

NO. 44704-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

SILVERIO MANUEL SANTIAGO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 12-1-01165-4

BRIEF OF RESPONDENT

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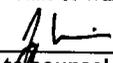
SERVICE	Jodi R. Backlund, Manek R. Mistry, and Skylar T. Brett PO Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 27, 2014, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Appellant has failed to show that the trial court abused its discretion in refusing to allow the Appellant to introduce evidence that the minor victim had had sexual contact with another person after she had sex with the Appellant and his brother?

2. Whether the Appellant's claim of Prosecutorial misconduct must fail when the Appellant has failed to show either improper conduct or prejudice?

3. Whether the Appellant's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt?

4. Whether the Appellant's claims that the trial court erred in imposing legal financial obligations is without merit when the trial court's order was consistent with Washington Law. In addition, the Defendant waived the right to raise this issue on appeal by failing to raise an objection to in the trial court?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Appellant,¹ Silverio Manuel Santiago (sometimes referred to in the record as “Manuel”), was charged by amended information filed in Kitsap County Superior Court with one count of child molestation in the third degree and one count of rape of a child in the third degree. CP 1. A jury found the Appellant guilty on the child molestation charge, but the jury was unable to reach a unanimous verdict on the rape of a child charge. RP (3/03) 9-10.

B. FACTS

The Appellant was charged with sexually abusing a 14 year girl with the initials M.M. CP 1. The Appellant’s brother, Francisco Santiago, was also charged with sexually abusing the same victim, but at a different time and place. The two cases were joined for trial at the request of both of the defendants. RP (1/17) 3-4.

At trial, M.M testified that she lived at home with her mother, Dominga Carrera, and that she has two older sisters, Evelyn (who is 18) and Stephanie (who is 21). RP 150. M.M. explained that she has known the Santiago brothers for approximately two years and that the Appellant

¹ Although the State generally prefers not to address a criminal defendant on appeal as “the Appellant,” the trial below was a joint trial with two co-defendants who were brothers with the same last name. Rather than referring to both gentlemen by their first

(who also goes by the name “Manuel”) was the boyfriend of her older sister, Stephanie. RP 151-52.² Francisco Santiago was also a friend of the family and a friend of M.M.’s mother. RP 151.³ M.M. described that the Santiago brothers would eat with her family and that they would all spend holidays together. RP 153.

M.M. also explained that she would communicate with the Appellant via text message a couple times a week and they would talk about what they were doing. RP 155-56. On one occasion M.M. was home alone while she was texting the Appellant, and during their conversation she invited him to come over. RP 158. The Appellant then came to her home and the two sat on a couch in the living room and talked. RP 159. The two began kissing and then began taking off their clothes. RP 160. M.M. took off all of her clothes and the Appellant kept his shirt on but pulled down his pants. He then put on a condom and the two had sexual intercourse. RP 160-61. Afterwards the two got dressed and sat on the couch and watched TV. RP 161-62. The Appellant then left the residence before anyone else arrived home. RP 162. After the event was over M.M. and the Appellant did not talk it again or discuss the

names, the State has chosen to refer to Silverio Santiago as “the Appellant” in order to avoid any confusion. No disrespect is intended.

² Testimony at trial showed that the Appellant’s date of birth was March 15, 1991. RP 251-52.

³ Testimony at trial showed that Francisco Santiago’s date of birth was November 3, 1988. RP 251-52.

matter, and M.M.'s sister was still dating the Appellant at the time of trial. RP 153, 162.

On a later date M.M. went bowling with her sister Stephanie, the Appellant, and Francisco Santiago. RP 165, 173. The Santiago brothers came over to the house where M.M. and her sister were living at the time and the group then went to the Kitsap County Fair. RP 166. The group went in two cars, and M.M. rode with her sister and the Appellant. RP 166. Upon arriving at the fair, however, they found that it was too late in the evening to go in, so the group decided to go bowling instead. RP 166-67. The group bowled for a period of time, and then M.M. and Francisco left to go to a McDonald's to get some food. RP 168. Stephanie and the Appellant (who were arguing at the time), however, went home. RP 168.

