended Information

Before resting its case, the State moved to amend the information. RP (2/16/2011) at 36. Specifically, the State sought permission to amend three counts, substituting the word “penis” for “vibrator.” RP (2/16/2011) at 38. *Compare* CP 25-33; CP T.B.D – Information (filed 8/19/2009). The State explained that it filed the original charges based on a police report that alleged Wilson inserted a vibrator into A.H.’s vagina on four occasions. RP (2/16/2011) at 38. *See also* CP 61. After A.H. testified Wilson used a vibrator on only one occasion, it was necessary to conform

⁴ Dr. Griest explained the dispute in the field pertains to how one measures the depth of a notch. RP (2/16/2011) at 68.

the charging language with the evidence introduced at trial. RP (2/16/2011) at 38.

The defense opposed the motion, arguing the State should vacate the three charges it sought to amend. RP (2/16/2011) at 38-39. After taking the matter under advisement, the trial court granted the State's motion, reasoning there was no prejudice to the defense because it presented a "general denial" to the charges. RP (2/16/2011) at 39, 58-59.

Defendant's Testimony

Wilson testified in his own defense. Wilson denied the allegations, claiming he was physically incapable of having sex. RP (2/17/2011) at 28-29. According to Wilson, his 2005 injury rendered him impotent.⁵ RP (2/17/2011) at 13, 23, 29-30. Wilson admitted he occasionally slept in A.H.'s room because her mattress helped to alleviate the pain in his back. RP (2/17/2011) at 19, 31. However, he stated the two were never alone together because A.H.'s sister would also share the bed on these nights. RP (2/17/2011) at 32-33, 35. He also said he slept fully clothed. RP (2/17/2011) at 19.

On cross examination, the State asked Wilson if his first marriage, which dissolved in 2003, ended because he refused to have sex with his

⁵ Wilson never told investigating officers that he was impotent. RP (2/15/2011) at 109-10.

wife. RP (2/17/2011) at 29-30. The trial court immediately sustained an objection to the question. RP (2/17/2011) at 30. The State never revisited the subject.

Closing Arguments

The defense forcefully reiterated that Wilson was physically incapable of committing the crimes alleged due to his erectile dysfunction:

But then we get to the last and most important part of the evidence, the un-refuted part of the evidence that is that Joel Wilson is impotent. ... Joel Wilson is impotent. The evidence is un-refuted. The evidence is un-refuted that since his accident ... he's not been able to function sexually. Un-refuted. So you got -- you accept that as a fact, a stone cold fact. So, from the day of that accident, explain for me then how he possibly could have gone into that bedroom let's say half the number of times we're talking about, let's say it's a tenth, let's say it's one time, how he possibly could have gone in that bedroom period. He straight had sexual intercourse, apparently ejaculated in a condom, at least that's the allegation, if he's impotent it couldn't have happened. It couldn't have happened period. That testimony is un-refuted, Kings X (sic), it's done, it could not have happened. ... This kid says we had sex, the un-refuted evidence says it's impossible for him to have done these things. It's impossible.

RP (2/17/2011) at 73-74. In response, the State pointed out that the only evidence to support Wilson's impotent defense was his own self-serving testimony. RP (2/17/2011) at 76-77, 80-81. The defense objected, arguing that the State was attempting to shift the burden of proof. The trial court allowed the argument, but it reminded the jury that "the State has the

burden of proving the case beyond a reasonable doubt. The Defendant does not have any burden to produce evidence in this case.” RP (2/17/2011) at 80-81. *See also* CP 42, 47-50.

Special Verdict Instruction

After the jury returned a guilty verdict for each of the thirteen counts of first-degree rape, the trial court provided the jury with the following special verdict instruction:

You will also be given a Special Verdict Form for the crimes charged in Counts I through XIII. If you find the Defendant not guilty of these crimes, do not use the Special Verdict Form. If you find the Defendant guilty of any of these crimes, you will then use the Special Verdict Form and fill in the blank with the answer “Yes” or “No” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the Special Verdict Form. In order to answer the Special Verdict Form “Yes,” you must unanimously be satisfied beyond a reasonable doubt that “Yes” is the correct answer. If any of you have a reasonable doubt as to this question, you must answer “No.”

CP T.B.D. – Special Verdict Instructions. The defense did not object to this instruction. RP (2/17/2011) at 44-46. The jury subsequently found an ongoing pattern of sexual abuse that involved the same minor victim over a prolonged period of time. CP T.B.D. – Special Verdict Form. The lower court sentenced Wilson to 300 months confinement for his crimes. CP 10.

///

///

Argument:

- A. THE COURT'S POLICY ALLOWING THE BAILIFF TO EXCUSE JURORS THAT WERE ILL OR INTOXICATED DID NOT VIOLATE WILSON'S RIGHT TO A PUBLIC TRIAL OR HIS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF THE PROCEEDING.

