No. 47963-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN RAGLAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Wilson, Judge
Cause No. 13-1-01628-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the failure of the trial court to instruct the jury as to the requirement of unanimity for the first degree rape of a child charge, the first degree incest charge, and the second degree incest charge may be raised for the first time on appeal, and if so, whether that failure constituted harmless error under the facts of this case.

2. Whether the prosecutor committed misconduct requiring reversal of Ragland's convictions.

3. Whether the trial court abused its discretion in finding I.M.R. competent as a witness.

4. Whether the trial court erred by not counting the incest convictions as the same criminal conduct as either the first degree rape of a child or one of the first degree child molestation convictions; if not, whether defense counsel was ineffective for failing to request a same criminal conduct analysis.

5. Whether the trial court failed to consider Ragland's financial circumstances before imposing extradition costs.

6. Whether this court should impose appellate costs on Ragland in the event the State substantially prevails on appeal.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts, with additional facts to be included in the argument section.

C. ARGUMENT.

1. <u>The failure of the trial court to instruct the jury as to its duty to be unanimous as to the charges of first degree rape of a child and first and second degree incest is not, under the circumstances of this case, a</u>

> manifest constitutional error that may be raised for the first time on appeal. If this court does choose to review the claim, however, the error was harmless.

The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington Constitution, require that a defendant may be convicted of a crime only if the members of the jury unanimously conclude that he committed the criminal act with which he was charged. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the evidence indicates that more than one distinct criminal act has been committed, but the defendant is charged with only one count of the crime, the jury must be unanimous as to which act constituted the crime charged. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009).

In cases where the State offers more than one act that could constitute the crime, but charges only one count, the State must elect which act it is relying on to convict the defendant, or the court must give the jury an instruction telling it that it must be unanimous as to the act constituting the charge on which it convicts—known as a *Petrich* instruction. Bobenhouse, 166 Wn.2d at 893. The failure to do one of these two things is constitutional error. Id. Prejudice is presumed, but that presumption may be overcome and the error is

harmless if a "rational trier of fact could find that each incident was proved beyond a reasonable doubt." State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990).

a. Ragland did not object to the lack of a unanimity instruction at trial, nor did he propose such an instruction. He has not shown that he has suffered a manifest constitutional error permitting him to raise this claim for the first time on appeal.

Ragland was charged with one count of first degree rape of a child, naming I.M.R. as the victim. CP 3. He was charged with three counts of first degree child molestation, one with I.M.R. as the victim and two with S.D.R as the victim. CP 3-4. There was one count of first degree incest involving I.M.R. as the victim and one count of second degree incest with S.D.R. as the victim. CP 4. The jury was instructed that as to the first degree child molestation charges it must unanimously decide upon the act which constituted each individual count. Instruction No. 22; CP 275. There was no similar instruction relating to the incest charges or the first degree rape of a child.

The State did not elect any specific act as the basis for any of the incest charges or the first degree rape of a child count. During closing argument, while discussing the first degree rape of a child charge, in which I.M.R. was the victim, the prosecutor talked

about three possible acts—Ragland penetrating I.M.R.s private with his penis, penetrating her private with his fingers, and making her suck his penis. RP 791.[1] The prosecutor then said:

> Now, you're required to define or determine unanimously which one of those you agree with, which one of those happened. You only have to pick one. I submit to you, ladies and gentlemen, you have three to choose from.

RP 791.

When addressing the first degree incest charge, where I.M.R. was the victim, the prosecutor offered three options: the defendant made I.M.R. suck his penis, penetrated her vagina with his penis, and put his fingers in her anus. RP 794. With regard to S.D.R., the prosecutor only referred to sexual contact and said, "Did it occur between [S.D.R.] and his dad? Yeah, it did." RP 794. The issue of unanimity as to the act was not discussed in connection with either count of incest. Shortly before that, when talking about the child molestation charges, the prosecutor discussed the defendant touching S.D.R.'s penis or the boy touching the defendant's penis. RP 793.

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1 Unless otherwise designated, references to the Verbatim Report of Proceedings are to the five-volume trial transcript dated July 6-9 and 13, 2015. These volumes are sequentially paginated 1 through 825.

Ragland filed some proposed jury instructions, but did not include a unanimity instruction. CP 196-213, 249-50. During the trial there were extensive discussions between both counsel and the court regarding the instructions. RP 135-149; 598-620; 724-29. Although it does not appear in the Defendant's Proposed Jury Instructions, there was discussion about the *Petrich* instruction proposed by the defense. The prosecutor agreed to use the defendant's proposed instruction. RP 725-27. Defense counsel explained his understanding of the law regarding unanimity. RP 726. At no time did defense counsel seek a unanimity instruction for any charge other than the child molestation charges. The defense had no objections or exceptions to the jury instructions as given. RP 728.