M.M. and Francisco Santiago went through the McDonald's drive-through and then took the food to a park to eat. RP 168-69. After eating, they walked around the park for a bit and then returned to the car. RP 170. Once in the car, M.M. and Francisco Santiago began kissing and they both moved to the back seat of the car where they both removed their pants (but kept their shirts on). RP 171-72. M.M. and Francisco Santiago then had sexual intercourse, and afterwards Francisco Santiago took M.M. home. RP 172-3.⁴

⁴ M.M. testified that she was 14 at the time she had sex with both the Appellant and

M.M did not tell her mother about either of the incidents, but M.M. did tell a friend about the events, and that friend eventually passed the information on to M.M.'s brother who, in turn, relayed the information to M.M's mother. RP 184-85.

M.M.'s mother confronted M.M about what she had heard, and at first M.M did not tell her mother about having sex with either of the Santiago brothers. RP 212. The next day, however, Ms. Carrera confronted her daughter again, and eventually M.M. admitted that she had sex with both the Appellant and Francisco Santiago. RP 213. On cross-examination on this point, M.M admitted that she had lied to her mother. RP 213.

Detective Ray Stroble of the Kitsap County Sheriff's Office eventually became involved in this matter and spoke with the Appellant and Francisco Santiago about these events. RP 244-45. Francisco admitted that he had had sex with M.M., but claimed that he thought that she was 17 or older. RP 248. The Appellant admitted that he had gone to M.M's house, kissed her, and that the two had taken off all of their clothes. RP 250. He claimed, however, that they had decided not to have sex because they did not want to get caught by M.M.'s mother and because he was over age. RP 250.

Francisco Santiago. RP 174.

Francisco Santiago testified at trial and admitted that he had had sex with M.M., but claimed that he believed she was 18 years old based on her Facebook page. RP 259, 266. The Appellant did not testify.

At the close of evidence the parties discussed jury instructions, and with respect to Francisco Santiago the court agreed to give an instruction on the affirmative defense that the defendant reasonably believed that the victim was at least 16 (based upon declarations of age by the victim). RP 299-307. No affirmative defense instruction was given regarding the Appellant. See, State's Supp. Designation of CP (Court's Instructions to the Jury).

In closing argument, the State repeatedly explained that the State bore the burden of proof regarding the elements of the crime. With respect to Francisco Santiago (and only him), however, the defense bore the burden of proving the affirmative defense. For instance, the State specifically argued that,

“Silverio has no burden of proof. None. The burden of proof in Silverio's case is completely and totally on the State of Washington.”

RP 327. The State further pointed out that although there was an instruction in Francisco Santiago's case regarding the affirmative defense, there was no such instruction with respect to the Appellant. RP 334. Rather,

All Silverio had is instruction 12 and 13 that tells you what the State has to prove; and that none of these say the State has to prove he knew how old she was. The State has the burden of proof. But don't make the State prove something more. We know the rules going in. These are the things that have to be proven. Knowledge of her age is not one of those things that the State has to prove.

RP 334. The State then immediately followed up on this point by again stressing that State bore the burden of proof,

Silverio has no burden of proof. None. The State has the complete burden of proof.

RP 335.⁵

The jury ultimately found the Appellant guilty on the child molestation charge, but the jury was unable to reach a unanimous verdict on the rape of a child charge. RP (3/04) 9-10.⁶

⁵ When the State turned to Francisco Santiago's case, the State was similarly careful to explain that the State bore the burden on the elements of the crime and that Francisco Santiago only bore a burden with respect to the affirmative defense. RP 337. This issue, of course, was not in dispute. RP 361.

⁶ With respect to Francisco Santiago, the jury was unable to reach a verdict on either of the charges. RP (3/04) 10.

III. ARGUMENT

A. THE APPELLANT HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO ALLOW THE APPELLANT TO INTRODUCE EVIDENCE THAT THE MINOR VICTIM HAD HAD SEXUAL CONTACT WITH ANOTHER PERSON AFTER SHE HAD SE WITH THE APPELLANT AND HIS BROTHER.

The Appellant argues that the trial court erred when it refused to allow the Appellant to ask the victim questions during cross examination about the victim's subsequent sexual contact with a man named "Armando." App.'s Br. at 8. This claim is without merit because the Appellant has failed to show that the trial court abused its discretion.