Wilson argues reversible error occurred when the bailiff excused two individuals who reported for jury duty but were unable to participate in the selection process because they were either too ill or under the influence of prescribed narcotics. *See* Brief of Appellant at 30-35. He contends that these excusals violated (1) his right to an open and public trial, and (2) his right to be present at a critical stage of the proceeding. *See* Brief of Appellant at 30-35. The argument is without merit.

Generally, judicial proceedings, including jury selection, are open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The defendant has a right to a public trial under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

A trial court may close a portion of a trial, including jury selection, to the public if the court engages in the five-part balancing test that the Washington Supreme Court prescribed in *State v. Bone-Club*, 128 Wn.2d

254, 906 P.2d 325 (1995). The five factors are: (1) the proponent of the closure must show a compelling need to exclude the public, (2) any person present when the motion is made must be given an opportunity to object, (3) the method used to curtail the public's access must be the least restrictive means available to protect the threatened interests, (4) the court must weigh the public's competing interests against the closure, and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59. A court errs when it closes jury selection without first applying the *Bone-Club* test. *State v. Strode*, 167 Wn.2d 222, 228, 217 P.3d 310 (2009) (quoting *Brightman*, 155 Wn.2d at 515-16). Whether a trial court violates the right to a public trial is a question of law this Court reviews de novo. *Brightman*, 155 Wn.2d at 514.

The right to a public trial is linked to the defendant's constitutional right to be present during all critical phases of the proceeding, which includes, voir dire and the jury selection process. *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001). However, "[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008).

RCW 2.36.100(1) provides that the trial court may excuse jurors "upon a showing of undue hardship, extreme inconvenience, public

necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.” As applied to the jury venire, this statute grants the trial court “broad discretion in excusing jurors.” *State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993). The Washington Supreme Court has held that RCW 2.36.100(1) authorizes the trial court to delegate this task to court personnel. *Rice*, 120 Wn.2d at 559-62. *See also State v. Langford*, 67 Wn. App. 572, 582-85, 837 P.2d 1037 (1992), *review denied* 121 Wn.2d 1007, 848 P.2d 1263, *certiorari denied*, 114 S.Ct. 148, 510 U.S. 850, 126 L.Ed.2d 110 (defendant’s rights were not violated when the clerk excused potential jurors).

Consistent with RCW 2.36.100, GR 28(b)(1) authorizes a judge to “delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.” However, a judge “may not delegate decision-making authority over any grounds for peremptory challenges or challenges for ^{cause}.” GR 28(b)(3). GR 28(c)(1) provides that “[p]ostponement of service for personal or work-related inconvenience should be liberally granted when requested in a timely manner.”

As an aside, Wilson makes no argument that the decision to excuse two jurors because of illness or intoxication failed to comport with the jury selection statutes and court rule. He cites no case that holds a defendant’s

constitutional rights are implicated when hardship discussions are held outside the defendant's presence or an open courtroom prior to voir dire.

Here, 82 individuals reported for jury duty. CP T.B.D. – Jury Selection Documents. The bailiff excused only two individuals because one was sick (Mr. Hoffman), and the second was experiencing severe back pain and taking powerful narcotics to alleviate his discomfort (Mr. Pruden).⁶ RP (2/14/2011) at 25-26. The bailiff's decision to excuse these two jurors was consistent with the trial court's protocol,⁷ RCW 2.36.100,

⁶ A third individual (Mr. Parker), who had a felony record, never reported for jury duty. RP (2/14/2011) at 24-25.

⁷ Clallam County has a written policy that outlines "the reasons that staff may excuse an individual from jury duty in instances other than a judge's dismissal/excuse."

A person is excused PERMANENTLY for the following reasons:

- A permanent health condition that precludes his/her service.
- Advanced age and he/she requests an exemption.
- No longer resides in Clallam County.
- Not a U.S. citizen.
- S/he is a felon and has not had his/her rights restored.
- Death.

A person is excused TEMPORARILY for the following reasons:

(Temporarily means one year)

- Going to school outside Clallam County.
- Business Hardship
- Temporary health condition that precludes his/her service.
- S/he is a stay at home parent with a new baby or no daycare.
- S/he cannot communicate in English.

A change of jury term is allowed 3 times for the following reasons:

- Vacation.
- Work related training or scheduling conflict.
- Family emergency.
- Health.

and GR 28. *See Rice*, 120 Wn.2d at 559-62; *Langford*, 67 Wn. App. at 582-85.