RAP 2.5 normally precludes raising an issue for the first time on appeal, unless the claimed error is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). "'To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.'" State v. McNearney, COA No. 32667-5-III, slip op. at 5-6 (March 31, 2016) (*quoting* State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). This exception "is not

intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1998) (*quoting* State v. Valladares, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *reversed in part on other grounds*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

Actual prejudice is what makes an error manifest. McNearney, *slip op.* at 6. "An appellant can demonstrate actual prejudice by making a plausible showing that the asserted error had practical and identifiable consequences in the trial." Id. Here, Ragland does not point to any specific prejudice, merely asserts that the State cannot overcome the presumption of prejudice. Appellant's Opening Brief at 14-15. He argues that the victims' stories changed significantly over time and cites to specific portions of the record. However, looking at those portions, it is apparent that, rather than changing their accounts of what happened, the children disclosed additional acts over time. *See, e.g.,* RP 443-44. Dr. Deborah Hall, who interviewed and physically examined both children, testified that it is normal for children to make small disclosures at first, and if they get a supportive reaction, to disclose more information over time. RP 579-80. At the time of trial I.M.R.

and S.D.R. were only eleven and nine years old, respectively. RP 178, 290. I.M.R. has significant developmental delays resulting from her traumatic birth four months prematurely. RP 419. Both children were in special education programs. RP 420. It is obvious from the record that I.M.R. was a difficult witness. RP 177-93; 336-86; 398-411.

While the disclosures of the children made to their mother, aunt, and grandmother, as well as Dr. Hall, Detective Ivanovich, and the defense investigator did not necessarily follow a chronological order, they were not necessarily contradictory. Ragland points to the testimony of I.M.R. that S.D.R. had never been abused. Appellant's Opening Brief at 15; RP 384. However, it is apparent from reading her testimony that nobody defined "abused" for her. It is not a given that an eleven year old child would understand that "abuse" meant sexual acts. Both I.M.R. and S.D.R. testified that Ragland had thrown I.M.R. in the hallway. RP 314, 401. They testified that Ragland had pushed and hit their mother. RP 312, 400. It is a reasonable inference that I.M.R. equated abuse with non-sexual violence.

In fact, given that the victims were very young at the time of trial and even younger at the time of the events at issue, their

disclosures to other parties as well as their testimony at trial was consistent. To establish a manifest error, Ragland must show that the error "had practical and identifiable consequences at trial." McNearney, *slip op.* at 6. The evidence for each of the acts which could form the basis of the crimes of first degree rape of a child and first and second degree incest was equally strong. If the jury believed one act occurred it likely believed that they all occurred. The error is not manifest and Ragland should not be allowed to raise it for the first time on appeal.

b. If this court does review the failure to instruct the jury regarding unanimity for the rape of a child and incest charges, the error was harmless.

When the State fails to elect a specific act constituting a particular charge, and the court does not instruct the jury as to unanimity, it is constitutional error. There exists the possibility that the jurors did not all rely on the same act. Kitchen, 110 Wn.2d at 411. The error is harmless if a rational trier of fact could find that each act was proved beyond a reasonable doubt. Camarillo, 115 Wn.2d at 65.

In Camarillo, the court held that:

> [T]he jury may consider the totality of the evidence of several incidents to ascertain whether there is proof beyond a reasonable doubt to substantiate guilt

> because of the acts constituting one incident and also to believe that if one happened, then all must have happened.

Camarillo, 115 Wn.2d at 71. *See also,* Bobenhouse, 166 Wn.2d at 895 ("[I]f the jury in Bobenhouse's case reasonably believed that one incident happened, it must have believed each of the incidents happened.")[2] In Ragland's case, there was no real conflicting evidence. Ragland relied on a flat denial, arguing that the children were coached. RP 738-43. Even though there was no unanimity instruction connected to the rape of a child charge, the prosecutor argued to the jury that it must be unanimous as to the act constituting the crime. RP 791. As to that charge and the incest counts, the evidence was equally strong as to each act that could form the basis of those charges. If the jury believed that one happened, it must have believed that they all happened.

Ragland interprets the rather convoluted and un-detailed testimony of the children to infer that their accounts were inconsistent or untruthful. But determinations of credibility lie with the jury alone. Camarillo, 115 Wn.2d at 71. The jury observed the witnesses on the stand and would have gleaned a great deal of

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2 This is essentially another way of saying that the error was not manifest.

information by watching their body language, their manner of speaking, and facial expressions. Words that do not sound credible on a printed page may be very credible when coming from the mouth of a child who is talking about an embarrassing subject in front of a roomful of strangers and in the presence of the person he or she is accusing of doing those embarrassing things to him or her. The task of the reviewing court is "to determine whether a rational trier of fact could have a reasonable doubt as to whether any of the incidents did not establish the crime. In other words, whether the evidence of each incident established the crime beyond a reasonable doubt." Id. at 71. Based upon the evidence presented to this jury, the answer to the last question is yes, and the error in failing to give the *Petrich* instruction regarding the rape of a child and incest charges was harmless.

2. There was no prosecutorial misconduct requiring reversal of Ragland's convictions.

A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). To make a showing of prejudice, the defendant must "show a substantial

likelihood that the misconduct affected the jury verdict." State v. Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). If the defendant objected at trial to the challenged conduct, he must only show the likelihood of prejudice resulting from it. If he did not object, he is considered to have waived any claim of error unless the prosecutor's misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Emery, 174 Wn.2d at 760-61. Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant and ill intentioned, and more on whether the resulting prejudice could have been cured. Id. at 762.

a. It was improper for the prosecutor to ask the defendant if the victims were lying. Ragland did not object. He cannot show that a curative instruction would have been useless.

