

66766-1

66766-1

NO. 66766-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BRIAN STARK,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANDREA DARVAS

**STATE'S RESPONSE TO APPELLANT'S
STATEMENT OF ADDITIONAL GROUNDS**

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A. ISSUES PRESENTED

1. Stark's right to an open and public trial was not violated when the prosecutor and defense counsel interviewed a witness outside the presence of the jury.

2. Stark had adequate opportunity to prepare for cross-examination of relevant witnesses.

3. The court properly admitted testimony about the victim's trauma narrative.

4. The trial court was not required to conduct an *in camera* review of counseling records.

5. There was no error with respect to child hearsay.

6. The defendant was convicted only of crimes occurring in King County.

7. The jury was properly instructed with respect to unanimity.

8. The defendant was not sentenced separately for the same criminal conduct.

9. The jury was properly instructed with respect to counts II and III and double jeopardy was not implicated.

10. The trial court properly proceeded with sentencing on its scheduled date and time.

11. Appellant's right to confrontation was properly safeguarded.

12. The prosecutor's closing argument with respect to the burden of proof was proper and did not minimize the State's burden.

13. The prosecutor did not commit misconduct by invoking the missing witness doctrine.

14. Stark's conviction for incest in the first degree was supported by the evidence.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 24, 2012, Appellant Brian Stark filed a pro se Supplemental Grounds on Appeal in this matter. On June 4, 2012, the State was asked to respond by Commissioner Mary Neel. The State's response to the appellant's fourteen issues follows below.

2. SUBSTANTIVE FACTS

The State will rely on the factual summary provided in Brief of Respondent. As any additional facts become necessary for

purposes of the arguments below, those will be included in each applicable section.

C. ARGUMENT

1. STARK'S RIGHT TO AN OPEN AND PUBLIC TRIAL WAS NOT VIOLATED WHEN THE PROSECUTOR AND DEFENSE COUNSEL INTERVIEWED A WITNESS OUTSIDE THE PRESENCE OF THE JURY.

Although very little actual argument and/or case law is offered in support, Stark appears to argue that he was denied an open and public trial because the parties conducted a mid-trial witness interview outside the presence of the appellant, the jury, and the public. Stark's claim is without merit.

Criminal defendants have a right to be present at all critical stages of a trial, though that right is not absolute. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). At its core, the right applies to when evidence is being presented, or when the defendant's presence has a relation reasonably substantial to the fullness of his opportunity to defend against the charge. In re Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593 (1998).

Here, Stark appears to argue that it was improper for the parties to interview Robin and Kailei Jordan anywhere but in open

court after the trial had commenced. However, Stark cites no case law to support this contention. In fact, there is no authority that the State has been able to locate that would support the assertion that a criminal defendant who is represented by counsel has the right to attend a pretrial preparatory/investigative interview of a witness. In this case, although the follow-up interviews at issue occurred after trial had begun, they were no different in their function or purpose, from any other pretrial witness interview. Neither Stark nor the public had any right to attend or participate in those interviews. Stark's claim should fail.

2. STARK HAD ADEQUATE OPPORTUNITY TO PREPARE FOR CROSS-EXAMINATION OF RELEVANT WITNESSES.

Stark next argues that because the parties learned of the victim's "trauma narrative" after trial had begun, he was denied the opportunity to adequately prepare for trial and the cross-examination of State's witnesses. His claim should be denied.

On the morning of October 14, 2010, after a jury had been selected and opening statements given, the prosecutor informed defense counsel Brad Meryhew that he had received new information from two scheduled witnesses; the trial court was

subsequently notified as well. 1RP 45-47. Specifically, the prosecutor learned that the victim, C.W., had, at the direction of her counselor, completed a "trauma narrative" and read it to witnesses Robin and Kailei Jordan prior to trial but after the interview they provided counsel. 1RP 4-47. Both the prosecutor and defense counsel expressed concern about proceeding with the witnesses' testimony without further addressing this with them, and perhaps obtaining a copy of the trauma narrative itself. 1RP 47-48. The court agreed that this presented an unanticipated issue, and that both parties should be afforded the opportunity to further interview the Jordans prior to presenting any testimony. 1RP 49, 58. To help accommodate such an interview, the court provided the services of the court reporter, and also helped secure a room in which the interview could occur. 1RP 49-50. Those interviews subsequently took place. 1RP 52.