These excusals did not concern the jurors' qualifications to serve impartially. They pertained solely to hardship matters and they did not require the resolution of disputed facts. In fact, the defense conceded that a juror's illness was an appropriate basis to be excused from the venire. RP (2/14/2011) at 26-27. After the two jurors were excused, the trial court subsequently presided over a public voir dire involving 80 individuals from the community. CP T.B.D. – Jury Selection Documents; RP (2/14/2011) at 27-28. Wilson was present throughout voir dire, and he accepted the 14 jurors (two alternates) that were ultimately impaneled. RP (2/14/2011) at 29. Thus, the bailiff's conduct did not prejudice the defense.

There was no courtroom closure that implicated Wilson's constitutional rights. Therefore, the *Bone-Club* factors do not apply. *See Rivera*, 108 Wn. App. at 652-53. Moreover, Wilson was present for all voir dire pertaining to juror qualifications and juror selection. There was no error.

///

///

See also RP (2/14/2011) at 27-28.

State v. Wilson, COA No. 41990-4-II
Brief of Respondent

B. THE COURT PROPERLY ADMITTED THE EXPERT'S TESTIMONY.

Wilson argues the trial court should have excluded Dr. Sugar's testimony. *See* Brief of Appellant at 13-19. According to Wilson, Sugar's testimony did not satisfy the *Frye* test because (1) the scientific community disputes the significance of "deep notches" on the posterior portion of an alleged victim of sexual abuse, and (2) the proffered science does not advance a method to calculate the likelihood of any vaginal penetration. *See* Brief of appellant at 14-15. Additionally, Wilson claims Sugar's testimony was a "nearly explicit" statement as to his guilt. *See* Brief of Appellant at 16-17. The argument fails.

Generally, the admissibility of expert testimony is governed by court rule. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). This Court applies the abuse of discretion standard when reviewing a trial court's decision to admit expert testimony under ER 702, 703, and 704. *State v. Roberts*, 142 Wn.2d 471, 520, 14 P.3d 713 (2001). However, the decision to admit expert testimony under *Frye* is reviewed de novo. *Roberts*, 142 Wn.2d at 520.

First, the State submits the present *Frye* challenge is not properly before this Court. At trial, the defense objected to Sugar's testimony on a single basis: that she failed to give a "diagnostic" opinion that was 99

percent certain as to the cause of the injury to the victim's hymen. RP (2/15/2011) at 160-62, 170-71. *See also* RP (2/14/2011) at 12-14. The defense never claimed the scientific community disputed the significance of "deep notches" on an adolescent's hymen. Thus, this Court need not consider the argument Wilson now advances on appeal. *In re Detention of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254 (2006).

Second, *Frye* is not applicable because Sugar's testimony did not encompass any novel scientific theories. Under *Frye*, the trial court must determine whether a scientific theory or principle has achieved general acceptance in the relevant scientific community before admitting it into evidence. *State v. Ortiz*, 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992); *Taylor*, 132 Wn. App. at 836. "The core concern ... is only whether the evidence being offered is based on established scientific methodology." *Taylor*, 132 Wn. App. at 836 (quoting *In re Detention of Thorell*, 149 Wn.2d 724, 754, 72 P.3d 708 (2003)). If the challenged testimony does not involve "new methods of proof or new scientific principles" then the expert's conclusions need not be subject to the *Frye* test. *Roberts*, 142 Wn.2d at 520; *Ortiz*, 119 Wn.2d at 311 (citing *State v. Young*, 62 Wn. App. 895, 906, 802 P.2d 829, 817 P.2d 412 (1991)).

Here, Sugar based her testimony on her personal observations, extensive clinical experience, and the research/findings of Dr. Joyce

Adams. The trial experts agreed that Dr. Adam's research pertaining to the presence and significance of "deep notches" in the posterior portion of an adolescent's hymen is generally accepted in the scientific community. RP (2/15/2011) at 151-56, 159, 174; RP (2/16/2011) at 67, 70-71, 80-81. Therefore, the trial judge did not abuse his discretion when he admitted Sugar's testimony under ER 702 and 703. *See Roberts*, 142 Wn.2d at 520; *Ortiz*, 119 Wn.2d at 311.

Third, the lack of certainty in Sugar's opinion went to the weight the jury gave the testimony, not its admissibility. The present case is analogous to *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997). In *Stenson*, police discovered small stains on the defendant's pant leg. 132 Wn.2d at 712. These stains reacted positively to phenolphthalein (phenol), which is a catalytic agent and a presumptive test for blood.⁸ *Stenson*, 132 Wn.2d at 712, 715. However, the small stains were not large enough for the State to do further testing and confirm whether the substance was actual blood. *Stenson*, 132 Wn.2d at 712, 717. At trial, the State's experts testified the small stains appeared to be "airborne droplets" of blood that traveled through the air and struck the defendant's pant leg. *Stenson*, 132 Wn.2d at 712, 716-17.