It is improper for a prosecutor to ask any witness if another witness is lying, and it is prejudicial to ask the defendant if another witness is lying. State v. Ramos, 164 Wn. App. 327, 334, 263 P.3d 1268 (2011). What one witness thinks of the credibility of another witness is irrelevant. State v. Wright, 76 Wn. App. 811, 821-22, 888 P.2d 1214 (1995).[3]

3 Wright was superseded by statute on grounds not relevant to this argument.

Ragland testified in his defense. He told the jury that he had never done any of the acts that I.M.R. and S.D.R. had testified that he did. RP 738-41. He did not elaborate; he merely denied each allegation. On cross-examination, the prosecutor asked, "So you heard what [I.M.R.] said and you heard what [S.D.R.] said. Your testimony is that they're lying?" RP 743. Defense counsel objected and a sidebar was held. Id. At the sidebar, defense counsel argued that the question could open doors into subjects relating to ER 4040(b) matters that the court had previously excluded. The prosecutor advised she was not going to broach those topics. RP 744-45. Following the sidebar, the prosecutor asked again if the children were lying and Ragland replied, "Absolutely not. . . No, I'm not saying that they're liars like you asked me. I'm saying that I believe they're being told to lie. I would never call my kids liars, they'd have to know what it is first." RP 743. The prosecutor then ended her questioning. RP 744.

In this case it was Ragland's theory that the children had been coached. While he insisted he would not call them liars, he flatly denied each and every allegation that the children had made. No reasonable juror could conclude anything other than that he was claiming the children lied, even if they were being told by someone

else to say untrue things. It was not possible that both he and the children were telling the truth. In fact, the prosecutor's question permitted him to put before the jury his defense, which for some reason he did not articulate in his direct examination. RP 737-41.

During closing argument, defense counsel argued that the children were coached, that because they received attention and approval for their disclosures they felt the need to say more, or that their mother was telling them what to say. RP 803, 815. Under the circumstances of this case, the prosecutor's question, while improper, could not have been prejudicial. It permitted the defendant to tell the jury his theory that the children were coached.

In addition, Ragland did not object because the question was improper. He objected because he did not want to open the door to subjects previously ruled inadmissible. Where the defendant does not object to a line of questioning, a reviewing court will not reverse unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated any prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). A conviction will not be reversed unless a substantial likelihood exists that the claimed prosecutorial misconduct affected the verdict. State v.

Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In Ragland's case, it cannot be said that a curative instruction would have been ineffective. Jurors are presumed to follow instructions. State v. Latham, 100 Wn.2d 59, 67, 667 P.2d 56 (1983).

As argued above, no juror could have missed the fact that either the children or the defendant was not telling the truth. This was not a situation where the children could have been confused about what happened to them or misinterpreted some innocent acts. Had defense counsel objected on the proper grounds, the court could have put a stop to the questioning and a curative instruction would have remedied any potential prejudice to Ragland. There is no prosecutorial misconduct where he fails to prove prejudice that could not have been cured by an instruction.

b. The prosecutor did not misstate the law regarding unanimity and Count II, child molestation in the first degree.

Ragland argues that the prosecutor misstated the law requiring that the jury be unanimous as to the act upon which they relied to find that first degree child molestation was committed. Appellant's Opening Brief at 18-20. Ragland misinterprets the prosecutor's statement.

As was argued at length in the first section of this brief, where there are multiple acts which could constitute the crime, but only one count is charged, the prosecutor must elect which act it is relying upon or the court must give the jury a unanimity instruction. In this case, as regards the charges of first degree child molestation, the court correctly instructed the jury as to the requirement of unanimity. Instruction No. 22; CP 275.

During closing argument, the prosecutor first discussed the elements instruction for Count I, first degree rape of a child, in which I.M.R. was the victim. RP 790-91. She told the jury it must be unanimous as to the act. RP 791. Then the prosecutor said:

> Now, the Court instructed you about a unanimity instruction, and basically what that means is that any count of child molestation in the first degree, there are three of them, you have to decide unanimously on one particular act, that you believe one particular act occurred. *Well, for Count II that's not going to really apply because Count II deals with [I.M.R.].* Count II is child molestation in the first degree and the issue at hand is whether there was sexual contact. Well, if you go back to that abuse that we talked about, the abuse disclosures by [I.M.R.] that dad made her suck on his wiener, that dad put his private or his wiener in her private, that dad made her suck his wiener, put her finger in his butt hole, *you get to decide what you believe but it has to be unanimous.* You have to decide what you believe occurred, everything that consisted of the sexual intercourse, it's also sexual contact because sexual contact is much broader, ladies and gentlemen.

RP 791-92 (emphasis added).

Ragland argues that when the prosecutor said that for Count II, "that's not going to really apply," she was telling the jury that it did not have to be unanimous as to the underlying act. But that makes no sense in the context of this entire portion of the argument, where she twice told the jurors that they did. It is apparent that she was differentiating Count II, in which I.M.R. was the victim, from Counts III and IV, in which S.D.R. was the victim. The written page does not enlighten the reader as to the gestures, facial expression, or body language used by the speaker. It would be helpful if the prosecutor had made that clearer, but it is apparent from the context that she is not misstating the law.