The admissibility of evidence of past sexual conduct is within the sound discretion of the trial court. *State v. Hudlow*, 99 Wn.2d 1, 17-18, 659 P.2d 514 (1983); *State v. Gregory*, 158 Wn.2d 759, 784, 147 P.3d 1201 (2006). Similarly, this Court has explained that an appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Williams*, 137 Wn.App. 736, 743, 154 P.3d 322 (2007), citing *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Williams*, 137 Wn.App. at 743, citing *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d

1169 (2004) (*quoting State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on the appellant to prove an abuse of discretion. *Williams*, 137 Wn.App. at 743, *citing State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). Furthermore, a trial court's balancing of probative value versus prejudicial effect is likewise reviewed for abuse of discretion the. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

In the present appeal the Appellant claims that evidence that victim had sex with Armando was probative because it raised the possibility that the victim “could have been describing a single incident three times” or that the victim “could have confused her encounter with [Silverio] Santiago with the other two incidents. App.’s Br. at 12. This argument, however, overlooks the fact that the Francisco Santiago always admitted that he had had sex with the victim and that the Appellant admitted to Detective Stroble that he had gone to the victim’s house, sat on her couch, and got naked with her. RP 250. This evidence was never disputed. Thus, there simply was no viable assertion that the victim completely fabricated the entire encounter with the Appellant. The only real issue with respect to the Appellant was whether there had been actual intercourse. Admission of evidence that the victim had had sex with a third individual simply had little to no bearing on this issue. Thus the trial

court did not abuse its discretion in determining that the probative value of this evidence was outweighed by the prejudice associated with the evidence.

The Appellant also contends that the evidence was needed to demonstrate that the victim had made a prior inconsistent statement when she failed to disclose the incident with the Appellant to her mother. App.'s Br. at 13. The trial court, however, allowed the defense to cross examine the victim on the fact that she had initially lied to her mother and failed to disclose the encounters with Francisco and the Appellant. RP 213. The only part that the trial court refused to allow was the fact that the victim had initially told her mother about having sex with another person. This fact, however, was of little relevance, since both defendants were allowed to bring out the important fact that the victim had initially lied to her mother about her interactions with the two defendants and failed to disclose that she had sex with them. In short, the Appellant has failed to show that the trial court's ruling in this regard was an abuse of discretion.

B. THE APPELLANT'S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE THE APPELLANT HAS FAILED TO SHOW EITHER IMPROPER CONDUCT OR PREJUDICE.

The Appellant next claims that the prosecutor committed prosecutorial misconduct. App.'s Br. at 17. This claim, however, is

without merit because the Appellant has failed to show that prosecutor's conduct at trial was improper.

To prevail on a claim of prosecutorial misconduct, a defendant must establish “that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011), *citing State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). The burden to establish prejudice requires a defendant to prove that “there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.” *Thorgerson*, 172 Wn.2d at 442-43, *citing Magers*, 164 Wn.2d at 191. Furthermore, the “failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Thorgerson*, 172 Wn.2d at 443, *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case. *Thorgerson*, 172 Wn.2d at 443, *citing Russell*, 125 Wn.2d at 86.

In the present case the Appellant first argues that the prosecutor committed misconduct by showing a PowerPoint slide during closing argument that asked the jury to “hold the defense to its burden.” App.’s

Br. at 15. The Appellant acknowledges that Francisco Santiago presented an affirmative defense, but he argues that this slide did not differentiate between the two cases and thus improperly suggested that both defendants had a burden. This claim is without merit because the instructions and the prosecutor's argument clearly explained that the Appellant (who did not raise an affirmative defense) had no burden.

In the present case the prosecutor clearly and repeatedly stated that the Appellant had absolutely no burden. Specifically, the prosecutor specifically argued that,

Silverio has no burden of proof. None. The burden of proof in Silverio's case is completely and totally on the State of Washington.

...

The State has the burden of proof.

...

Silverio has no burden of proof. None. The State has the complete burden of proof

RP 327, 334, 335. The jury instructions for the Appellant's case also correctly outlined the burden of proof, and the Appellant has not suggested otherwise. Given this record the Appellant has failed to show that the prosecutor's conduct at trial was improper or prejudicial. In addition, as there was not objection raised at trial, the Appellant has the burden to show that the remark was so flagrant and ill intentioned that it causes an

enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Any possible confusion regarding the PowerPoint at issue in the present case was clearly rectified by the prosecutor's clear and accurate statements regarding the burden of proof. Even if this Court were to assume for the sake of argument that some confusion persisted, that confusion could have been rectified by a curative instruction had an objection been raised below. The Appellant's claim, therefore, is without merit.