⁸ Phenol is considered a presumptive test because there are other materials, besides blood, that can cause a positive reaction. *Stenson*, 132 Wn.2d at 712, 715-17.

On appeal, Stenson argued the trial court erred when it admitted the presumptive phenol tests and the expert's opinion that the small stains could be blood. *Stenson*, 132 Wn.2d at 713. The Washington Supreme Court held there was no error because the jury repeatedly heard that the phenol was only a presumptive test that did not confirm whether the stains were in fact human blood. *Stenson*, 132 Wn.2d at 714, 717-18. Thus, the question was one of weight and not admissibility. *Stenson*, 132 Wn.2d at 718. *See also Roberts*, 142 Wn.2d at 521-24 (holding the trial court properly admitted expert testimony regarding incomplete DNA and blood splatter testing because “[t]he criticisms of the test[s] ... go to the issue of weight, not admissibility.”)

Here, the trial experts agreed the disconcerting areas on the victim's hymen *could be* “deep notches.” RP (2/15/2011) at 152-53, 155, 157-60, 163-64, 166, 171-73, 180, 191-92; RP (2/16/2011) at 67, 70-71, 75-76, 80-82. The experts only disputed whether the genital exam *actually revealed* the presence of “deep notches.” *Compare* RP (2/15/2011) at 156-60, 163-66, 171, 180, 191; RP (2/16/2011) at 67, 69-72, 75, 82-83. Because the jury repeatedly heard testimony that the genital exam did not definitively establish the existence of “deep notches,” any challenge to Sugar's testimony went to weight and not admissibility. *See Stenson*, 132 Wn.2d at 718; *Roberts*, 142 Wn.2d at 521-24.

Finally, Sugar's testimony was not an improper statement of guilt. Expert witnesses may testify in the form of an opinion. ER 702. "Evidence is admissible under ER 702 if the witness qualifies as an expert and the expert testimony would be helpful to the jury." *State v. Hayward*, 152 Wn. App. 632, 649, 217 P.3d 354 (2009). An expert witness may not offer an opinion that is a direct statement or inference regarding the defendant's guilt. *Hayward*, 152 Wn. App. at 649. However, testimony is not objectionable simply because it embraces an ultimate issue that the trier of fact must decide. *Hayward*, 152 Wn. App. at 649 (citing *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001)). "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt." *Hayward*, 152 Wn. App. at 649 (emphasis in original).

Here, Sugar only opined the "deep notches" on the victim's hymen were consistent with repeat vaginal penetration. RP (2/15/2011) at 159-60, 171, 180, 191. The defense challenged this conclusion and elicited testimony that the presence of "deep notches" could have explanations other than penetration (*e.g.* birth anomalies). RP (2/15/2011) at 182, 189-90. In response, the State asked the following question:

Now ... [the defense] also asked you about possibilities of other things accounting for what you were able to observe. ... [I]f you had to rank in your opinion the

likelihood of ... past penetrating injury, would you be able to give that?

RP (2/15/2011) at 191-92. Sugar answered that such a ranking would be “fairly arbitrary” because her conclusion was “not a hundred percent by any means.” RP (2/15/2011) at 192. Nonetheless, she opined that in her “medical opinion the likelihood that this particular finding on this girl was due to past penetration is something like ... 60 to 85 percent, there’s obviously [a] range in there.” RP (2/15/2011) at 192.

While Sugar’s testimony addressed the ultimate issue of penetration, her opinion did not include an opinion as to the defendant’s guilt. Sugar’s testimony did not involve any discussion that Wilson actually inflicted the “deep notches.” See RP (2/15/2011) at 145-93. Furthermore, Sugar admitted she was unable to determine when A.H. sustained the injury or how often penetration occurred. RP (2/15/2011) at 181. While Sugar’s testimony embraced the ultimate issue of penetration, it was not objectionable. See ER 704; *Demery*, 144 Wn.2d at 759; *Hayward*, 152 Wn. App. at 650-51.

In sum, Dr. Sugar’s opinion did not involve any new methods of proof or scientific principles. Thus, *Frye* did not apply because “[the doctor] merely testified that certain clinical findings existed, and that in her own professional experience those clinical findings were consistent

with penetration and abuse.” *See Young*, 62 Wn. App. at 906. Furthermore, the testimony was not objectionable simply because it embraced an ultimate issue. The trial court did not err when it admitted the expert testimony.

C. THE COURT CORRECTLY ALLOWED THE STATE TO AMEND THE INFORMATION AFTER FINDING THE AMENDMENT DID NOT PREJUDICE THE DEFENSE.

Wilson argues the court erred when it permitted the State to amend the charges after trial had already commenced. *See* Brief of Appellant at 28-30. He contends the State failed to provide him with sufficient notice of the facts supporting the amended charges. *See* Brief of Appellant at 28-30. The argument is without merit.