Further, the jury was instructed that the law was contained in the instructions and any argument not supported by those instructions must be disregarded. Instruction No. 1, CP 253. Early in her closing argument, the prosecutor reminded the jury that what she said was argument, not evidence. RP 772. She did not misstate the law and there was no prosecutorial misconduct. If any juror interpreted the prosecutor's statement in the way Ragland argues, he or she would have disregarded the argument.

In addition, a defendant has a duty to object to an argument he alleges is improper. Emery, 174 Wn.2d at 761. Ragland did not object. This duty is waived only where there is "incurable prejudice," where a new trial is the only way to cure the prejudice. Id. Even if the prosecutor had misstated the law, a curative instruction would surely have removed any prejudice. Ragland waived any claim of prosecutorial misconduct.

c. Ragland misinterprets the closing argument of the State. The prosecutor did not argue to the jury that it could convict on two counts of first degree child molestation if it found that one act had been committed.

Ragland takes a paragraph out of the prosecutor's closing argument and claims that she was misstating the law. In the context of the overall argument, it is apparent that she did not.

The challenged portion of the argument occurred when the prosecutor was addressing Counts III and IV, both first degree child molestation and both against S.D.R. She had already listed the disclosures made by S.D.R. RP 789. When she got to the elements of the crime of first degree child molestation, she obviously felt no need to recite all of those disclosures again. Instead, she gave two examples or illustrations of acts that the jury could find to support a conviction for two counts. Her argument

explained that the jury did not have to find that the defendant touched the boy's penis on more than one occasion, or that he had been forced to touch the defendant's penis on more than one occasion, to find Ragland guilty of a count of first degree child molestation.

Ragland simply misstates the prosecutor's argument. Further, as argued in subsection (b) above, Ragland did not object. He cannot show that, even if the prosecutor misstated the law, an instruction would not have cured the error. There was no prosecutorial misconduct.

d. The prosecutor neither misstated nor minimized the State's burden of proof.

Ragland maintains that the prosecutor mischaracterized the reasonable doubt standard. Appellant's Opening Brief at 23-25. In context, the challenged portion of the argument is as follows:

> Judge Wilson also instructed you on what's reasonable doubt. So a reasonable doubt is one for which a reason exists. I submit to you in this case you do not—there is not a reasonable doubt in this case. The State has provided you with the testimony, with the evidence. A reasonable doubt is one that is reasonable. Seems counterintuitive, but you're the reasonable people, you're the people that have to make that decision, not to a mathematical certainty, it's not beyond all doubt, it's not beyond a shadow of a doubt, it's a reasonable doubt.

> If, from such consideration, you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt. *Ladies and gentlemen, if you walk out of here and you say, "I believe those kids," that's an abiding belief. That's beyond a reasonable doubt.*

RP 776 (challenged language emphasized).

During rebuttal argument, the prosecutor said:

> Counsel asks you to think about plausibility, but he also just indicated to you that if you believe that these children *suffered* these acts *at the hands of their father*, you believe that's plausible, if you have an abiding belief, if you walk out of this room and say yes, in fact, I think these children did suffer these acts by their father, you have enough evidence beyond a reasonable doubt. Simple as that.

RP 817 (challenged language emphasized). Ragland argues that the suffering of the children could have been physical abuse of their mother. Appellant's Opening Brief at 24. But he omitted the words "these acts" from his recitation of the prosecutor's argument. The jury had spent several days listening to testimony about sexual acts perpetrated on the children by Ragland. It is unlikely that the jury would be confused about what "these acts" suffered "at the hands of their father," would be.

As before, Ragland must prove that the prosecutor's statements were improper and that this improper conduct prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559,

578, 79 P.3d 432 (2003). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. Id. A reviewing court considers the challenged comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id. Because Ragland did not object to the prosecutor's argument, he has waived any claim of prosecutorial misconduct unless the remarks were so "flagrant and ill intentioned" that they caused enduring prejudice which a curative instruction could not have remedied. Russell, 125 Wn.2d at 86.

While a prosecutor has wide latitude during argument to draw reasonable inferences from the evidence, he or she must correctly characterize the law as given in the court's instructions. State v. Estill, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972). Viewing the remarks of the prosecutor in context, it is apparent that she did not minimize the State's burden of proof. She was clearly referring to the court's instruction about reasonable doubt as she spoke. "Judge Wilson also instructed you on what's reasonable doubt. So a reasonable doubt is one for which a reason exists. . . If, from such consideration, you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt.

Ladies and gentlemen, if you walk out of here and you say, 'I believe those kids,' that's an abiding belief. That's beyond a reasonable doubt." RP 776.

In State v. Larios-Lopez, 156 Wn. App. 257, 233 P.3d 899 (2010), the defendant challenged as improper this statement by the prosecutor: "Whether you vote guilty or not guilty, you have to know that you did the right thing. That is abiding belief." Id. at 261. The court said that, taking this statement out of context the statement appeared to be a misstatement of the law, but taking it in the context of the entire argument, it was an accurate statement of the law. Id. The court further held that by failing to object, Larios-Lopez waived his challenge.