The Appellant next claims that the prosecutor committed misconduct by arguing that the "presumption of innocence" did not include a presumption of truthfulness, honesty, or credibility. App.'s Br. at 16-17. This claim is likewise without merit because the Appellant cannot show that prosecutor's statements were improper.

At trial, the prosecutor in the present case addressed the presumption of innocence as follows:

We can all agree the presumption of innocence is important, is absolutely important. You should presume the defendants in this case innocent.

Now, the presumption of innocence, though, isn't the same as the presumption of truthfulness or the presumption of honesty or the presumption of credibility. You may not have heard of those, because they don't exist. You don't have to go back in that jury room and say, well, they told me this happened, so that must be the way it happened. No. You judge their credibility just like you would judge

everybody else's credibility. You judge Francisco's credibility and you judge the credibility of Silverio through the statements that he made to Detective Swayze.

RP 324.

The prosecutor's statements above were a correct statement of law and were not improper. The Appellant, however, without any citation to authority claims that "The presumption of innocence requires the jury to presume the accused person spoke truthfully." App.'s Br. at 17. This claim is without merit.

Washington law has long held that a jury is the sole judge of credibility. *State v. Dietrich*, 75 Wn.2d 676, 677, 453 P.2d 654 (1969), citing *State v. Snider*, 70 Wn.2d 326, 422 P.2d 816 (1967); *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. McDaniels*, 30 Wn.2d 76, 190 P.2d 705 (1948). Furthermore, it is well-settled that a jury "may give such weight and credibility to any alleged out-of-court statements of the defendant as they see fit, taking into consideration the surrounding circumstances." WPIC 6.41; *State v. Benn*, 120 Wn.2d 631, 657, 845 P.2d 289 (1993). In addition, a jury is free to reject even uncontested statements from a defendant as long as it does not do so arbitrarily. *State v. Summers*, 107 Wn.App. 373, 389, 28 P.3d 780 (2001).

Contrary to the Appellant's claim, there is no Washington authority that holds or suggests that a defendant is presumed to be truthful

or credible. Rather, as the trial court instructed the jury in the present case, the jury is the sole judge of credibility. See State's Supp. Designation of CP (Court's Instruction's to the Jury – Instruction #1).

Given these facts, the Appellant has simply failed to show that the prosecutor's argument was improper in any way. Rather, the prosecutor clearly pointed out that although the Appellant was entitled to a presumption of innocence the jury was not required to presume that the Appellant's statements were credible. As these statements were an accurate statement of the law, the Appellant has failed to demonstrate any misconduct.⁷

The Appellant next argues that the prosecutor improperly bolstered the victim's credibility in the prosecutor's rebuttal closing argument by arguing that she was credible because she told the truth about having sex with Francisco Santiago. App.'s Br. at 18-19.

It is well settled that in "closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." *Thorgerson*,

⁷ Finally, as no objection was raised below, the Appellant has the burden of showing that the remark was "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Thorgerson*, 172 Wn.2d at 443. In the present case even if this Court were to assume for the sake of argument that the remarks in question were improper, the Appellant has nevertheless failed to show that any error could not have been neutralized by a curative instruction.

172 Wn.2d at 448, citing *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991).

In the present appeal the Appellant cites to *State v. Boehning*, 127 Wn.App. 511, 514, 111 P.3d 899 (2005) for the proposition that it is misconduct for a prosecutor to improperly bolster the credibility of the state’s witnesses. App.’s Br. at 18-19. In *Boehning* the defendant's convictions were reversed in large part because the prosecutor told the jury that the victim was not able to tell her story as well in court as she had in a safer setting, and discussed three rape counts that had been dismissed, informing the jury “that there were ‘some other charges, those charges aren't present anymore because she didn't want to talk about this as much as she was willing to talk about it before.” *Thorgerson*, 172 Wn.2d at 449, quoting *Boehning*, 127 Wn.App. at 517. This was held to be highly prejudicial, reversible misconduct as it invited the jury to determine guilt on improper grounds. *Thorgerson*, 172 Wn.2d at 449, citing *Boehning*, 127 Wn.App. at 522. Nothing remotely comparable to this occurred in the present case.