CrR 2.1(d) governs amendments to the charging information. “The court may permit any information ... to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” In order for the defense to challenge an amended information, it must first demonstrate prejudice. CrR 2.1(d); *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968); *State v. Ziegler*, 138 Wn. App. 804, 809, 158 P.3d 647 (2007). Prejudice exists if the amendment surprised or misled the defendant. *State v. Brisebois*, 39 Wn. App. 156, 163, 692 P.2d 842 (1984). A trial court’s decision to allow an amended information is reviewed for

an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995); *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

Here, the State moved to amend the charges pursuant to CrR 2.1(d) before it rested its case. RP (2/16/2011) at 36. The State sought to substitute the word “penis” for “vibrator” in three counts. RP (2/16/2011) at 36, 38. The State explained the amendment was necessary because A.H. testified Wilson used a vibrator only once during the several rapes she endured. RP (2/16/2011) at 37-38. This contradicted the original police report that alleged Wilson employed a vibrator three or four times. CP 61.

The State’s amendment did not jeopardize Wilson’s ability to present a defense. The State did not allege any additional counts, rather it amended the existing charges to conform with the evidence elicited at trial. CP 25-33; CP T.B.D. – Information (filed 8/19/2009); RP (2/16/2011) at 37-38. The amended charges referenced the same facts and time-period as the original. CP 25-33; CP T.B.D. – Information (filed 8/19/2009); RP (2/15/2011) at 31, 33, 47-50, 76. The amendment did not require Wilson to defend against additional allegations or rebut added testimony. Moreover, Wilson’s defense was always a “general denial” – *i.e.* he never committed the acts alleged. RP (2/17/2011) at 28-30, 35. Wilson failed to show the amended information prejudiced his defense. This Court should affirm.

D. THE DEFENSE PROVIDED EFFECTIVE ASSISTANCE BECAUSE IT INTRODUCED COMPETENT EVIDENCE TO REFUTE THE INFERENCE THAT WILSON WAS GUILTY BECAUSE THE VICTIM HAD PRECOCIOUS SEXUAL KNOWLEDGE AND AN INJURED HYMEN.

Wilson claims he received ineffective assistance of counsel when his attorney failed to introduce evidence that a third party may have abused A.H. when she was three years old. *See* Brief of Appellant at 24-28. In support of this argument, he references the State's motion *in limine* to preclude the defense from inquiring into unproven allegations that a neighbor girl fondled the victim. *See* Brief of Appellant at 27. The argument is unpersuasive.

A claim of ineffective assistance of counsel presents a mixed question of law and fact and is reviewed *de novo*. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). In order to prevail, the defendant must satisfy the two-prong test under *Strickland v. Washington*.⁹ If a defendant fails to establish either prong, the argument fails. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

First, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Hendrickson*, 129 Wn.2d at 77. Second, he must show the deficient performance was prejudicial.

⁹ 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Hendrickson, 129 Wn.2d at 78. Prejudice occurs when it is reasonably probable that but for counsel's errors, "the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). There is a strong presumption of effective representation of counsel, and the defendant must show there was no legitimate strategic or tactical reason for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

Here, the State moved *in limine* to preclude the defense from eliciting testimony to suggest a third party, a young neighbor girl, sexually abused the victim two years before the crimes alleged. CP 55-56. The State argued (1) the victim did not have an independent recollection of the alleged abuse, and (2) the evidence was inadmissible because the allegations were irrelevant to the pending charges. CP 55-56; RP (2/14/2011) at 8-9. According to the State, the unsubstantiated claims only involved inappropriate touching on the outside of the victim's clothing. CP 56. There was no allegation that the alleged perpetrator vaginally penetrated the victim. CP 56. The trial court granted the motion, but permitted the defendant to revisit the matter based upon the testimony introduced at trial. RP (2/14/2011) at 9. The defense never raised the issue at trial.

However, Wilson's attorney did elicit testimony to rebut the claim that he inflicted the "deep notches" on the victim's hymen. At trial, A.H.'s mother testified that the victim regularly masturbated with vibrators during the time-period charged in the information. RP (2/16/2011) at 27-32, 41-43, 50. *See also* RP (2/17/2011) at 27, 39. Additionally, the defense introduced evidence that A.H. had exposure to pornography, which supported the inference that she had an independent familiarity with the sexual acts she described. RP (2/16/2011) at 50-51; RP (2/17/2011) at 27-28. Thus, Wilson's attorney introduced competent evidence to refute the assumption the defendant was guilty because the victim had precocious sexual knowledge and injured hymen. *See State v. Carver*, 37 Wn. App. 122, 123-25, 678 P.2d 842 (1984). Wilson received effective assistance of counsel.

