

NO. 48855-8

No. 96034-8

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

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD IVER SVALESON, JR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn Nelson

No. 15-1-00660-8

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**BRIEF OF RESPONDENT**

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

1. Whether the State adduced sufficient evidence for the trier of fact to find that the defendant's touching of E.B. was done for the purpose of sexual gratification when he reached underneath her shirt and touched her bare breast area and then proceeded to grab and squeeze her vagina and buttocks through her jeans?

2. Whether the prosecutor appropriately argued and did not shift the burden of proof when she argued to the jury that they should draw a permissive inference about the defendant's touching of E.B. being done for the purpose of sexual gratification given the direct and circumstantial evidence that was presented and their own common experience?

3. Whether defendant is unable to show the trial court improperly commented on the evidence when it gave an instruction stating the law that corroboration of the victim's testimony is not required for a jury to convict when such an instruction has been held proper by the Washington Supreme Court in *State v. Clayton*<sup>1</sup> and subsequent case law?

4. Whether defendant is unable to show that any of the witnesses' testimony constituted improper opinion testimony when

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<sup>1</sup> 32 Wn.2d 571, 202 P.2d 922 (1949).

they did not comment on the defendant's guilt or the veracity of the victim?

5. Whether defendant has failed to show prosecutorial misconduct occurred when none of the prosecutor's comments during closing were improper, let alone flagrant and ill-intentioned?

6. Whether defendant is unable to meet his burden of showing defense counsel's performance was deficient and that he was prejudiced by any deficiency?

7. Whether defendant has failed to show he is entitled to relief under the cumulative error doctrine when he has failed to show any error occurred much less an accumulation of errors?

8. Whether this Court should remand with orders to modify several community custody conditions in Appendix H?

9. Whether defendant is unable to show the trial court erred when the record shows that the trial court did consider the defendant's ability to pay when it imposed legal financial obligations?

B. STATEMENT OF THE CASE.

1. Procedure

On February 18, 2015, the Pierce County Prosecutor's Office charged RICHARD IVER SVALESON, JR., hereinafter "defendant", with

one count of child molestation in the first degree. CP 1. The case proceeded to trial in front of the Honorable Kathryn Nelson. RP<sup>2</sup> 3. A CrR 3.5 hearing was held after which the court ruled defendant's statements were admissible. RP 21-47. The jury found defendant guilty as charged and defendant was sentenced to the low end of the standard range of 51 months to life. 2RP 3; SRP 8. Defendant filed a timely notice of appeal. CP 103.

## 2. Facts

In 2014, 10 year old E.B. lived with her mom, Teresa Brandt, her dad, Gary Brandt, and her older sister in Spanaway, Washington. RP 341-44, 388-89, 424-25. Occasionally, E.B.'s parents would drop her and her sister off to spend time at their grandma's house in Tacoma. RP 346-48, 391. Her name is Margaret and the girls referred to her as "grandma", but she is actually their great grandma (their father's grandma). RP 346-47, 391-92. She lived at the home with the defendant who is her son and the girls' father's uncle. RP 346-47, 391-92, 427-28. His birthday is September 8, 1946, and the girls referred to him as "Uncle Dick". RP 344, 502.

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<sup>2</sup> The verbatim report of proceedings consists of 10 volumes which will be referred to in the same way as appellant's opening brief for purposes of clarity. They are referred to as follows: pretrial proceedings on January 2, 2016 as "PRP"; the volumes from February 23, 24, 25, 29, March 1 and March 2 (2 volumes) as "RP"; the verdict on March 3, 2016 as "2RP"; and sentencing on April 15, 2016 as "SRP".

The morning of December 30<sup>th</sup>, Teresa<sup>3</sup> dropped E.B. and her sister off at their grandma's home. RP 348-50, 399. They watched TV and at some point, E.B. got up to get something to eat in the kitchen. RP 350-53. The defendant was sitting in a spinning chair and E.B. sat down on his lap as she had done on previous occasions. RP 353. While she was sitting on his lap, the defendant touched her "private areas". RP 353-56. E.B. was wearing jeans and a shirt and the defendant put his hands under her shirt and touched the skin on the front of her chest. RP 357-60. E.B. pushed his hands down and the defendant rubbed in between her kneecaps. RP 358-59. He touched her vaginal area and bottom over her jeans. RP 369-70. Once he stopped touching her, E.B. returned to the living room where her grandma and sister were watching TV and could not see what was happening because of a wall. RP 361-62, 398, 444.

E.B. and her sister stayed at the house until the end of the day when their mom picked them up. RP 363-64. A few minutes after she got in the car, E.B. told her mom what the defendant had done because she thought her mom would do something about it and the touching had made her feel uncomfortable. RP 364-65, 378-88, 402. Teresa tried to act calm and called her husband to tell him that the girls would not be going over to Margaret's the next day. RP 365, 401. When he asked why, she said "I don't want to tell you over the speakers in my car." RP 401. Gary could

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<sup>3</sup> Because the parents have the same last name, the State is referring to them by their first names for purposes of clarity and no disrespect is intended.

tell his wife was upset and he got his gun out of the safe while he waiting for them to get home. RP 429-30.

When they got home, Gary, Teresa and E.B. called Gary's mom, the defendant's sister, who lives in Nebraska. RP 356-66, 402-03, 430. E.B. told them over speakerphone what had happened. RP 404, 430-32. When E.B, began describing what happened, Gary got very upset and had to leave. RP 432-33. Teresa told E.B. it was not her fault as E.B. started crying. RP 404-05. Gary was on his way to the defendant's home, but after speaking more with his wife and mother, he went to the police station. RP 405, 432-33, 514. After Gary spoke with the police officers, Teresa brought the girls to the police station where they met with an officer and told him what had happened. RP 406, 434-35, 514-15.

Another officer went to the defendant's home to speak with him. RP 484-87. When the officer approached and asked if his name was Richard, the defendant said "Yep. I know why you're here." RP 488. After being read his *Miranda* rights, the defendant agreed to speak with the officer, but said that he did not want to do a handwritten statement because his handwriting was so bad it would look like Chinese. RP 490. The defendant said that E.B. got dropped off at his mother's home around 7 am and that she was "a real pain in the ass." RP 493. When asked what he meant by that, the defendant said that E.B. follows him around the house, sits on his lap and bugs him. RP 493. He said that she often sits on

his lap, leans back and rubs her head and face on his hands while mumbling stuff he could not understand. RP 493.