After those interviews, which concluded around 10:30 a.m., Mr. Meryhew informed the trial court that he could be ready to cross-examine both witnesses in the context of trial around 2:30 or 3:00 p.m. that same day, assuming no additional discovery was forthcoming. 1RP 51, 56. The prosecutor subsequently indicated that he would like to look into obtaining an actual copy of the

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trauma narrative at issue, but that he would need time to speak with the victim and/or her counselor. 1RP 54, 57. The trial court agreed to give the State time to do that, and excused the jury and recessed the trial until the following Monday as a result. 1RP 62.

In reality, the trial did not recommence until Tuesday, October 19, 2010, giving the parties four additional days to prepare for trial. 2RP 64. In the meantime, the trauma narrative was obtained and provided to defense, and was later marked by defense for identification at trial. Supp. CP ____ (Sub. No 49B, List of Exhibits p.3, Exhibit 13). Taking into account the above facts, Appellant has failed to identify any specific prejudice that resulted from the unintentional late disclosure of this material, nor has he identified any claim of prejudice or inadequate preparation by defense counsel after the parties had time to investigate this new information. Mr. Stark was afforded a fair trial; accordingly, his claim must fail.

3. THE COURT PROPERLY ADMITTED TESTIMONY ABOUT THE VICTIM'S TRAUMA NARRATIVE.

Appellant argues that the trial court erred in allowing testimony regarding C.W.'s "trauma narrative" that she did as a part

of her counseling. In so arguing, Stark cites to State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987). No objection was offered to this testimony. Accordingly, this issue was not properly preserved for appeal. Even if the Court disagrees, however, Black is inapposite and Stark's claim should be rejected.

In State v. Black, the court evaluated whether expert testimony regarding rape trauma syndrome—a consistent profile of symptoms purportedly exhibited by rape victims—should be deemed admissible in a rape case. In holding that such testimony is unduly prejudicial, the court stated that “it constitutes an opinion as to the guilt of the defendant, thereby invading the exclusive province of the finder of fact.”

No such testimony was offered in this case. Rather, testimony by the victim and her friends was offered about the effect Appellant's actions had on her. 2RP 78; 3RP 293. She also discussed having done a “trauma narrative” with her therapist. 3RP 293. The admission of this testimony was not unfairly prejudicial, as it did not constitute an expert opinion on Stark's guilt, but rather addressed C.W.'s personal experience. The holding in Black was never designed to limit or exclude this type of testimony; rather, Black specifically indicated that such lay testimony was

patently admissible and appropriate. Black, 109 Wn.2d at 349.

Because the trial court here did not allow any inappropriate testimony, there was no error and Stark's claim should be rejected.

4. THE TRIAL COURT WAS NOT REQUIRED TO CONDUCT AN *IN CAMERA* REVIEW OF COUNSELING RECORDS.

Appellant next argues that the Court should have conducted an in camera review of C.W.'s counseling records. He is mistaken. First, aside from the trauma narrative which was obtained by the State and provided in discovery, no other counseling records were requested by either party. While at first blush it appears there was some limited discussion about C.W.'s counseling records beyond the trauma narrative, a careful reading of the record demonstrates that the only "counseling record" that was being discussed was the trauma narrative itself; nothing more was sought. 1RP 53-57. Moreover, even if more extensive records had been requested, it is highly likely that such a request would have been denied. Rape victims have rights; a defendant must make a particularized factual showing that information useful to the defense is likely to be contained in those records. State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993). No such showing was made here.

Accordingly, there was no error in either party's decision not to request more detailed counseling records from C.W. and/or her counselor. Appellant's claim should be denied.

5. THERE WAS NO ERROR WITH RESPECT TO CHILD HEARSAY.

Stark next contends that the trial court erred by admitting C.W.'s statements to her mother when she first attempted to report the abuse at the hands of the appellant. Stark asserts that they should have been governed by RCW 9A.44.120 (our child hearsay statute), and that a hearing to determine their reliability should have been held. Stark is mistaken and his claim should be rejected.