In the present case counsel for the Appellant raised several issues in her closing argument in order to challenge the victim’s credibility. For instance, counsel argued that the victim described the actual sexual intercourse with both defendants in a similar fashion. RP 348. Counsel

also suggested that the victim was not credible when said she had sex with the Appellant, and counsel further suggested that the victim might have made up this fact because she wanted to have sex with him or because she was motivated by jealousy or revenge. RP 352-53. Defense counsel also made the following statement,

What about the fact that it appears she didn't lie about having sex with Francisco? It does appear that way. He testified he had sex with her. She testified he had sex with her. Does that make her accusation against [Silverio] more believable? No.

RP 352.

In his rebuttal closing argument, the prosecutor briefly addressed this argument from defense counsel and stated,

We know Francisco had sex with her. We know she was telling the truth about that. Why she would come and make this up about Silverio, I don't know. Ms. Robinson theorizes maybe she wanted to be with him. So she gets him in trouble. That's how she wants to be with him, by getting him in trouble. I don't think there was any evidence that she wanted to get him in trouble. I don't think there was any evidence that she wanted to get either of these guys in trouble. She didn't even tell anyone until she told her friend, who goes to her mom.

RP 373. The Appellant claims that this argument improperly bolstered the victim's credibility and improperly encouraged the jury to convict the Appellant based on evidence against his brother. App.'s Br. at 19.

The Appellant's claim is without merit for several reasons. First, it must be noted that the two cases against the Santiago brothers were joined at the request of the two defendants. *See* RP (1/17) 3-4. Furthermore, there were no limiting instructions proposed or given that somehow limited the way in which the evidence at trial could be used. No instruction or ruling, for instance, stated that certain evidence or testimony could only be used against one defendant. Given these facts, it was entirely proper for the prosecutor to argue that the facts and evidence supported the conclusion that the victim was credible, as a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *See, e.g., State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006).

Furthermore, it was the Appellant who first raised the issue of what bearing the victim's statements regarding Francisco Santiago had on the jury's determination of the victim's credibility as it related to her statements regarding the Appellant. The prosecutor, therefore, was clearly entitled to make a fair response to this argument. Washington courts, for instance, have clearly held that because "the central purpose of a criminal trial is to decide the factual question of guilt or innocence, 'it is important that both the defendant and the prosecutor have the opportunity to meet

fairly the evidence and arguments of one another.” *State v. Stackhouse*, 90 Wn.App. 344, 957 P.2d 218 (1998), quoting *United States v. Robinson*, 485 U.S. 25, 33, 108 S.Ct. 864, 869, 99 L.Ed.2d 23 (1988). Similarly, the Washington Supreme Court has held that, “As an advocate, the prosecuting attorney is entitled to make a fair response to the arguments of defense counsel.” *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997), citing *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Given these facts and law, the Appellant has failed to show that the prosecutor’s argument was improper. Rather, the prosecutor was free to argue that the evidence at trial supported the inference that the victim was credible. In addition, the prosecutor was free to make a fair response to the Appellant’s arguments regarding what inferences could be drawn from the fact that the victim had accurately reported that she had had sex with Francisco Santiago. In short, the Appellant has failed to show that the prosecutor’s argument was improper in any way (or that the Appellant suffered any unfair prejudice from the argument).⁸

⁸ Furthermore, as no objection was raised below, the Appellant has the burden of showing that the remark was “so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Thorgerson*, 172 Wn.2d at 443. In the present case even if this Court were to assume for the sake of argument that the argument in question was improper, the Appellant has nevertheless failed to show that any error could not have been neutralized by a curative instruction.

Finally, the Appellant argues that that the prosecutor argued “that the jury had to think M.M. was lying in order to acquit Mr. Santiago.” App.’s Br. at 20. This argument is without merit and seriously mischaracterizes the record below.

The State acknowledges that a prosecutor may not argue that in order to acquit a defendant the jury must find that the State's witnesses are either lying or mistaken. Such arguments may undermine the presumption of innocence and mislead the jury because “[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *State v. Casteneda–Perez*, 61 Wn.App. 354, 363, 810 P.2d 74 (1991); *Fleming*, 83 Wn.App. at 213.