Nothing in the record shows any witness had information to corroborate the claim that a neighbor girl sexually abused A.H. More importantly, nothing in the record shows any witness had information that the alleged abuse involved vaginal penetration. Accordingly, this Court should reject Wilson's speculative claim that his attorney had evidence relevant to his defense but for some reason failed to introduce it at trial.

E. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING ITS CROSS EXAMINATION OR CLOSING ARGUMENT.

Wilson argues the State committed prosecutorial misconduct. *See* Brief of Appellant at 19-24. According to Wilson, the deputy prosecutor committed reversible error when she suggested that (1) “sexual issues” were to blame for the dissolution of his first marriage, and (2) the defense had an obligation to present medical testimony to prove he was impotent. *See* Brief of Appellant at 21-24. Essentially, Wilson contends the State obtained a conviction based solely upon innuendo and burden shifting. The argument is without merit.

A claim of prosecutorial misconduct requires the defense to prove the trial deputy’s conduct was improper and prejudicial. *State v. Borboa*, 157 Wn.2d 108, 122, 135 P.3d 469 (2006). To establish prejudice, the defendant must demonstrate there is a substantial likelihood that the misconduct affected the jury’s verdict. *Borboa*, 157 Wn.2d at 122.

A defendant’s failure to object to an improper question/argument constitutes a waiver unless the remark is “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.” *Borboa*, 157 Wn.2d at 124 (citing *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d (1997)). The appellate courts should never reverse a conviction if the error could have

been obviated by a curative instruction. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Additionally, the absence of a timely objection, the request for a curative instruction, or a motion for a mistrial, “strongly suggests ... 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). Moreover, “[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on ... appeal.” *Swan*, 114 Wn.2d at 661 (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

1. The trial deputy’s cross-examination of the defendant did not imply facts not in evidence and any potential harm was averted when the trial court sustained a defense objection.

A prosecutor may not make prejudicial statements that are unsupported by the record, nor may she suggest that evidence not presented at trial provides additional grounds to convict the defendant. *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006); *Russell*, 125 Wn.2d at 87.

Here, Wilson’s ex-girlfriend testified that her sexual relationship with the defendant was “really good,” but it deteriorated after he injured

his back in 2005.¹⁰ RP (2/16/2011) at 22. According to Wilson, his back injury rendered him physically incapable of having sex. RP (2/17/2011) at 9, 23, 30. On cross-examination, the State asked Wilson if his first marriage, which dissolved in 2003, ended because he refused to have sex with his wife. RP (2/17/2011) at 29-30. The trial court sustained an immediate objection to the question.¹¹ RP (2/17/2011) at 30. After the court sustained the objection, the State never revisited the subject. *See* RP (2/17/2011) at 41-43, 47-53, 76-87.

While the prosecutor's question may have been improper, this Court should hold defense counsel's objection and the court's prompt response cured any resulting prejudice. Furthermore, the question did not elicit a response that required the State to introduce supporting intrinsic evidence. *Cf. State v. Miles*, 139 Wn. App. 879, 886-89, 162 P.3d 1169 (2007) (holding the prosecution improperly implied facts via innuendo by referring to extrinsic evidence that was never introduced at trial). Moreover, a curative instruction could have remedied any potential prejudice. *See Russell*, 125 Wn.2d at 88; *Swan*, 114 Wn.2d at 644. The

¹⁰ The mother did testify that Wilson stopped having sex with her after his injury, but she never claimed he was impotent. RP (2/16/2011) at 22. *See also* RP (2/16/2011) at 14-60; RP (2/17/2011) at 79.

¹¹ The defense argued the question was irrelevant. RP (2/16/2011) at 30. The State claimed the line of questioning was pertinent because Wilson's testimony implied he only stopped having due to his alleged impotence. RP (2/16/2011) at 30.

trial deputy's isolated question was not so prejudicial as to warrant a new trial. *See Russell*, 125 Wn.2d at 88. This Court should affirm.

2. The trial deputy's closing argument did not shift the burden of proof when she highlighted the absence of any independent evidence to corroborate the defendant's self-serving claims.

The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. The prosecutor's closing remarks are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). The prosecutor has wide latitude in her closing argument to draw reasonable inferences from the evidence and express those deductions to the jury. *State v. Swan*, 114 Wn.2d 613, 662-63, 790 P.2d 610 (1990). A prosecutor's improper closing remarks are not grounds for reversal if they were invited or provoked by the defense, unless the comments were not pertinent to the reply or were so prejudicial that a curative instruction would be ineffective. *Russell*, 125 Wn.2d at 86.

Generally, a prosecutor may not comment on the lack of defense evidence because the defendant has no duty to present evidence. *See State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). However, it is not true that any comment referencing the defendant's failure to call

witnesses or produce evidence constitutes impermissible burden shifting. *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). *See also State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009) (“The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.”).