First, there is some factual dispute as to how old C.W. was at the time of her first report. C.W. testified that she believed she was seven or eight at the time. 2RP 222. However, her mother—a witness called by Stark himself—asserted that she was eleven or twelve. 5RP 665-66. Based upon the testimony elicited by the defense, no such hearing was even remotely necessary, as RCW 9A.44.120 only applies to statements made by a child under the age of ten.

Second, Stark failed to object to the absence of a hearing or to the testimony itself at trial. In fact, quite the opposite—as noted above, the same testimony was also elicited by the defense in its case-in-chief. 3RP 665-66. Moreover, the “child”—*seventeen* at the time of her appearance in court— testified and was available for cross-examination, as was her mother, the recipient of the report. Under these circumstances, Stark’s failure to raise a timely objection precludes appellate review. State v. Warren, 55 Wn. App. 645, 569-50, 779 P.2d 1159, rev. denied, 114 Wn.2d 1004 (1989), citing State v. Leavitt, 111 Wn.2d 66, 71-72, 758 P.2d (1988).

Finally, even if the court finds that appellate review is not barred, the minimal statements admitted from the time C.W. was quite young were not admitted by the court as child hearsay, but rather admitted as “hue and cry” evidence and to explain the subsequent delay in more aggressive or effective reporting by C.W. Such evidence is routinely deemed admissible in our courts. See, e.g., State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779 (1980). C.W. testified in this case that she was attempting to ascertain how her mother would respond to a report of abuse. Her mother’s reaction made it clear in her mind that she should not

raise the issue again, thus explaining why she waited so long to notify someone else of the abuse. 2RP 223-25.

For the reasons above, it is clear that Stark's claim of error is misplaced.

6. THE DEFENDANT WAS CONVICTED ONLY OF CRIMES OCCURRING IN KING COUNTY.

Stark next argues that he was improperly convicted in Count I for acts that occurred outside King County. He is mistaken.

C.W. testified to four distinct incidents of abuse, and it was upon those four incidents that the State explicitly relied in closing argument. 2RP 210-15, 231, 234, 241; 6RP 877-79, 894-95. The first of those incidents, upon which Count I was based, occurred, per C.W., at the Benson Hill apartments in Renton, within King County. 2RP 202-10. In closing argument, the prosecutor went out of his way to identify which incident was represented by each count, matching the Benson Hill apartment incident with Count I. 6RP 877-79, 894-95.

Additionally, to ensure that there was no confusion, and that the jury only relied upon incidents that occurred within King County, the court included language in the "to convict" instruction for Count I

that indicated that the act had to have occurred in King County rather than just in the State of Washington. CP 46. This was coupled with instruction 6, which stated:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of allegations of sexual misconduct occurring outside of King County in Spanaway, Washington, and may be considered by you only for the purpose of determining whether the defendant demonstrated a lustful disposition towards C.W. *You may not consider it for any other purpose.* Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 35 (emphasis added). Jurors are presumed to read the instructions as a composite whole and to follow them. State v. Willis, 67 Wn.2d 681, 685-86, 409 P.2d 669 (1966). For that reason, we must assume that the jurors followed the instructions here that precluded them from convicting the defendant for any act other than those that occurred in King County. There was no error.

7. THE JURY WAS PROPERLY INSTRUCTED WITH RESPECT TO UNANIMITY.

Mr. Stark next argues, for the first time on appeal, that the trial court erred in giving a unanimity instruction, commonly referred

to as a Petrich¹ instruction, that only applied to two of the four counts charged. CP 51. However, given the evidence presented, the charging periods alleged, and the specific election by the prosecutor, the jury was properly instructed. Mr. Stark's claim is without merit.