That day, the defendant said he got up to get a cup of tea and she followed him into the kitchen. RP 494. He sat in the chair and she sat on his left knee and began playing with his face and hair. RP 494. The defendant said E.B. said that she was ticklish and so he began tickling her on her sides around her ribcage. RP 495. He said he would squeeze and push his fingers into her ribcage. RP 495. When the officer asked if he did this over her clothes, the defendant said “No, I went under her shirt” and that she was wearing “a half shirt thing and a T-shirt with jeans on.” RP 495. The officer asked why he went under her clothes and the defendant said he did not know and that she was ticklish there. RP 495-96. The defendant said no one else was present. RP 496.

The defendant continued talking about what happened saying that he tickled E.B. once more under her clothes before he pushed her off and went to pour more tea. RP 496. He said she followed him and when he returned to the chair, she again climbed up on his left knee and said “I’m ticklish everywhere.” RP 496. The defendant said he put his hands up her back T-shirt and sweatshirt and tickled her while she squirmed and laughed. RP 496. He said that during this, E.B. said his hands were cold. RP 496. The officer asked if his hands were cold and the defendant said “Yeah, they were cold, but her back was warm. It felt nice.” RP 496.

When asked if he felt a bra strap on her back, the defendant said “Nah, none that I noticed.” RP 496.

The defendant described continuing to tickle E.B. on the side of her ribcage underneath her clothes. RP 497. When the officer asked the defendant if he may have accidentally grazed E.B.’s breast or accidentally touched her nipple, the defendant said “Yeah, my left thumb did” and lifted up his thumb to show the officer. RP 497. The officer asked what his thumb touched and the defendant said “it touched the edge of her tit area. Well, she did not have any, but if she did, it would have.” RP 497. When asked how he knew he touched her “tit area”, the defendant said that her skin seemed softer in that area. RP 497. The officer then asked if he touched her nipple on accident and the defendant said “nothing that I noticed.” RP 497.

The officer asked the defendant what E.B. did when he touched that area and he said that she laughed and squirmed like usual. RP 497-98. The defendant also said he tickled her on her upper leg and pointed to his thighs. RP 498. He denied tickling her under her jeans and when asked if he may have touched near her vagina on accident while tickling her legs, the defendant said no. RP 498. When asked if he touched E.B.’s butt on accident, the defendant said “Yeah, I pinched it and told her she had a bony ass.” RP 498. He then said “after I tickled her, her ass was bony on my knee.” RP 498.

The officer asked the defendant if he was turned on or got aroused by E.B. and the defendant said “no, she’s not womanly. If I were to be turned on, it would be by her 13 year old sister, [A.B.]. She’s not so skinny, you know what I mean.” RP 498. The defendant denied ever tickling the sister. RP 499. The defendant said that after he pinched E.B.’s butt, he went upstairs to get away from her because he was bugging him like usual. RP 499. He said he returned downstairs and sat on the recliner watching TV and E.B. sat on his lap again for a little bit, but he did not tickle her. RP 499. He pushed her off again and went upstairs. RP 499.

After the girls left, the defendant said he got a call from his sister in Nebraska accusing him of molesting the child. RP 500. The defendant said he was very upset and told the officer “If tickling her was molestation, then I guess I learned my lesson.” RP 500. When asked what he meant by that, the defendant said “I was just tickling her. I guess I won’t tickle kids anymore.” RP 500. The defendant also said that E.B. does not sit on his lap or bug him when her father is over and instead acts like a little angel around her dad. RP 500.

A few days later after the incident, Teresa took E.B. to the Child Advocacy Center for a forensic interview. RP 407. E.B. spoke to Stacia Adams, a child forensic interviewer, about what had happened. RP 367, 577. Ms. Adams has a bachelor’s degree in criminal justice with a minor

in psychology and a bachelor's degree in sociology with an emphasis on law and social control. RP 578. She was trained at Harborview off of the National Institute of Child Health and Human Development protocol and also trained in the American Professional Society on the Abuse of Children protocols and has interviewed over 323 children. RP 578-79. She said that while 90% of them involve allegations of sexual abuse, not all of the children disclose actual abuse. RP 580. She testified that during her interview with E.B., E.B. described how her Uncle Dick had touched her boobs and private areas, specifically where she peed and pooped from. RP 594.

The same day, E.B. also underwent a physical exam at the Child Advocacy Center by Dr. Yolanda Duralde. RP 368, 407, 610. Dr. Duralde did not find anything abnormal during E.B.'s exam and later testified she would have been surprised if there had been any findings given the disclosure she had made that was limited to touching. RP 617-19. During the exam, E.B. told Dr. Duralde how her Uncle Dick had put his hands on her private areas and it made her feel uncomfortable. RP 615-16. At the conclusion of her exam, Dr. Duralde recommended E.B. start counseling. RP 619.

Shortly thereafter, E.B. started going to see a counselor named Linda Skinner. RP 368, 408. She has a master's degree in marriage and family therapy, a bachelor's degree in psychology, an associate's degree in arts and sciences and is a licensed marriage and family therapist. RP 528.

Ms. Skinner's specialty is in children's mental health services and receives continuing training in trauma and the effects of trauma on children, adolescents and adults. RP 529-30. She testified that she began seeing E.B. in January of 2015 after the incident after her mother reported concerns about her behavior, difficulty sleeping, nightmares, worrying and fear of returning to her great-grandmother's house. RP 533-36. Ms. Skinner testified that those problems are common in people who have been sexually abused. RP 537.

After their initial appointment, Ms. Skinner diagnosed E.B. with acute stress disorder. RP 537. She described it as a diagnosis used when a traumatic experience has occurred, either by witnessing it or learning about it and there are symptoms resulting from that traumatic experience. RP 538. E.B. told Ms. Skinner that her great uncle had called her over and was sitting in a chair when he reached under her shirt and touched her inappropriately. RP 543-44. She said that he said "your hands are starting to get warm." RP 544. E.B. also said in a later session that her uncle grabbed her butt and squeezed it and grabbed her vagina and squeezed that with both of his hands. RP 544, 553.

Ms. Skinner testified during the trial that most child victims of sexual abuse have difficulty talking about it because it is highly personal and sensitive information that is difficult to share. RP 533. During the sessions E.B. provided Ms. Skinner with more information about what happened to her, Ms. Skinner praised E.B. for being brave. RP 548-51.

Ms. Skinner and E.B. developed a treatment plan that identified E.B.'s problems and developed measurable outcomes to help her reach her goals while focusing on her strengths. RP 538-41. E.B. saw Ms. Skinner until April of 2015, when she spent the summer in Nebraska with her grandmother. RP 544. She began seeing Ms. Skinner again when she returned as she was experiencing anxiety about the upcoming court proceedings. RP 544-45.