In the present case the Appellant claims that the prosecutor argued that “the jury had to think M.M. was lying in order to acquit” and that jury had to “convict unless it found that M.M. was lying.” App.’s Br. at 20-22. The record, however, contains no such statements. The Appellant, for instance, claims that such statements were made at RP 374. App.’s Br. at 21. No such statement, or anything remotely like it, can be found on RP 374. As the Appellant correctly notes, the prosecutor in the present case did ask the jury to weight the credibility of the defendants and the victim and asked the jury “who do you trust is telling the truth?” App.’s Br., at

21; CP 108. As explained below, however, these arguments were entirely proper.

The Appellant in the present case specifically bases his argument on two cases: *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) and *In re Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). However, in each of these cases, the prosecutor argued that the jury must disbelieve the State's witnesses in order to acquit the defendant. For instance, in *Fleming* (a rape case) the court found misconduct when the deputy prosecutor stated during closing argument that “for you to find the defendants ... not guilty of the crime of rape ..., you would have to find either that [the victim] has lied about what occurred ... or that she was confused; essentially that she fantasized what occurred.” *Fleming*, 83 Wn.App. at 213. The Court of Appeals held that because the argument misstated the law, misrepresented the role of the jury and the burden of proof, “it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.” *Id.*

Similarly in *Glasmann* the Court noted that misstating the basis on which a jury can acquit shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt. *Glasmann*, 175 Wn.2d at 713. In *Glasmann* the prosecutor informed the jury that in order to reach a

verdict it must decide whether the defendant told the truth and the prosecutor strongly insinuated that the jury could only acquit if it believed Glasmann. *Id.* The Supreme could did hold “while it was clearly misconduct for the prosecutor to inform the jury that acquittal was only appropriate if the jury believed Glasmann,” this misconduct “was not as egregious as the conduct in *Fleming*, however, and in and of itself would probably not justify reversal.” *Id.* at 713-14. The Court nevertheless *reversed on other grounds. Id.* at 714.

Unlike the statements found improper in *Fleming* and *Glasmann*, the challenged comments in the present case did not state that the jury had to find that the victim was lying in order to acquit. Rather, the prosecutor merely argued that the jury should weight the credibility of the victim and the Appellant and the prosecutor further countered defense counsel’s claims that the victim was not credible.⁹ Unlike the impermissible arguments made in *Fleming*, there is nothing improper about a prosecutor asking a jury to reject a defendant's argument that the State's witnesses are not credible. To the contrary: a prosecutor enjoys “reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility.” *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

⁹ Furthermore, unlike in unlike in *Fleming*, the prosecutor in the present case unequivocally told the jury repeatedly in closing argument that the State had the burden to prove each element of the charged crime beyond a reasonable doubt and that the

A prosecutor may argue inferences from the evidence including why the jury would want to believe one witness over another. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). That rule applies to the credibility of a defendant and any associated witnesses for the defense. *Id.* at 291. Moreover, it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87. Because the prosecutor did not, in fact, argue to the jury that it must find that the victim was lying in order to acquit, the Appellant has failed to demonstrate that the challenged statements were improper.

Furthermore, when viewed in their proper context, the prosecutor's comments in the present case merely highlighted the obvious fact that account of the Appellant and the victim were obviously at odds with one another.

The remarks were therefore analogous to those approved in *State v. Wright*, 76 Wn.App. 811, 888 P.2d 1214 (1995). In *Wright*, the prosecutor argued that in order to believe Wright, the jury would have to believe that the officer "got it wrong." *Wright*, 76 Wn.App. at 823. The Court of Appeals explained that the use of the word "believe" as opposed to "acquit" was important,

Appellant had absolutely no burden whatsoever. See RP 327, 334-35.

Here the prosecutor argued that, to *believe* (as opposed to acquit) Wright, the jury would need to believe that the State's witnesses were *mistaken* (as opposed to *lying*). We conclude that this kind of argument is not objectionable and does not constitute misconduct. It is fundamentally different from the one made in *Barrow* which told the jury that, to acquit the defendant or find him or her not guilty, it must conclude that the State's witnesses were *lying*.