When a defendant advances a theory to exculpate himself, the theory is not immunized from attack. *Contreras*, 57 Wn. App. at 476. On the contrary, the evidence supporting a defendant’s theory of the case is subject to the same searching examination as the State’s evidence. *Contreras*, 57 Wn. App. at 476.

During opening arguments, the defense told the jury that Wilson was impotent and physically incapable of committing the crimes alleged. *See RP (2/17/2011) at 78*. Wilson’s self-serving testimony was the only evidence to support this claim. *RP (2/17/2011) at 9, 23*. In rebuttal, the State highlighted the absence of any independent evidence to corroborate the defendant’s impotence defense. *RP (2/17/2011) at 76-81*. However, she never asserted Wilson had an affirmative duty to produce evidence to establish his innocence. *RP (2/17/2011) at 76-81*. In fact, the trial court reminded the jury that, “the State has the burden of proving the case beyond a reasonable doubt. The Defendant does not have any burden to produce evidence in this case.” *RP (2/17/2011) at 80-81*. *See also CP 42*,

47-50. The State was entitled to attack Wilson's defense and subject it to a searching examination. It was reasonable for the State to infer/express its belief that Wilson fabricated an impotence defense because no other independent corroborated the self-serving claim. *See Blair*, 117 Wn.2d at 491; *Contreras*, 57 Wn. App. at 476.

While the trial court did not allow the trial deputy to argue the "missing witness" doctrine, the State submits that the argument would have been proper in the present case. Under the missing witness doctrine, the prosecutor may comment on the defendant's failure to call a witness. *Montgomery*, 163 Wn.2d at 597-98. When a party fails to call a witness to provide testimony that would properly be part of the case, the testimony would naturally be in the party's interest to produce, and the witness is within the particular control of the party, the jury may draw an inference that such testimony would have been unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

Certain limitations apply to the missing witness doctrine in criminal cases:

First, the doctrine applies only if the potential testimony is material and not cumulative. Second, the doctrine applies only if the missing witness is particularly under the control of the defendant rather than being equally available to both parties. Third, the doctrine applies only if the witness's absence is not satisfactorily explained.... Finally, the doctrine may not be applied if it would

infringe on a criminal defendant's right to silence or shift the burden of proof.

Montgomery, 163 Wn.2d at 598-99.

Here, Wilson's self-serving testimony was material because if believed it may have served as a defense to a number of the charges. RP (2/17/2011) 9, 23, 30. In closing arguments, the defense stressed that it was physically impossible for Wilson to commit the crime alleged. RP (2/17/2011) at 73-74. This argument provoked and compelled the State to highlight the absence of any independent evidence to corroborate the defendant's self-serving claim. RP (2/17/2011) at 76-77, 80-81.

The State did not know the name of Wilson's attending physician,¹² nor did it have access to any medical reports that may have confirmed Wilson's erectile dysfunction (because such information would have been protected under the health insurance portability and accountability act (HIPPA)). In fact, Wilson's suggestion that the State could have obtained a search warrant to compel the release of such information, *see* RP (2/17/2011) at 79, demonstrates the information was particularly under the control of the defense. *See State v. Cheatam*, 150 Wn.2d 626, 652-54, 81 P.3d 830 (2003) ("Availability is to be determined

¹² The record shows that Wilson was seeing a physician after his 2005 back injury. *See e.g.* RP (2/16/2011) at 19; RP (2/17/2011) at 13.

based upon the facts and circumstances of that witness's 'relationship to the parties, not merely physical presence or accessibility.'").

Additionally, the defense never explained why independent corroborating evidence was unavailable. *See* RP (2/17/2011) at 9-35, 53-76. Moreover, the State never argued the defense had an affirmative obligation to introduce exculpatory evidence. RP (2/17/2011) at 76-77, 80-81. Instead, the State limited its rebuttal, stating "[t]here has been no science showing that [the defendant] is incapable or it is impossible for him to have sexual intercourse", and "[t]he only evidence regarding the defendant's [im]possibility to perform was his own testimony." RP (2/17/2011) at 77, 81.

Under the facts of this case, the State's comments were also justified under the "missing witness" doctrine. *See Russell*, 125 Wn.2d at 91; *Blair*, 117 Wn.2d at 491-92. The deputy prosecutor's comment referenced Wilson's testimony and only highlighted that logical support for his theory of the case was missing. The comment did not shift the burden of proof. *See Russell*, 125 Wn.2d at 91. This Court should affirm.

///

///

///

///

F. THE STATE CONCEDES THE SPECIAL VERDICT INSTRUCTION MISSTATED THE LAW, BUT (1) THE ISSUE IS NOT PROPERLY BEFORE THIS COURT, AND (2) THE ERROR WAS HARMLESS.