To begin with, unlike many cases in which Petrich instructions—or the lack thereof—are at issue, each of the four counts charged in this matter had different charging periods; the only two that had any overlap whatsoever—and thus were the subject of the unanimity instruction given—were counts II and III. CP 40, 42, 46, 50, 51. Moreover, although C.W. talked in general terms about ongoing abuse at the hands of Stark, she only testified to four incidents with any specificity—one incident for each count charged. Thus, for example, for count I, there was only one incident—the attempted child molestation incident that took place when C.W. was six where Stark removed her underwear and stared at her vagina—that could have comprised that charge. Thus no unanimity instruction was even needed. See State v. Forseth, 156 Wn. App. 516, 520-51, 233 P.3d 902 (2010) (a unanimity instruction is only needed in “multiple acts” cases). The same was true on

¹ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

Count IV, which occurred when C.W. was fourteen and Stark got on top of her and tried to insert his penis in her vagina. Because there was no overlap in the charging period, and only one incident fit the time frame and elements of each respective count, unanimity was not an issue. Nonetheless, in an abundance of caution, such an instruction was given with respect to Counts II and III because there was a slight period of overlap with respect to the charging periods for those two charges. This only further ensured that the jury was unanimous on the crimes charged.

Moreover, as mentioned above, the prosecutor here specifically told the jury which acts the State was relying on for each of the counts against Stark. A defendant has a constitutional right to be convicted by a jury that unanimously agrees that the crimes charged in the information have been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When there is evidence and testimony of multiple acts, any one of which could form the basis for a charged count, *either* the State must tell the jury which act to rely on its deliberations *or* the court must instruct the jury to agree unanimously on a specific criminal act. Id. 110 Wn.2d at 409, citing State v. Petrich, 101 Wn.2d at 570, and State v. Workman, 66 Wash. 292, 294-95, 110 P. 751 (1911).

This “either/or” rule, originally outlined in Petrich modified the previous holding in Workman that required an election by the State. Petrich, 101 Wn.2d at 672; State v. Brown, 55 Wn. App. 738, 746, 780 P.2d 880 (1989). Petrich recognized that there are situations in which an election by the State is impractical. Petrich, 101 Wn.2d at 572. This court has noted one such situation:

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim which memory may be clouded by a blur of abuse and a desire to forget.

Brown, 55 Wn. App. at 746. Since Petrich, it is well settled that the requirement of jury unanimity is met by either an election on the part of the State or an instruction by the court. See State v. Vander Houwen 163 Wn.2d 25, 177 P.3d 93 (2008) (Because the State did not articulate what evidence related to which count, in the absence of a unanimity instruction, it was impossible to ensure that all of the jurors voted to convict based on the same evidence.).

During the trial, as noted, C.W. testified to four instances of abuse. Specifically, she testified to the incident in Stark's bed when she was six (described above); an incident where Stark took her to a home under construction and rubbed her vagina; an incident when she was between eleven and twelve and Stark licked her vagina; and an incident when she was fourteen and he tried to insert his penis in her. 2RP 210-15, 219-21, 231, 241; 6RP 877-79, 894-95. During closing argument, the State specifically informed the jury what evidence to rely on for each of the four counts. 6RP 877-79, 894-95, 894-95. It was abundantly clear from the prosecutor's remarks what evidence the State relied on for each of the four charged counts. There was no ambiguity regardless of the Petrich instruction. Because the State specifically told the jury which of the acts of molestation and incest related to each count, the defendant's constitutional right to a unanimous jury verdict was protected. The court did not err.

8. THE DEFENDANT WAS NOT SENTENCED SEPARATELY FOR THE SAME CRIMINAL CONDUCT.

In his eighth issue, Stark argues that because the charging periods for Counts II and III overlap, he was sentenced for the

same criminal conduct. His analysis is flawed and should be rejected.

In sentencing a defendant for two or more current offenses, all current convictions should be counted in calculating the offender score unless the court finds that the current offenses encompass the same criminal conduct. RCW 9.94A.589(1)(a). "Same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." Id.; State v. Fisher, 131 Wn. App. 125, 133, 126 P.3d 62 (2006). "If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score." State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Here, as described in detail in the State's response to Issue 7 above, the acts which constituted the convictions in each count—including counts II and III—were separate and distinct and clearly delineated for the jury. Count II was based on an incident when C.W. was ten and Stark rubbed her vagina in a home under construction; Count III occurred when C.W. was eleven or twelve and Stark forced himself on top of her. 6RP 877-79, 894-95.

Moreover, the elements of child molestation (Count II) and Incest (Count III) differ significantly in that incest requires sexual intercourse. For these reasons, the crimes here did not involve the same criminal intent, time, or place and were not the same criminal conduct. Stark was properly sentenced.