During her testimony, E.B. stated she did not remember the answer to several questions, including whether the incident occurred before or after lunch, whether she said anything to him while he was touching her and whether she told her grandmother or sister what had happened. RP 352-63. She initially said she could not remember whether the defendant had touched her vaginal area and then later described that touching. RP 359, 369-70. She said that that was the first and only time the defendant had ever touched her and she got along fine with him before the incident. RP 369, 379. E.B. stated that she did not call her parents right after it happened because she did not have her phone and she did not know her parents cell phone by heart. RP 381-82. She also talked about how in May of 2015, she wrote a letter about what had happened to her. RP 370, 412-416. It was given to her parents after E.B. dropped it during school and her teacher gave it to the school counselor who showed it to the Brandts. RP 370, 412-14, 451-52.

Teresa testified that prior to this incident, their family got along

with the defendant. RP 409. She had observed E.B. sitting on the defendant's lap on previous occasions when she went to pick the girls up and E.B. had never said anything bad about him. RP 410. Gary testified that he noticed behavioral changes with E.B. after the incident, like being uncomfortable around him for a little bit and more withdrawn. RP 448-49. E.B. has never been married to or in a registered domestic partnership with the defendant. RP 386, 414, 452.

The defendant chose to testify during the trial. RP 622. He testified that on December 30, 2014, Teresa came inside and had a cup of coffee when she dropped the girls off. RP 628-29. During that time, E.B. sat on the defendant's knee while he was watching tv. RP 629-30. After Teresa left, he got up and moved to the swivel chair and E.B. followed him. RP 629-30. He testified that when E.B. was sitting on his lap in the chair, her sister could see them from the other room. RP 627-28. He said when E.B. sat on his knee she said she was not ticklish so he said "oh yeah?" and grabbed her ribs. RP 630. E.B. then said "oh, I am ticklish, but it's under my armpit" and so he moved his hand up. RP 630. He denied tickling her rear end, but admitted he pinched her rear end and told her to get off his knees because her "bony ass" was hurting his knees. RP 631.

The defendant said the tickling session lasted ten seconds and then he went upstairs before leaving with a friend for three hours. RP 631-32. He said that when he returned home his sister called and was upset at him

and hung up on him. RP 632-33. Later that night, the police came and he told them what had happened. RP 634. The defendant testified that he did not tickle E.B. to satisfy any sexual desire on his or her part and he was just tickling her. RP 634. He admitted he told the police officers that when E.B. turned, his hand was underneath her shirt and the side of his thumb touched her “tit area”, but said “[he] didn’t grab it or nothing.” RP 639-43.

C. ARGUMENT.

1. SUFFICIENT EVIDENCE EXISTED FOR THE TRIER OF FACT TO INFER THAT THE DEFENDANT’S TOUCHING OF E.B. WAS DONE FOR THE PURPOSE OF SEXUAL GRATIFICATION WHERE HE REACHED UNDERNEATH HER SHIRT AND TOUCHED HER BARE BREAST AREA AND THEN PROCEEDED TO GRAB AND SQUEEZE HER VAGINA AND BUTTOCKS THROUGH HER JEANS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the

sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted). Therefore, when

the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To convict the defendant of child molestation in the first degree, the State was required to prove, amongst other things, that the defendant had “sexual contact” with E.B.. RCW 9A.44.083; CP 44-59 (Instruction No. 6). Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” RCW 9A.44.010(2); CP 44-59 (Instruction No. 8). “Sexual gratification” is not an essential element of first degree child molestation, but clarifies the meaning of the term “sexual contact”. *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). A showing of sexual gratification is required “because without that showing[,] the touching may be inadvertent.” *State v. T.E.H.*, 91 Wn. App. 908, 916, 960 P.2d 441 (1998).

Defendant in the present case argues there was insufficient evidence that he had contact with E.B. for the purpose of sexual gratification. Specifically, he argues that there was a momentary touching under the shirt and two fleeting touches over the clothes which as in *Powell*<sup>4</sup>, could be susceptible to innocent explanation or were inadvertent. Appellant’s Opening Brief at 17-19. But the evidence that was presented did not suggest an inadvertent or fleeting touch, and the relevant case law

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<sup>4</sup> *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991).

reflects that the defendant's touching of E.B. was the type of touching which supports the inference it was done for the purpose of sexual gratification.

When the evidence of the defendant touching E.B. is looked at in the light most favorable to the State, it is apparent it was an intentional touching of her most intimate areas. E.B. testified that while she was sitting on the defendant's lap, the defendant reached both of his hands under her shirt and touched the skin on the front of her chest<sup>5</sup>. RP 357-60. E.B. said she pushed his hands down and he rubbed in between her knee caps and touched her vaginal area and bottom over her jeans. RP 358-70. During her testimony, E.B. referred to these areas as her "private areas". RP 353-56. She told the forensic interviewer and Dr. Duralde that the defendant had touched her boobs, and her private areas where she peed and pooped from. RP 594, 615-16. She told her counselor that the defendant reached under her shirt and touched her inappropriately, grabbed her butt and squeezed it, and grabbed her vagina and squeezed it with both of his hands. RP 543-44. E.B. told her mother and Dr. Duralde the touching made her feel uncomfortable. RP 364-65, 378-88, 402, 615-16.

"Contact is 'intimate' within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could be

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<sup>5</sup> Defendant admitted that this touch occurred on her "tit" or breast area. RP 640-41.

fairly expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.” *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008) (citing *In re Welfare of Adams*, 24 Wn. App. 517, 521, 601 P.2d 995 (1979)). The genitalia, breast, and buttocks are considered “intimate” areas. *Jackson*, 145 Wn. App. at 819; *In re Welfare of Adams*, 24 Wn. App. at 519. There is no question that the defendant touched all three of these intimate areas on E.B. as that was reflected in her testimony and statements to the forensic interviewer, doctor and counselor.

“Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992) (citations omitted). In *State v. Hartstad*, the court found the evidence was sufficient to support the inference that the defendant’s touching was for the purpose of sexual gratification when it described how “covering a child with a blanket could be seen as caretaking, but it is not the kind of caretaking that requires close contact with an unrelated child’s intimate parts.” *State v. Hartstad*, 153 Wn. App. 10, 23, 218 P.3d 624 (2009). While the defendant in the present case was distantly related to E.B. as her great uncle, he was certainly not performing a caretaking function at the time the touching occurred. There was absolutely no

reason, caretaking or not, for him to reach up underneath her shirt with both hands and touch her bare chest.

In addition, defendant did not limit his touching to E.B.'s chest. He also touched her vagina and buttocks, albeit over the clothing<sup>6</sup>. “[I]n those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992) (citations omitted). In *State v. Powell*, the court held that the evidence was insufficient to support the inference that the defendant touched a child for the purpose of sexual gratification when the child was sitting on the defendant's lap in a skirt, he hugged her and when he assisted her off his lap he placed his hand on her front and bottom touching her underpants under her skirt. *Powell*, 62 Wn. App. at 916. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. *Id.* at 917-18.