Wright, 76 Wn.App. at 824 (emphasis in original), citing *State v. Barrow*, 60 Wn.App. 869, 809 P.2d 209, review denied, 118 Wash.2d 1007, 822 P.2d 288 (1991). The Court went on to conclude that when the parties present the jury “with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *Wright*, 76 Wn.App. at 825.

More importantly, this Court has specifically found that is not improper for a prosecutor to suggest that a jury ask themselves whose version of events they believe. For instance, in *State v. Lewis*, 156 Wn.App. 230, 233 P.3d 891 (2010) the defendant was alleged to have assaulted the victim (Crocker) and taken money from him. The defendant, however, testified that he assaulted Crocker in self defense as Crocker took the first swing. *Id* at 235. In closing argument the State argued that the jury should weigh the defendant's credibility against Crocker's credibility, and suggested that the jury ask themselves the following questions:

Do you believe that Mr. Crocker isn't telling you the whole story or do you believe that the defendant is fudging on the story? Do you believe that Mr. Crocker took a swing or do you believe that the defendant beat him up to take the money and the wallet?

Id. at 236. On appeal the defendant (citing *Fleming*) argued that this argument that the prosecutor committed misconduct by suggesting that in order to acquit, the jury had to find that Crocker lied under oath and that defendant told the truth, thereby impermissibly shifting the burden of proof from the State to the defendant. *Lewis*, 156 Wn.App. at 241. This Court, however, rejected the defendant's claim explaining that in *Fleming* the prosecutor had argued that in order to acquit the jury had to find that the victim had lied. *Id.* at 241. The Court further explained that the comments by the prosecutor in *Lewis*, however, were different:

Here, the prosecutor did no such thing; rather, he asked the jury to decide whom they believed. Merely asking questions of the jury does not rise to the level of misstating the law or misrepresenting the role of the jury and the burden of proof as in *Fleming*. The prosecutor here did not misrepresent the role of the jury, the burden of proof, or the law. We hold, therefore, that the prosecutor's closing argument here was neither misconduct nor flagrant and ill-intentioned.

Lewis, 156 Wn.App. at 241-42.

Given the holdings of *Lewis* and *Wright*, it is clear that it was entirely proper for the prosecutor to ask the jury the rhetorical question "Who do you trust is telling the truth?" This is especially true in light of

the prosecutor's repeated statements that the Appellant had absolutely no burden of proof. The Appellant's claim of prosecutorial misconduct, therefore, must be rejected because he has failed to show any improper argument.

Finally, even assuming that the prosecutor's argument was improper, the Appellant did not object below and thus he must now show that the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. Even assuming the prosecutor's argument could have been misconstrued, a curative instruction could have easily cured any potential error. The Appellant's argument, therefore, must be rejected.¹⁰

C. THE APPELLANT'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

The Appellant next claims that there was insufficient evidence to support the jury's finding of guilt on the charge of child molestation in the

¹⁰ The Appellant also argues that the cumulative effect of the alleged prosecutorial misconduct warrants reversal. App.'s Br. at 22. This argument is without merit, however, since the Appellant has failed to show any "flagrant and ill-intentioned misconduct," despite the Appellants suggestion to the contrary. App.'s Br. at 22.

third degree. App.'s Br. at 23. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

In the present case, the Appellant was convicted of one count of child molestation in the third degree. CP 1, 4. A person is guilty of child molestation in the third degree when the person “has ... sexual contact with another who is at least fourteen years old but less than sixteen years

old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.” RCW 9A.44.089(1). “Sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2).

Evidence of sexual intercourse, of course, is sufficient to demonstrate sexual contact, and that Appellant does not suggest otherwise nor does the Appellant dispute the fact that the evidence below showed that that Appellant had sexual intercourse with the victim. The Appellant, however, argues that because the jury was unable to reach a verdict on the rape of child charge, the jury must have necessarily been unable to decide if there was sexual intercourse and thus must have based their guilty verdict on some contact other than the sexual intercourse described by the victim. App.’s Br. at 24. The Appellant, however, cites no authority that supports this claim.¹¹

Washington courts, however, have previously rejected claims that a court can or should draw conclusions about the reason for a jury’s decision (even including an acquittal) on a related charge. The Supreme