In Ragland's case, the sole evidence against him was the statements of the two children, both on the stand and to the other witnesses who testified about them. It is only common sense that if the jurors believed those statements, it was convinced that the defendant was guilty. That carries the same connotation as "you have to know you did the right thing." Larios-Lopez, 156 Wn. App. at 261. The prosecutor put it in terms of an abiding belief and reasonable doubt:

> Counsel asks you to think about plausibility, but he also just indicated to you that if you believe that these children suffered these acts at the hands of their father, you believe that's plausible, if you have an abiding belief, if you walk out of this room and say yes, in fact, I think these children did suffer these acts by their father, you have enough evidence beyond a reasonable doubt.
>
> . . .
>
> If you have an abiding belief that these children suffered at the hand of their father, you need to convict on all counts.

RP 817. Ragland did not object.

Even if the statement was improper, it cannot be described as so flagrant and ill intentioned that an instruction would not have cured it. Had Ragland objected, the court could have given an instruction to the jury that would have cured any error.

e. <u>The prosecutor did not disparage the role of defense counsel during rebuttal argument</u>.

Ragland maintains that the prosecutor disparaged the role of defense counsel during rebuttal argument. In context, her remarks were these:

> He asks you to look at the plausibility of other scenarios. *Look over here and look over here and look over here.* Don't look at actually what the kids said. Don't think about the fact that [I.M.R.] told you about daddy making her suck on his wiener and tells everybody about that and provided everybody, particularly you, with more detail about that when defense counsel asked her.

RP 817 (emphasis on challenged statement). Ragland did not object nor request a curative instruction.

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. Russell, 125 Wn.2d at 86. While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id. at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000).

"[A] prosecutor must not impugn the role or integrity of defense counsel." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). The prosecutor's statement that defense counsel had directed the jury's attention away from the victims did not do that.

Ragland cites to State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002). In that case, the prosecutor argued that he had

an obligation to seek justice while defense counsel had an obligation to his client. Id. at 283. While the court found this argument improper in general, it did not make any finding as to whether that was the case in that particular instance. The conviction was reversed on other grounds. Id. at 281, 284.

Ragland also cites to State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). In that case, the prosecutor had called the defense a "sleight of hand;" "Look over here, but don't pay attention to there. . . Don't pay attention to the evidence . . ." Id. at 451. The court in that case found the argument both improper and ill intentioned. Id. at 452. However, it concluded that it was not likely to have changed the result of the case, and that a curative instruction would have "alleviated any prejudicial effect . . ." Id. at 452.

In State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), the court found improper the prosecutor's argument that defense counsel had twisted the facts. Id. at 29-30. Warren did not object. The court found that the comments were not so flagrant and ill intentioned that they could not have been cured by an instruction. Warren failed to show prejudice. Id. at 30.

In State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), *review denied*, 123 Wn.2d 1030 (1994), defense counsel called one State witness a trained liar and another a person paid to frame people. Id. at 66. On rebuttal, the prosecutor said that defense counsel was being paid to twist the words of the witnesses. Id. The court sustained a defense objection but no curative instruction was requested, nor did Negrete move for a mistrial. Id. The court found the remark improper, but not "irreparably prejudicial. Defense counsel's failure to move for a curative instruction or a mistrial at the time strongly suggests the argument did not appear so in the context of the trial. . . Moreover, any prejudice was minimized by the trial court's instructions to the jury." Id. at 67.

In Russell, 125 Wn.2d 24, the prosecutor argued that defense counsel had "stooped to new lows" and expressed gratitude that it was the jury, not defense counsel, deciding the credibility of the witnesses. Id. at 92. Russell did not object. The court found the remarks were provoked by defense counsel and were "arguably" a fair response to attacks by the defense attorney on the prosecutor and State witnesses. The court further held that "[w]hile inflammatory, the remarks were not so prejudicial that a curative instruction would have been ineffective." Id. at 93.

Using these cases as a standard, one cannot say that the prosecutor in Ragland's case impugned defense counsel at all. Even if her remark could be construed that way, Ragland did not object or request a curative instruction. If the examples cited above could have been cured by such an instruction, any prejudice in this case most certainly could have been alleviated by an instruction.

f. The cumulative error doctrine does not apply in this case.

The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

The cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

"The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary." State v. Yarbrough, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). "Where no prejudicial error is shown to have occurred, cumulative error

cannot be said to have deprived the defendant of a fair trial." The doctrine does not apply in the absence of prejudicial error. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005).

Ragland has pointed to no prejudicial error. There is no cumulative error.

> 3. The trial court did not abuse its discretion in finding that I.M.R. was competent to testify. She demonstrated her ability to tell truth from a lie, to remember events from the relevant time period, and the ability to accurately perceive those events.

"Every person is competent to be a witness except as otherwise provided by statute or by court rule." ER 601. Those found incompetent by statute are those of unsound mind, those intoxicated at the time of testifying, and those who appear to be incapable of receiving just impressions of the facts or relating them truthfully. RCW 5.60.050. CrR 6.12(c) specifically disqualifies "children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly."