In the present case, while the touching of E.B.'s vagina and buttocks was over her clothes, it was not a momentary or fleeting touch involving an innocuous action like in *Powell*. In *Powell*, the testimony was that the touching occurred when the defendant assisted the girl off his

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<sup>6</sup> Although defendant denied that any of this touching occurred, the evidence before the jury was sufficient for the trier of fact to find that this occurred and it is for the trial fact finder to resolve conflicts in testimony. *State v. Carver*, 113 Wn. 2d 591, 604, 781 P.2d 1308 (1989).

lap and when she told him to stop, he said “Oops” and stopped, suggesting the touch was inadvertent and not done for a sexual purpose. *Powell*, 62, Wn. App. at 917-18.

By contrast, the defendant in the present case performed multiple deliberate and purposeful actions which were not susceptible to an innocent explanation. The defendant simply had no reason to reach underneath E.B.’s shirt with both hands and touch her bare chest. Then, when E.B. pushed the defendant’s hands down to stop him, the defendant did not stop like in *Powell*. Instead, he began rubbing in between her kneecaps. RP 358-70. She told her counselor that he then proceeded to grab her butt and squeezed it, and grabbed her vagina and squeezed it with both of his hands. RP 358-70, 543-44. All of this occurred when the defendant and E.B. were in the kitchen and out of sight of anyone else in the home and E.B. described to more than one person how the touching made her feel uncomfortable. RP 361-65, 378-88, 398, 402, 444, 615-16.

Defendant’s touching of E.B. not only included bare skin contact with an intimate part of her body, the additional touches that were over her clothing were not momentary, fleeting or innocuous in any way. All of the touching occurred while they were alone and all of it made her feel uncomfortable. He was not performing any sort of caretaking function and he failed to stop when she tried to make him. The defendant’s actions in the present case are significantly more similar to cases where courts have found a rational trier of fact could find the touching was done for the

purpose of sexual gratification. See *State v. Price*, 127 Wn. App. 193, 201-02, 110 P.3d 1171 (2005), *affirmed*, 158 Wn. 2d 630, 146 P.3d 1183 (2006) (Evidence that daycare provider had rubbed a four year old child's vagina, even if clothed, so as to cause redness and swelling sufficient to infer it was done for the purpose of sexual gratification); *State v. Wisenhunt*, 96 Wn. App. 18, 24-25, 980 P.2d 232 (1999) (Evidence that man who rode 5 year old victim's bus reached over his seat and touched her privates on three separate occasions sufficient to infer it was done for the purpose of sexual gratification); *State v. Harstad*, 153 Wn. App. 10, 22-23, 218 P.3d 624 (2009) (Evidence that father put his hand under a blanket moving it side to side by victim's private area while breathing heavily sufficient to infer touching was done for the purpose of sexual gratification).

There is simply no innocent explanation for why a grown adult male hands need to reach up underneath a young girl's shirt and touch her chest and then grab and squeeze her vagina and buttocks. This case is not like the touching that was described in *Powell*. When the court looks at all of the defendant's actions, taken in context and in the light most favorable to the State, it is apparent that a rational trier of fact could infer the defendant touched E.B. for the purpose of sexual gratification.

2. THE PROSECUTOR'S ARGUMENT DID NOT SHIFT THE BURDEN OF PROOF AS SHE APPROPRIATELY ARGUED THAT THE JURY SHOULD DRAW A PERMISSIVE INFERENCE BASED ON THE DIRECT AND CIRCUMSTANTIAL EVIDENCE THAT WAS PRESENTED AND THE JURY'S OWN EXPERIENCE.

Due process requires the State to bear the burden of proving every element of the crime beyond a reasonable doubt. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). The State may, however, use evidentiary devices, such as inferences and presumptions, to assist it in meeting its burden of proof. *Id.* A mandatory presumption instructs the jury that it “*must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.” *Id.* (citing *County Court of Ulster Cy. V. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2225, 60 L.Ed.2d 777 (1979)). These can run afoul of a defendant's due process rights if they serve to relieve the State of its obligation to prove all of the elements of the crime charged. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996).

By contrast, a permissive inference or presumption, permits, but does not require, the jury to infer an element of the offense, an “elemental” or “presumed” fact, from an “evidentiary” or “proved” fact. *Hanna*, 123 Wn.2d at 710. Such a permissive inference does not relieve the State of its burden of proof because the State must still convince the

jury the suggested conclusion should be inferred from the proven facts.

*Id.* When such an inference is only part of the State's proof supporting an element and not the "sole and sufficient" proof of such element, due process is not offended if the State shows that the inference more likely than not flows from the proven fact. *State v. Brunson*, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

Defendant in the present case argues that the State improperly shifted the burden of proof by arguing the inference that anytime the State has proven touching of a child's private areas, the jury should presume it was done with intent to gratify a sexual desire. Appellant's Opening Brief at 20-21. But the prosecution was arguing such a permissive inference in conjunction with other circumstantial and direct evidence in the present case to prove defendant's intent.

During closing argument, the prosecutor argued several reasons for why the jury should draw such a permissive inference. She discussed the differences between the defendant and E.B.'s testimony, specifically in their descriptions of what happened while E.B. sat on the defendant's lap. RP 650-52. The prosecutor talked about how E.B. described much more than just the fleeting touch that the defendant claimed occurred. Rather, E.B. described the defendant using *both* hands to reach up her shirt and touch her private chest area, and although defendant denied touching her vagina and buttocks, E.B. told her counselor and the forensic interviewer that had also happened. RP 650-52. The prosecutor then discussed the

credibility of the defendant and E.B. at great length and asked the jury to evaluate that on their own. RP 650-62.

The prosecutor also focused on E.B.'s description of how the touching made her uncomfortable, not only during her testimony, but when she was telling others what had happened. RP 651-52. The prosecutor talked about how E.B. told not just her mother and father what had happened, but her grandmother, the police, the forensic interviewer, the doctor and her counselor. RP 651-52. The prosecutor discussed the nightmares and change in behavior that E.B.'s parents had described after the incident lending support to her credibility, as well as circumstantial evidence that the touching by the defendant did in fact occur as E.B. described. RP 655. Finally, the prosecutor discussed how the incident occurred when no one else was around and could be accomplished without anyone seeing. RP 656-57.