For the first time on appeal, Wilson claims the trial court erred when it failed to instruct the jury that it was not required to be unanimous to answer “no” on the special verdict. *See* Brief of Appellant at 35-38. The State concedes error. However, the error cannot be raised for the first time on appeal. Moreover, the error was harmless.

RAP 2.5(a)(3) provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed error[] for the first time in the appellate court: ... [if it is] a manifest error affecting a constitutional right.

State v. Powell, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). CrR 6.15(c) requires timely and well-stated objections to jury instructions. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The policy underlying the preservation rule is to promote “efficient use of judicial resources.” *Scott*, 110 Wn.2d at 685. This Court should “not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Scott*, 110 Wn.2d at 685.

The Washington Supreme Court has held that a special verdict instruction that requires a jury to be unanimous to answer “no” is error. *State v. Bashaw*, 169 Wn.2d 133, 139, 234 P.3d 195 (2010); *State v. Goldberg*, 149 Wn.2d 888, 893-94, 72 P.3d 1083 (2003). These published decisions predated the trial in the present case.

The intermediate appellate courts have recently held a special verdict jury instruction that requires a unanimous “no” does not constitute a manifest constitutional error that a defendant can raise for the first time on appeal under RAP 2.5(a)(3). *State v. Morgan*, 163 Wn. App. 341, 351-52, 261 P.3d 167 (2011); *State v. Nunez*, 160 Wn. App. 150, 158-60, 164-65, 248 P.3d 103 (2011). The rule underlying these decisions is presently pending before the Washington Supreme Court. *See State v. Nunez*, 172 Wn.2d 1004, 258 P.3d 676 (2011).

Here, the trial court provided the following special verdict instruction:

You will also be given a Special Verdict Form for the crimes charged in Counts I through XIII. If you find the Defendant not guilty of these crimes, do not use the Special Verdict Form. If you find the Defendant guilty of any of these crimes, you will then use the Special Verdict Form and fill in the blank with the answer “Yes” or “No” according to the decision you reach. *Because this is a criminal case, all twelve of you must agree in order to answer the Special Verdict Form.* In order to answer the Special Verdict Form “Yes,” you must unanimously be satisfied beyond a reasonable doubt that “Yes” is the

correct answer. If any of you have a reasonable doubt as to this question, you must answer “No.”

CP T.B.D. – Special Verdict Instructions (emphasis added).¹³ Wilson never objected to the special verdict instruction despite the aforementioned authority from the Washington Supreme Court. RP (2/17/2011) at 44-46. As a result, he cannot challenge the instruction on appeal. *See Morgan*, 163 Wn. App. at 351-52; *Nunez*, 160 Wn. App. at 159. This Court should affirm.

Assuming, without conceding, that the alleged error is a manifest constitutional error, the error was harmless. To hold an error was harmless beyond a reasonable doubt, an appellate court must find the alleged instructional error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Here, the jury unanimously agreed that the State proved Wilson committed 13 counts of first-degree child rape beyond a reasonable doubt. CP 42, 47-50; CP T.B.D. – Verdict Form A. Wilson did not dispute A.H. was under the age of 18 during the six years the State alleged the crimes were committed. Therefore, the procedure by which the unanimity was achieved could not have affected the jury’s special finding: “an ongoing pattern of sexual abuse of the same victim under the age of eighteen manifested by multiple

¹³ On appeal, Wilson mistakenly cites the State’s proposed special verdict instruction, which was identified as Instruction No. 27. *See* Brief of Appellant at 12, 37.

incidents over a prolonged period of time.” CP T.B.D – Special Verdict Instructions; CP T.B.D. – Special Verdict Form.

The instructional error in the present case does not implicate constitutional safeguards, nor is it manifest. Wilson did not object to the instruction below, nor does he present appellate arguments that the error had practical and identifiable consequences during his trial. Thus, the error was not preserved and it is not subject to review under RAP 2.5(a). Additionally, the error was harmless beyond a reasonable doubt. This Court should affirm.

III. Conclusion:

Based on the arguments above, the State respectfully asks this court to affirm Mr. Wilson’s conviction and sentence for thirteen counts of first-degree child rape.

Respectfully submitted: December 23, 2011.

DEBORAH S. KELLY, Prosecuting Attorney



Brian P. Wendt, WSBA #40537
Deputy Prosecuting Attorney

CLALLAM COUNTY PROSECUTOR

December 23, 2011 - 4:52 PM

Transmittal Letter

Document Uploaded: 419904-Respondent's Brief.pdf

Case Name: State v. Joel Wilson

Court of Appeals Case Number: 41990-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Doreen K Hamrick - Email: **dhamrick@co.clallam.wa.us**

A copy of this document has been emailed to the following addresses:

bwendt@co.clallam.wa.us

backlundmistry@gmail.com