The Washington Supreme Court has established criteria for determining the competency of a child witness in State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967).

> The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Id. at 692.

The Allen test has been consistently upheld, *e.g.*, State v. S.J.W., 170 Wn.2d 92, 239 P.3d 568 (2010). The trial court bears the responsibility for determining a child's competency. The judge sees the witness and can evaluate his or her intelligence and capacity. "There are matters that are not reflected in the written record for appellate review." Allen, 70 Wn.2d at 692; Wheeler v. United States, 159 U.S. 523, 524-25, 16 S. Ct. 93, 40 L. Ed. 2d 244 (1895). For this reason there is great deference given to the trial court's determination of competency. State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). An appellate court reviews the entire record. Id. A trial court's determination of competency will not be overturned on appeal except for abuse of discretion. S.J.W., 170 Wn.2d at 97. Abuse of discretion occurs when no reasonable

person would make the same decision regarding competency. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

The court begins with the presumption that the child is competent and it is the burden of the party challenging competency to rebut that presumption. The court is to apply the Allen factors in making that determination. S.J.W., 170 Wn.2d at 102.

In making the competency determination, it is not required that the child witness testify about the specific offense; he may be asked general questions. State v. Przybylski, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987). In fact, it is better to test the child's perceptions and memory against objective facts and events which can be verified. Id. ("So long as the witness demonstrates by her answers to the court an ability to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue, the court may infer that the witness is likewise competent to testify regarding those incidents as well.") A child's reluctance to testify about specifics of the case against the defendant does not make her incompetent. State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 538 (1991).

The fact that there may be inconsistencies and contradictions in a child's testimony goes to the weight of the testimony, not its admissibility. The child may still be found competent. State v. Stange, 53 Wn. App. 638, 642, 769 P.2d 873, *review denied*, 113 Wn.2d 1007 (1989); State v. McKinney, 50 Wn. App. 56, 64, 747 P.2d 1113 (1987); Przybylski, 48 Wn. App. at 666; Carlson, 61 Wn. App. at 874. The determination as to competency may be made based on the child's answers on direct examination. An inability to recall details on cross examination "can be attributed to fatigue or whim." State v. Guerin, 63 Wn. App. 117, 123, 816 P.2d 1249 (1991), *review denied*, 118 Wn.2d 1015 (1992).

Ragland argues that the court incorrectly found I.M.R. competent because her mother contradicted her regarding an incident I.M.R. said happened at Top Foods, and because she said she had cameras hidden everywhere. Appellant's Opening Brief at 28. It is apparent from the record that I.M.R. was a difficult witness. Although she was eleven years old at the time of trial, RP 178, I.M.R. faced severe challenges because of her traumatic birth. Her mother testified at the competency/child hearsay hearing and at

trial[4] that she was smart, had a good memory, and knew the difference between the truth and a lie, she had nervous system problems, lacked focus, and suffered from Asperger's Syndrome and Attention Deficit Disorder. RP 419-421; Vol. I 06/17/15 RP 132-33. The combined competency and child hearsay hearing took place over three days, June 15, 17, and 18; *see* the two-volume transcript dated June 15, 17, 18, and 22, 2015. I.M.R. had difficulty staying on track and her testimony was interrupted on June 15 and resumed on June 17. Vol. I 06/15/15 RP 42; Vol. I 06/17/15 RP 98.

At the conclusion of the hearing, the trial court made a finding of competency. Findings of Fact and Conclusions of Law were entered. Supp. CP 3-7. The court addressed RCW 5.60.050 and the Allen factors. Vol. I 06/22/15 RP 95-96. The judge observed I.M.R. and noted her apparent developmental delays, but found her bright and articulate, although she lacked tact and social skills. Id. at 96-97. The court further observed that I.M.R. was uncomfortable on the witness stand, stuttered at times, and in spite of taking several breaks, was unable to finish her testimony on the first day and had to return a second. Id. at 98.

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4 Even though competence is determined before trial, an appellate court will examine the entire record to review the trial court's conclusion. Avila, 78 Wn. App. at 737.

I.M.R. was able to say that she got in trouble when she told a lie and it was important to tell the truth. Vol. I 06/15/15 RP 10-12. She promised to tell the truth. Id. at 13. She correctly identified several statements as either the truth or a lie. Id. at 9-10. I.M.R. described a story she had heard from her mother about a man throwing babies into a fire, which her mother said related to a story about the Holocaust she had told I.M.R. nearly a year before. Id. at 10-11, 20; Vol I 06/17/15 RP 165. She was able to describe her school and her teachers during the period the offenses occurred and her mother corroborated her account. Vol. I 06/15/15 RP 7-8; 06/17/15 RP 132-34, 140.