All of these pieces of direct and circumstantial evidence were argued and discussed by the prosecutor as evidence to support the argument that the jury should draw the permissive inference that the defendant's acts of touching E.B. were done for the purpose of sexual gratification. The prosecutor never argued to the jury they should find the touching was done to satisfy some sexual desire because "what other reason could there be?" Defendant quotes this phrase in his brief and cites to RP 651, but this phrase does not appear on that page and the State was unable to find that phrase anywhere in the State's closing argument.

Appellant's Opening Brief at 19. Similarly, the defendant cites to RP 678 and describes an argument by the State, but in the State's copy of the transcription, RP 678 is actually during the closing argument of the defendant and therefore, not comments by the State. Appellant's Opening Brief at 20.

The State's argument to the jury was not that they should find the touching by the defendant was done for the purpose of sexual gratification because that was the only reason for it. The State asked the jury to draw the inference that the defendant's touching of E.B. was done for the purpose of sexual gratification because that inference flows from the evidence when it is looked at in conjunction with all the other direct and circumstantial pieces of evidence that were presented. The prosecutor stated:

Sexual desire, whether or not touching was done for the purpose of satisfying sexual desire. Again, it's a place to use your common sense because you certainly don't need someone to testify for you in order to meet this element, an eleven-year-old saying he touched me and while he was doing this though he said he was doing it to satisfy his sexual desire. You don't need someone to say that. *You infer it based on the context, common sense, common experiences why that touching occurred.* And what I'm submitting to you is that the explanation of just the tickling, it doesn't make sense in this context.

RP 686-87 (emphasis added). The prosecutor's argument did not relieve the State of its burden. It appropriately argued the permissive inference in accordance with the law.

3. THE TRIAL COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE WHEN IT GAVE AN INSTRUCTION THAT HAS BEEN HELD PROPER BY THE WASHINGTON STATE SUPREME COURT IN *STATE V. CLAYTON* AND SUBSEQUENT CASE LAW.

Article 4, section 16 of the Washington Constitution states “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose behind this provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the submitted evidence. *State v. Miller*, 1179 Wn. App. 91, 107, 316 P.3d 1143 (2014)(citing *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S.Ct. 98, 148 L.Ed. 57 (2000)). “To constitute a comment on the evidence, it must appear that the trial court’s attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court’s statements.” *Id.* (citing *Elmore*, 139 Wn.2d at 376).

A jury instruction can be an improper comment on the evidence. *Miller*, 179 Wn. App. at 107. However, “[a] jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.” *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709,

721, 132 P.3d 1081 (2006). In such a case where a jury instruction is found to be a comment on the evidence, it is presumed to be prejudicial and the burden rests on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Prior to closing arguments in the present case, the State submitted the following instruction as part of its proposed jury instructions:

In order to convict a person of child molestation in the first degree as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

CP 23-40 (Instruction No. 10). It based this instruction on RCW 9A.44.020(1) which holds that “[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.” Defendant objected to the instruction and after much discussion, the court allowed the instruction as proposed by the State. RP 558-68; CP 44-59 (Instruction No. 9). On appeal, defendant argues this was an unconstitutional comment on the evidence because it appeared to express an attitude toward the merits of the case and the strength of the evidence. Appellant’s Opening Brief at 29.

Defendant’s argument fails however, as the Washington Supreme Court has already found that such an instruction was not an improper comment on the evidence in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922

(1949). In that case, the Court instructed the jury:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

*Clayton*, 32 Wn.2d at 572. The Court found that the trial court had not expressed an opinion as to the truth or falsity of the alleged victim or as to the weight to give to her testimony, but submitted all questions involving credibility and the weight of the evidence to the jury for its consideration. *Id.* at 573-74.

In 2005, this Court itself was confronted with this so called “non-corroboration” instruction in *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005), *review denied*, 161 Wn.2d 1012, 166 P.3d 1218 (2007). This Court looked to the precedent in *Clayton*, discussed above, and the 1978 Division One case of *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978), *review denied*, 91 Wn.2d 1018 (1979). In *Malone*, the trial court in a rape case had instructed the jury that “[i]n order to convict the defendant of the crime of rape in any degree, it shall not be necessary that the testimony of the alleged victim be corroborated.” *Malone*, 20 Wn. App. at 714. Division One held that “the instruction was a correct statement of the law and was pertinent to the issues presented at the trial.

It also found that the phrasing of the instruction did not convey an opinion on the alleged victim's credibility" and was therefore not a comment on the evidence. *Zimmerman*, 130 Wn. App. at 181 (citing *Malone*, 20 Wn. App. at 714-15).

Relying on these two cases, and specifically the precedent in *Clayton*, this Court held that the instruction in *Zimmerman*'s case correctly stated the law and was not an improper comment on the evidence. *Zimmerman*, 130 Wn. App. at 182. Although this Court noted that the Washington Pattern Criminal Jury Instructions (WPIC) do not contain the instruction, and the Washington Supreme Court Committee on Jury Instructions recommends against using such an instruction, this Court recognized it was bound by *Clayton* and that the giving of such an instruction is not reversible error. *Id.* at 182-83.

While defendant attempts to distinguish the instruction in *Clayton* from that in the present case, case law interpreting *Clayton* has found no distinction. The instructions given in *Malone* and *Zimmerman* were nearly identical to the instruction in the present case and were found to be accurate statements of the law and not a comment on the evidence. *Malone*, 20 Wn. App. at 714; *Zimmerman*, 130 Wn. App. at 173-74. They did not even include the second sentence that was included in the present case which stated and thus reiterated that "the jury is to decide all questions of witness credibility." CP 44-59 (Instruction No. 9).

Likewise, Division One of the Court of Appeals again addressed this issue when it dealt with an instruction that was identical to the one in the present case, save for the crime (incest instead of child molestation). *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13, *review denied*, 184 Wn.2d 1023, 361 P.3d 747 (2015). The court again recognized that the Washington Supreme Court Committee on Jury Instruction recommends against giving such an instruction and how several courts “share the Committee’s misgivings”, but found that “there is a historical basis for instructing the jury regarding corroboration for sex crimes.” *Id.* at 536-37. Citing the fact that sex offenses are rarely, if ever, committed in the presence of more than the perpetrator and victim and are therefore often incapable of corroboration, the court described how it is permissible to instruct the jury that there is no corroboration requirement. *Id.* at 537. The court again expressed its concern in using the instruction, but found it was not a comment on the evidence. *Id.* Indeed, the concurrence by Judge Becker expressed disagreement, but reiterated how this was not a matter of first impression in Washington and the courts were bound by *Clayton* which holds that the giving of such an instruction is not reversible error. *Id.* at 538.