¹¹ The Appellant cites three cases in this entire section of his brief: *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993); *State v. Dye*, 178 Wn.2d 541, 309 P.3d 1192 (2013); and *State v. Chouinard*, 169 Wn.App. 895, 282 P.3d 117 (2012). App.’s Br. at 23-25. None of these cases in any way addresses a situation where a jury has hung (or even acquitted) on one charge and what consequence that has on determining whether there

Court has explained that “[J]uries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity.” *State v. Goins*, 151 Wn.2d 723, 733, 54 P.3d 723 (2002). And “[d]espite the inherent discomfort surrounding inconsistent verdicts,” both the United States Supreme Court and Washington Supreme Court have held that a general or special verdict adverse to a defendant will not be vacated merely because it is inconsistent with a general or special verdict favorable to the defendant. *Goins*, 151 Wn.2d at 733; *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). The Supreme Court further explained that that an inconsistent guilty verdict “should not necessarily be interpreted as a windfall to the Government at the defendant's expense” because it is equally possible that the jury was convinced of the defendant's guilt on the other offense, and then “through mistake, compromise, or lenity, arrived at an inconsistent acquittal . . .” *Goins*, 151 Wn.2d at 733, citing *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

In the present case the Appellant seeks to look behind the jury's verdict and draw conclusion about what the jury's was thinking when it was unable to reach a verdict on the rape of a child count. The Washington Supreme Court, however, has consistently rejected similar attempts to assess a jury's rationale for its verdict. Rather, the Court has

was sufficient evidence on a second related charge.

explained that out of respect for a jury's resolution of a case, "jury convictions on separate counts should not be disturbed, despite inconsistencies, so long as there is sufficient evidence to support the conviction." *Goins*, 151 Wn.2d at 734, *citing Ng*, 110 Wn.2d at 48 ("Where the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count.").

In addition, both the United States and the Washington Supreme Courts have held that the trial and appellate courts provide a safeguard from jury error by independently evaluating whether the guilty verdict rested on sufficient evidence. *Goins*, 151 Wn.2d at 733, *citing Powell*, 469 U.S. at 67, 105 S.Ct. 471. In the present case the victim testified that she had sexual intercourse with the Appellant. This evidence was clearly sufficient to establish sexual contact. Nothing more was required.

D. THE APPELLANT'S CLAIMS THAT THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS IS WITHOUT MERIT BECAUSE THE TRIAL COURT'S ORDER WAS CONSISTENT WITH WASHINGTON LAW. IN ADDITION, THE DEFENDANT WAIVED THE RIGHT TO RAISE THIS ISSUE ON APPEAL BY FAILING TO RAISE AN OBJECTION TO IN THE TRIAL COURT.

The Appellant next claims that the trial court erred when it ordered him to pay the cost of his court-appointed attorney. App.'s Br. at 25. This claim is without merit because it has previously been rejected by Washington courts. As the Appellant correctly acknowledges, Washington courts have previously rejected the arguments he raises in the present case. See App.'s Br. at 26, *citing e.g., State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997). The Appellant thus essentially is asking this court to ignore numerous Washington cases on this issue. This Court should decline the issue.

Furthermore, the Appellant did not object to the imposition of the legal financial obligations below. See RP (3/29). This Court has recently held that a reviewing court need not address (or allow a defendant to raise) a claim regarding his ability to pay his legal financial obligations for the first time on appeal. *State v. Blazina*, 174 Wn.App. 906, 301 P.3d 492 (2013), citing RAP 2.5. This court, therefore, should similarly reject the

Appellant's argument regarding his legal financial obligation in the present case, as the Appellant failed to raise this issue below.

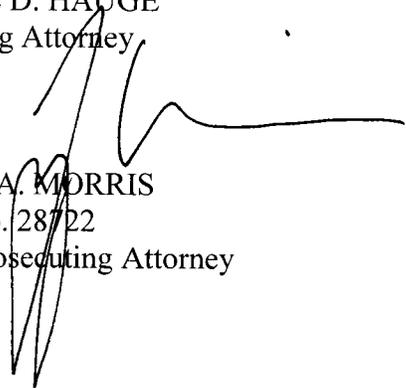
IV. CONCLUSION

For the foregoing reasons, the Appellant's conviction and sentence should be affirmed.

DATED February 27, 2014.

Respectfully submitted,
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KITSAP COUNTY PROSECUTOR

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