The court also found that I.M.R. had said some things during her testimony that were not true. Finding of Fact 8(a)(v), Supp. CP 5; Vol. II 06/22/15 RP 99. Ragland refers to the hidden cameras and the incident at Top Foods. However, the court concluded that those statements, as well as her difficulty focusing on the questioning, affected the weight to be given her testimony, not her competence. Vol. II 06/22/15 RP 99; Supp. CP 5. Applying the authorities cited above, it cannot be said that the court abused its discretion, that no other person would have reached that conclusion. I.M.R. was unquestionably a difficult witness. She

clearly did not want to be on the witness stand and she suffered from neurological problems over which she had no control. A difficult and reluctant witness is not the same as an incompetent witness. Nor is a witness who sometimes does not tell the truth incompetent. If that were the case, a good many witnesses would be incompetent.

Ragland relies on State v. Karpenski, 94 Wn. App. 80, 971 P.2d 553 (1999) as an example of a child witness who could not distinguish between truth and falsehood. The child in that case, however, was seven at the time of the competency hearing. Id. at 83, 94 (the child was born June 9, 1989, and the competency hearing was held on October 17, 1996). He had a history of telling stories that he apparently believed but which could not be true, such as speaking with a deceased uncle and taking a trip to Hawaii. Id. at 83, 86. At the competency hearing he vividly described the birth of his two year old brother as occurring directly after his own birth. Id. at 95-96. His first grade teacher was so concerned about his imaginary story about Hawaii that she referred him to the school psychologist, and the boy was in counseling for a lengthy period of time. Id. at 86-87.

I.M.R.'s situation is much different. Her mother testified that I.M.R. was smart and normal for her age except for the developmental issues and had a good memory. Vol. I 06/17/15 RP 133, 166, 168. Her grandmother said I.M.R. was smart and truthful, but lacked focus. Vol. I 06/17/15 RP 198; Vol. II 06/17/15 RP 4. No one testified that she habitually fabricated stories. The trial court took into account her developmental difficulties and concluded that they went to her credibility rather than her competency. Ragland has not shown that the court abused its discretion.

> 4. The trial court did not err by failing to count the incest convictions as the same criminal conduct with the first degree rape of a child and one of the counts of first degree child molestation. Not only did he fail to request such a finding, by law they are not the same criminal conduct.

Ragland argues both that the trial court erred by not counting the incest convictions as the same criminal conduct as the first degree rape of a child and at least one of the counts of first degree child molestation. He further argues that his counsel was ineffective for failing to ask the court to conduct a same criminal conduct analysis. Appellant's Opening Brief at 32-35.

When calculating an offender score, RCW 9.94A.589(1)(a) provides that all "current and prior convictions [should be treated] as if they were prior convictions for the purpose of the offender score," but recognizes the exception that "*if the court enters a finding that some or all of the current offenses encompass the same criminal conduct* then those current offenses shall be counted as one crime." RCW 9.94A.589(1)(a) (emphasis added). "Same criminal conduct" "means two or more crimes that require the same criminal intent, involve the same victim, and are committed at the same time and place." All of these elements must exist in order for a court to make a finding of same criminal conduct. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). A trial court's finding on the issue is reviewed under an abuse of discretion standard. Porter, 133 Wn.2d at 181 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004); Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999).

The defendant bears the burden of proving same criminal conduct. State v. Graciano, 176 Wn.2d 531, 538-40, 295 P.3d 219 (2013). RCW 9.94A.589(1)(a) is to be construed "narrowly to

disallow most assertions of 'same criminal conduct.'" State v. Wilson, 136 Wn. App. 596, 613, 150 P.3d 144 (2007).

Because the jury in Ragland's case was not asked to identify the specific act on which it relied to convict on any specific count, there is no way of knowing if it relied on the same act to find both the first degree rape of a child and incest or one of the first degree child molestation counts and incest. It may well have done so. It does not matter.

a. Incest and first degree rape of a child cannot constitute the same criminal conduct.

In State v. Chenoweth, No. 91366-8 (Wash. Supreme Court March 17, 2016), the court squarely held that rape of a child and incest are not the same criminal conduct for sentencing purposes. Id., *slip op.* at 8. The court found that the two crimes do not have the same intent. Rape of a child requires the intent to have sex with a child and incest requires the intent to have sex with someone related to the perpetrator. Id., *slip op.* at 6.

First degree rape of a child occurs "when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073. Incest

in the first degree occurs when a person "engages in sexual intercourse with a person whom he knows to be related to him, or her, legitimately or illegitimately, as an ancestor, descendent, brother, or sister of either the whole or half blood." RCW 9A.64.020(1)(a). Second degree incest has the same elements except that it prohibits sexual contact as opposed to sexual intercourse. RCW 9A.64.020(2)(a).

The court in Chenowith cited to the legislative history to conclude that the legislature intended to punish incest and rape as separate crimes, even if committed by a single act, citing to State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), and Bobenhouse, 166 Wn.2d 881. Even if defense counsel had asked the court to find same criminal conduct for the first degree rape of a child and first degree incest as charged in Count V, the court would not have done so.

b. Because first degree child molestation contains elements that either degree of incest does not, those two crimes cannot constitute the same criminal conduct.

The same analysis applies to the question of whether incest can constitute the same criminal conduct as first degree child molestation. The elements of that crime are that the perpetrator

"has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). The intent of the perpetrator of a child molestation is to have sexual contact with a child at least thirty-six months younger than he or she and the intent of incest is to have sexual contact with a relative. This court should find that these two offenses cannot constitute the same criminal conduct.

c. Ragland does not show ineffective assistance of counsel for agreeing to the offender score of 15 or for failing to ask the court to consider counting some of his offenses as same criminal conduct.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S.