While defendant attempts to distinguish the instruction in the present case from the instruction in *Clayton*, case law, specifically *Chenoweth* which is identical to the present instruction, finds no distinction. Like the court in *Chenoweth* and the concurring opinion

reiterate, this Court is bound by the Washington Supreme Court. Regardless of what other states around the country are doing, the Washington Supreme Court has expressly approved of this instruction and found no error.

The giving of the instruction that there is no corroboration requirement in sex offense case where the only witness was a ten year old child was not a comment on the evidence. It did not convey the court's attitude toward the merits of the case, tell the jury to give the evidence more or less credence, or express an opinion about the credibility of the witnesses. The instruction accurately stated the law and reiterated that the jury was to decide all questions of credibility. In accordance with *Clayton*, and subsequent case law on this issue, the trial court's instruction to the jury did not improperly comment on the evidence

4. DEFENDANT IS UNABLE TO SHOW ANY OF THE WITNESSES TESTIMONY CONSTITUTED IMPROPER OPINION TESTIMONY.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the jury." *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief

or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*, 144 Wn.2d at 760 (*quoting Heatley*, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59. “[T]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury and is based on inferences from the evidence is not improper opinion testimony.” *Heatley*, 70 Wn. App. at 578.

When raised for the first time on appeal, a claim of improper opinion testimony will only be considered if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “Manifest error” requires a showing of actual and identifiable prejudice to the defendant’s constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27. In regards to improper opinion testimony, a defendant can show manifest constitutional error only if the record contains “an explicit or almost explicit witness statement on an ultimate issue of fact.” *State v. Elmore*, 154 Wn. App. 885, 897-98, 228

P.3d 760 (2010)(quoting *Kirkman*, 159 Wn.2d at 938). Courts construe the exception narrowly because the decision not to object to such testimony may be tactical. *Kirkman*, 159 Wn.2d at 934-35. Also important in a court's determination whether opinion testimony prejudiced a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. *Elmore*, 154 Wn. App. at 898 (citing *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)).

In the present case, because defendant did not object to the testimony at trial, he must demonstrate a manifest constitutional error. He argues that improper opinion testimony was elicited during the testimonies of the forensic interviewer, Stacia Adams, and E.B.'s counselor, Linda Skinner. Appellant's Opening Brief at 37. But when the actual statements are looked at in the context of what was being discussed, it is apparent that they do not constitute improper opinion testimony. Thus, defendant is unable to show any of the statements he cites to constitute a manifest constitutional error.

With regard to Ms. Adams' testimony, defendant cites to statements she made when she discussed the process of forensically interviewing children. Specifically, he points to when Ms. Adams said:

It's a format to just empower the child, but also, we know by giving them those ground rules as well as in later following up with promise – making them promise to tell the truth, that with those two – two foundations, that the interview is going to be **more accurate and we know that statistically.**

RP 584-85 (emphasis added). He also cites to her statement where she describes free recall memory and says “so you’re trying to get specifics to get, again, **the most accurate information**, and then information around that specific incident.” RP 584-85 (emphasis added). Both of these statements came during Ms. Adams’ lengthy discussion of the process of forensically interviewing a child and the various steps she takes in doing so. She was describing her methods and reasons for using those methods as opposed to others. RP 584-87. For instance, the second comment came in discussing a technique to obtain free recall memory versus script memory. RP 585-86.

In neither of these statements was Ms. Adams offering an opinion on the veracity of the statement itself. Rather, she was making a comment about the actual process of gathering information from a child and how scientifically, the ability to gather information from children’s memory is more accurate using certain methods as opposed to others. Her statements were also described in the context of statistics she was aware of and how this process is the scientifically-approved method in her field taught by the National Institute of Child Health and Human Development. RP 584-87. Her statements were not based on her own beliefs or ideas, but rather on direct knowledge of the accuracy of this scientific method. Essentially, Ms. Adams was referring to how the process itself is the most accurate in terms of obtaining information from a child, not that the information itself

is accurate. Her statements did not constitute improper opinion testimony.

Defendant also cites to statements made by E.B.'s counselor, Ms. Skinner, he contends amounted to improper opinion testimony. Defendant first refers to Ms. Skinner answering "Yes" to the prosecutor's question "are these problems, these ones you identified with [E.B.], in your education, training, and experience, are common in people who have been sexually abused?" Appellant's Opening Brief at 35-36. He then points to Ms. Skinner's testimony discussing her diagnosis of E.B. with acute stress disorder and the treatment plan that was formulated to address symptoms and problems E.B. was having in terms of dealing with the abuse. Appellant's Opening Brief at 35-36.

Defendant argues that this testimony is comparable to what occurred in the case of *State v. Black* where in a rape trial, the victim's counselor testified that the victim suffered from "rape trauma syndrome". *State v. Black*, 109 Wn.2d 336, 339, 745 P.2d 12 (1987). Specifically, the expert testified that " '[t]here is a specific profile for rape victims and [the victim] fits it.' " *Id.* at 339. The Supreme Court found that there was a significant danger of prejudice in using the term "rape trauma syndrome" as the term itself connotes rape and such expert testimony constituted "in essence, a statement that the defendant is guilty of the crime of rape." *Id.* at 349.

Unlike in *Black*, Ms. Skinner never commented on the credibility of the victim or diagnosed her as having a condition specifically relating to

victims of sexual abuse. Ms. Skinner's testimony merely explained that the problems E.B. was experiencing was also common with people who had experienced sexual abuse and went on to describe her interaction and subsequent treatment of the victim based on the symptoms E.B. was experiencing. RP 537-40. Ms. Skinner was E.B.'s counselor and her testimony presented evidence of the trauma E.B. experienced after her interaction with the defendant. It did not comment on the guilt of the defendant or invade the jury's province to weigh the evidence and make credibility determinations.

In addition, the trial court instructed the jury that they alone were to decide issues of credibility. The written jury instructions stated in jury instruction number one that "you are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP 44-59. The court also read this aloud to the jury just prior to the parties closing arguments. RP 644. Defendant is unable to show any improper opinion testimony amounting to a manifest constitutional error occurred in the present case.

5. DEFENDANT HAS FAILED TO SHOW THAT ANY PROSECUTORIAL MISCONDUCT OCCURRED WHEN THE PROSECUTOR'S COMMENTS WERE NOT IMPROPER.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). “If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (overruled on other grounds by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). In closing arguments, attorneys have latitude to argue the facts in evidence and any reasonable inferences therefrom. *State v. Smith*,

104 Wn.2d 497, 510, 707 P.2d 1306 (1985). However, they may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993).

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). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718.

Defendant in the present case cites to numerous statements by the prosecutor which were made during both her closing and rebuttal argument. Appellant's Opening Brief at 38-40. Only one of these comments was objected to by defense counsel as calling for sympathy and was overruled by the court and therefore, aside from that one comment, defendant must meet the higher burden showing that the comments by the prosecutor were flagrant and ill-intentioned and could not have been cured by a curative instruction. RP 659. He fails to not only meet this heightened burden, but fails to show how any of the prosecutor's comments were improper in any way.

Defendant argues that all of these comments amounted to telling the jury that "a failure to convict would be to make this E.B.'s fault and further depend on finding that she was lying." Appellant's Opening Brief at 42. None of the prosecutor's comments came even remotely close to saying this during either closing or rebuttal. The prosecutor simply never said anything about that in order to acquit, the jury was required to find the E.B. was lying. Rather, the prosecutor's point throughout her closing and rebuttal was that if the jury believed the testimony of E.B., they did not need any corroborating evidence to convict the defendant. RP 658-660, 682-84. This was consistent with the law as it exists and the law that the court put forth in the jury instructions. CP 23-40 (Instruction No. 10); RCW 9A.44.020(1).

In addition, defendant's claim that the prosecutor said that a failure to convict would make it E.B.'s fault is misleading when the statement is properly viewed in context. The prosecutor made the comment in reference to the defense attorney's cross examination of E.B. wherein he attacked her decision not to call her parents from the house right after the incident. The prosecutor stated:

Don't make this [E.B.]'s fault. There is testimony that, you know, there's a house phone. Why wouldn't you call? She didn't have a cell phone yet at the time. It's not [E.B.]'s fault she did not pick up the house phone and call her mom. She knew her mom was coming to get her at the end of the day, and she told her mom pretty much as soon as she got in the car, but that aside, the defendant is the one who did this.

RP 663-664. When the statement is viewed in context of the full argument, it is apparent the prosecutor was arguing to the jury that they should not be distracted, not be fooled by the red herring to blame E.B. for her actions that day when it was the defendant's actions that were on trial. The prosecutor never made any sort of comment to the jury that a failure to convict would make this E.B.'s fault. The comment was simply taken out of context.

Defendant also claims that the prosecutor shifted the burden of proof by questioning the defendant's explanations for the touching and saying things like "there's no reason and no reasonable explanation as to why the defendant's hands would have found themselves" on E.B.'s privates. Appellant's Opening Brief at 38; RP 661. The majority of this

case concerned issues of credibility and the defendant chose to take the stand. The prosecutor's entire argument was focused on why E.B. was a credible witness and why the defendant's version of what had occurred was not credible. Such an argument was entirely appropriate in light of the defendant's testimony. The defendant denied having ever touched E.B.'s vagina or buttocks despite testimony that E.B. told her mother, her counselor and Dr. Duralde that he had done so. RP 543-44, 94, 615-16. The prosecutor was allowed to comment on the defendant's credibility and the reasons he gave to explain the type of touching he says occurred. Challenging the defendant's version of events did not shift the burden.

None of the comments made by the prosecutor were improper, let alone flagrant or ill-intentioned. Defendant is unable to show prosecutorial misconduct occurred in the present case.

6. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT HE WAS PREJUDICED BY ANY DEFICIENCY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

*Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177

(1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant argues that defense counsel's decision not to object to comments by the prosecutor in closing was ineffective. Appellant's Opening Brief at 42. But for the reasons set forth in the preceding section, the prosecutor's comments were not improper. Therefore, defendant is unable to show his defense counsel was ineffective for failing to object when there was no error that was occurring. Further, when the defense attorney's performance is looked at in the record as a whole, it is apparent that defendant did not receive ineffective assistance of counsel. Defendant is unable to meet his burden of showing defense counsel's performance was deficient and that he was prejudiced by such a deficiency.

7. DEFENDANT IS NOT ENTITLED TO RELIEF  
UNDER THE CUMULATIVE ERROR  
DOCTRINE WHEN HE HAS FAILED TO SHOW  
ANY ERROR OCCURRED.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been a harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296,

332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Defendant in the present case has failed to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. He is not entitled to relief under the cumulative error doctrine.

8. THIS COURT SHOULD REMAND WITH ORDERS TO MODIFY SEVERAL COMMUNITY CUSTODY CONDITIONS IN APPENDIX H.

When a defendant is sentenced under RCW 9.94A.701, the sentencing court must sentence the defendant to community custody. RCW 9.94A.703. As part of the term of community custody, there are certain conditions the court must order the defendant to comply with, and certain conditions the court has discretion to impose upon the defendant. RCW 9.94A.703(1)-(3).

Appellate courts review de novo whether the trial court had statutory authority to impose a community custody condition. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). If the trial court

had statutory authority, the imposition of the community custody decision is reviewed for abuse of discretion. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The Washington Supreme Court has held that issues of vagueness in sentencing potentially fall under such erroneous sentences and warrant review for the first time on appeal. *Bahl*, 164 Wn.2d at 745. When a trial court imposes an unauthorized condition on community custody, we remedy the error by remanding the issue with instructions to strike the unauthorized condition. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Defendant in the present case challenges five conditions of community custody imposed by the court in Appendix H of his judgment and sentence. Appellant's Opening Brief, at 43-49. Each is addressed below.

- a. This Court Should Remand to Modify Conditions 14 and 15 of Appendix H.

As part of his term of community custody, the court ordered the defendant to comply with conditions stating “[d]o not purchase, possess, or consume alcohol” and “[d]o not enter into any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores.” CP 100-102. While the current version of RCW 9.94A.703 authorizes the trial court to impose the condition that defendant “[r]efrain from possessing or consuming alcohol”, the version in effect at the time defendant committed his offense stated only that the court may impose the condition that the

defendant “[r]efrain from consuming alcohol.” RCW 9.94A.703(3)(e); Laws of 2009, ch. 214, § 3. As a result, this Court should remand with orders to modify community custody condition number 14 to read “Do not consume alcohol.”

Similarly, at the time defendant committed his offense, there was no express condition authorizing the trial court to order defendant to refrain from entering “any location where alcohol is the primary product, such as taverns, bars, and/or liquor stores” as ordered in condition 15 of appendix H of defendant’s judgment and sentence. Laws of 2009, ch. 214, § 3. Instead, this condition appears to fall within the trial court’s authority to order as a “crime-related prohibition”. *Id.* “A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). An appellate court reviews the factual basis for crime-related conditions under a “substantial evidence” standard. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). In the present case, there was no evidence that alcohol directly related to the circumstances of the crime. As a result, the State agrees that this Court should remand with orders to strike Condition 15 from Appendix H of defendant’s judgment and sentence.

- b. Condition 23 of Appendix H is authorized by statute and not unconstitutionally vague.