1008 (1998). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

Ragland had no prior convictions that counted in his offender score. CP 347. For all of his current convictions, each conviction counted against every other conviction, with a multiplier of three. CP 348-53. He complains that his attorney should not have stipulated to an incorrect offender score, but, as argued above, it was correct. In addition, even if the incest charges had been counted with some other charge, he would have had four convictions, each counting against the others with a multiplier of three. RCW 9.94A.525(17). That would still give him an offender

score of nine, which is where the standard range tops out. RCW 9.94A.510. The State did not seek an exceptional sentence. 08/27/15 RP 5. Counting any of his offenses as the same criminal conduct would not have lowered the standard range he was facing. Ragland would not have been prejudiced even if his argument was correct.

Defense counsel did not render ineffective assistance in any way.

5. The trial court did take into account Ragland's financial circumstances when imposing the costs of his extradition as part of his judgment and sentence.

Ragland argues that the trial court failed to make "an individualized inquiry" into his financial circumstances before imposing $2158.30 in extradition costs in his judgment and sentence. CP 357. He relies on State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). While the court did not specifically ask how much money Ragland had, it did deny the State's request for the expert witness fee while imposing the extradition costs. The court said:

> I will impose the cost of extradition. I am not going to impose the cost of the expert witness fee for two reasons. One, I am sensitive to the fact that the defendant appears to have no financial means and

> the length of the sentence will preclude him from having financial means, ...

08/27/15 RP 21-22. The court did impose the mandatory $500 crime victim fee, $200 filing fee, and $100 DNA fee. Id. at 21. His total legal financial obligations (LFOs) are $2958.30. CP 357.

No formal or specific findings of ability to pay are required. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). "The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one." State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013) (finding that a reference in a presentence report to the defendant describing himself as employable is sufficient). The trial court is prohibited from imposing legal financial obligations only when the record shows there is no likelihood that the defendant will ever have the ability to pay. Id. at 99.

Ragland's date of birth is February 8, 1980. CP 354. At the time of sentencing he was 35 years old. There was no evidence that he is or was disabled or unable to work. In 2011, he was collecting unemployment. Vol. I 06/17/15 RP 143. That implies that at some time he held a job. Employment opportunities are available in Washington prisons, and, in fact, prisoners are required

to work. RCW 82.64.030. They are paid for their work. RCW 72.64.040. Funds are deposited in an account, from which LFOs may be withdrawn, but in doing so the balance in the account may not be reduced below the level of indigency. RCW 72.11.020. LFOs take priority over other mandatory statutory withdrawals. RCW 72.11.030. While he is in prison, Ragland's basic needs will be met by the taxpayers and the money he earns can go to LFOs. It is not unfair expect a defendant who is able to work to contribute to the costs of his extradition.

6. Appellate costs are appropriate in the event the State substantially prevails on appeal.

In his Supplemental Brief, Ragland argues that this court should not impose appellate costs in the event the State substantially prevails on appeal.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976[5], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. Id., .160(2). In State v. Barklind, 87 Wn.2d 814, 557

5 Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. Id., at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn.

App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id., at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in State v.Sinclair, 192 Wn. App. 380, 389-90, ___ P.3d ___ (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See* Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin,

63 Wn. App. at 311; *see also* State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241–242. *See also* State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. *See* Lundy, 176 Wn. App. at 104 n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs. *See* State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. *See* Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In Blazina, 182 Wn.2d 827, the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id., at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants

taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

Even though Ragland has been found indigent in the trial court, that is not a finding of indigency in the constitutional sense. Constitutional indigence is more than poverty. State v. Johnson, 179 Wn.2d 534, 553-54, 315 P.3d 1090, *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014). Only the constitutionally indigent are protected from the requirement to pay. Id. at 555. Indigency, moreover, is a "relative term" that "must be considered and measured in each case by reference to the need or service to be furnished." State v. Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964); Johnson, 179 Wn.2d at 555.

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair points out at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition

for the remission of costs on the grounds of "manifest hardship." *See* RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

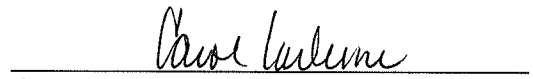
In this case, the State has yet to "substantially prevail." It has not submitted a cost bill. Ragland offers no evidence of his future ability to pay other than that he was found indigent in the trial court and "this status is unlikely to change." Appellant's Supplemental Brief at 4. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Ragland's convictions, his sentence, and the imposition of extradition costs,

and to impose appellate costs in the event the State substantially prevails on appeal.

Respectfully submitted this 12th day of April, 2016.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief on the date below as follows:

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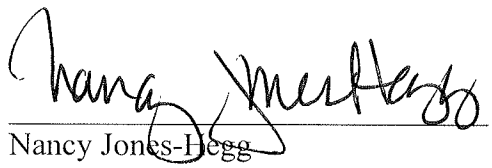
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of April, 2016, at Olympia, Washington.



Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

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