In Condition 23 in Appendix H of the judgment and sentence the trial court ordered that defendant comply with the following term of community custody: "Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court." CP 100-102. Defendant argues that this condition is not authorized by statute and is unconstitutionally vague.

Former RCW 9.94A.703(3)(b), gave the trial court the discretion to order that as part of a defendant's community custody conditions, that "refrain from direct or indirect contact with the victim of the crime or a specified class of individuals." Laws of 2009, ch. 214, § 3. The specified class must bear some relationship to the crime. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010). The court also has the authority to order the defendant to "[c]omply with any crime related prohibitions." RCW 9.94A.703(3)(f). "A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

In the present case, defendant was found to have molested a ten year old girl in a situation where other people were nearby. Because a

minor child was the victim in this case, and prohibiting the defendant from going to places where they are more likely and known to be is reasonably crime related and necessary to protect the public, the trial court had statutory authority to impose this condition.

Due process requires that laws not be vague. *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). A community custody condition is not vague as long as it (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards that are definite enough to “ ‘protect against arbitrary enforcement.’ “ *Id.* At 653 (internal quotations omitted) (*quoting State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008)). The requirement of sufficient definiteness does not demand impossible standards of specificity or absolute agreement concerning a term's meaning; some amount of imprecision in the language is allowed. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); *see also City of Seattle v. Eze*, 111 Wn.2d 22, 27, 759 P.2d 366 (1988)(statute is not unconstitutionally vague merely because person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct). In deciding whether a term is unconstitutionally vague, it is considered in the context in which it is used. *Bahl*, 164 Wn.2d at 754. The appellate court reviews de novo whether the trial court had statutory authority to impose a community custody condition. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010).

In *Irwin*, the defendant pleaded guilty to second degree child molestation and the trial court imposed the following community custody condition: “ ‘Do not frequent areas where minor children are known to congregate, as defined by the supervising [community corrections officer (CCO)].’ “ *Id.* At 649. The *Irwin* court held that the condition was unconstitutional under both prongs of the vagueness analysis. *Id.* At 654-55. Under the first prong, the court reasoned that without some clarifying language or an illustrative list of prohibited locations, simply prohibiting the defendant from going where “ ‘children known to congregate’ “ did not give ordinary people “sufficient notice to ‘understand what conduct is proscribed.’ “ *Id.* At 655 (internal quotation marks omitted) (*quoting Bahl*, 164 Wn.2d at 753). Under the second prong, the court reasoned that allowing the CCO to designate prohibited locations was constitutionally impermissible because it was susceptible to arbitrary enforcement. *Id.*

Unlike the condition in *Irwin*, the condition in the present case does contain clarifying language and an illustrative list of prohibited locations where defendant is not allowed to go. It therefore gives defendant, and ordinary people, a fair warning of the proscribed conduct. It also does not give boundless authority to the CCO to designate prohibited locations. Rather, it only requires the defendant to obtain permission from the Court in advance if it is necessary for him to go to such a location. As a result, this condition is not like the vague condition that was unconstitutional in *Irwin*. The trial court had the authority to

impose condition 23 of Appendix H and it is not unconstitutional as in

*Irwin.*

- c. Condition 27 and 29 of Appendix H Do Not Relate to the Crime for Which the Defendant was Convicted and This Court Should Remand with Orders to Strike the Conditions from Defendant's Judgment and Sentence.

The trial court in the present case ordered defendant to comply with Condition 27 of Appendix H in his judgment and sentence which states “You are also prohibited from joining or perusing any public social websites (Facebook, Myspace, Craigslist, etc.) Skyping, or telephoning any sexually-oriented 900 numbers.” CP 100-102. It also ordered defendant to comply with Condition 29 which states “Do not patronize prostitutes or any businesses that promote the commercialization of sex.” CP 100-102.

Again, under RCW 9.94A.703(3)(f), the court has the authority to order the defendant to “[c]omply with any crime related prohibitions.” “A ‘crime-related prohibition’ is an order prohibiting conduct that directly relates to the circumstances of the crime.” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

There was no evidence adduced at trial to suggest that defendant used public social websites or that sexually explicit materials, prostitutes, or establishments that promote the commercialization of sex were used by

defendant or visited by defendant in the perpetration of his crimes. As such, community custody conditions which prohibit the defendant from using public social sites or patronizing do not fit within what the trial court is authorized to impose as "crime-related prohibitions" under RCW 9.94A.703(3)(f) in the present case.

This Court should remand and order the trial court to enter an order modifying the judgment and sentence which strikes Condition 27 and 29 from Appendix H of defendant's judgment and sentence.

9. DEFENDANT IS UNABLE TO SHOW THE TRIAL COURT ERRED AS IT CONSIDERED DEFENDANT'S ABILITY TO PAY WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS.

In *Blazina*, the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

*Blazina*, 182 Wn.2d at 837-38. See RCW 10.01.160(3).

Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present, but also the future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Blazina*, 182 Wn.2d at 837-38. The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Under GR 34, a person who receives assistance under a needs-based, means-tested assistance program is considered indigent for purposes of qualifying for court-appointed counsel. GR 34(3). GR 34 also discusses the federal poverty level, living expenses, and other compelling circumstances as considerations for qualifying for court-appointed counsel. *Id.*

Defendant claims that the trial court failed to consider the defendant's ability to pay when imposing the legal financial obligations in the present case. However, this is contrary to the record which shows the trial court not only considered the defendant's ability to pay, it decreased the recommended amount by the prosecutor based on the defendant's financial situation.

During sentencing in the present case, the prosecutor asked that the following legal financial obligations be imposed: \$500 Crime Victim

Penalty Assessment, \$200 court costs, \$100 DNA sample fee, and \$1500 DAC recoupment. SRP 4. Defense counsel requested that the court impose the “bare minimum” as the defendant owed money for credit cards, other expenses and his government assistance would be suspended while the defendant was incarcerated. SRP 7. The court imposed first three legal financial obligations requested by the State, but specifically declined to impose any DAC recoupment because the defendant was indigent. SRP 8.

Because it is clear from the record that the trial court did take into consideration the defendant’s ability to pay when imposing the legal financial obligations, defendant’s claim that the court erred is without merit.

D. CONCLUSION.

The State respectfully requests this Court affirm defendant’s conviction, but remand for modification of the community custody conditions consistent with the above argument by the State.

DATED: April 13, 2017.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Miller 32724je", is written over the printed name of Chelsea Miller.

CHELSEY MILLER  
Deputy Prosecuting Attorney  
WSB # 42892

Certificate of Service:

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

4/14/18 Sharon Ka  
Date Signature

**PIERCE COUNTY PROSECUTOR**  
**April 14, 2017 - 10:33 AM**  
**Transmittal Letter**

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