9. THE JURY WAS PROPERLY INSTRUCTED WITH RESPECT TO COUNTS II AND III AND DOUBLE JEOPARDY WAS NOT IMPLICATED.

Stark next argues that the jury was not told that the act constituting child molestation in the first degree under Count II could not be the same as the act constituting incest in the first degree under Count III. Stark is mistaken. In the “to convict” instructions for each of those counts, the jury was specifically instructed that in order to convict Stark, it had to be “on an occasion separate and distinct” from the other count.” CP 40, 50. This instruction was in keeping with the requirements and protections enumerated by State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007). There was no error.

10. THE TRIAL COURT PROPERLY PROCEEDED WITH SENTENCING ON ITS SCHEDULED DATE AND TIME.

Stark next alleges that the trial court erred when it rejected a suggestion by his counsel that sentencing be continued in light of a letter sent to the court alleging witness misconduct. This claim is without merit. The letter sent to the court by C.W.'s maternal grandmother made allegations that C.W. had had inappropriate contact with witnesses during the course of the trial. However, the allegations were vague and unsubstantiated at best, and even defense counsel represented to the court that he had no reason to believe that misconduct had occurred:

I did indicate to [the prosecutor], in looking over the records, there is only one or maybe two phone calls that give even the most suspicious person any reason to really look at the timing of those and surmise that something might have happened. And as an officer of the Court, I will tell you I don't have anything more....

7RP 5.

In Washington, under ER 615, a court may, but need not, order that witnesses be excluded. Where exclusion is ordered and subsequently violated with the connivance or knowledge of a party or counsel, the court may refuse to allow the witness to testify. State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984). However,

this is an extreme remedy and should not be employed when there is no evidence to suggest that the offending conversation involved any collusion. State v. Skuza, 156 Wn. App. 886, 235 P.3d 842 (2010).

Here, the letter sent to the Court alleged that C.W. spoke on the phone with witness Lori Nielson for five minutes after C.W. testified, and also claimed that C.W. received information about her mother's testimony via text message after her mother testified for the defense. Finally, the letter claimed that C.W. received information about defense counsel's demeanor from witness Kailei Jordan, also via text message.

These allegations, *even if taken as true*, are essentially meaningless. First, while witnesses were instructed not to discuss the *subject* of their testimony, contact in general was not prohibited. 7RP 8. There is no violation in alerting a witness to a defense attorney's demeanor; indeed, that is information that a prosecutor may very well share with a victim or witness prior to their testimony and cross-examination. Second, any information C.W. obtained about the trial *after* her testimony was not a violation of the ruling. RCW 7.69.030 specifically allows victims to be physically present in court during trial after they have testified. Because C.W. could

have been there during her mother's testimony, there was no harm in someone else sharing with her its content—again, assuming the allegation had any factual basis. Finally, as the prosecutor pointed out quite eloquently, there was no reason to suspect any untoward behavior on C.W. or Lori Neilson's part based solely on a short phone call after C.W.'s testimony ("It defies credulity to think in a five-minute telephone conversation, Lori Nielson and C.W. could have discussed anything that would have had any impact whatsoever."). 7RP 7.

Given this limited information, and the non-committal—at best—comments from defense counsel, there was no legitimate basis to continue sentencing. As the trial court pointed out, should additional concerning information have come to light after sentencing, defense counsel could properly have raised that at a later date; clearly, no such information was uncovered. The court did not err in proceeding with sentencing.

11. APPELLANT'S RIGHT TO CONFRONTATION WAS PROPERLY SAFEGUARDED.

In Stark's eleventh claim, he alleges that his right to confrontation was violated because a large board was placed

between him and the complaining witness. Not only was no objection made at the time of trial, there is absolutely no evidence of this whatsoever in the record. In fact, in support of his claim, he refers to 6RP 936, wherein *after closing argument* the trial court asked the prosecutor to move a board (presumably a closing exhibit) that was blocking the judge's view of several of the jurors. This was *days* after C.W. testified and there is no indication it blocked Stark's view of anything. This claim is wholly meritless and should be rejected.

12. THE PROSECUTOR'S CLOSING ARGUMENT WITH RESPECT TO THE BURDEN OF PROOF WAS PROPER AND DID NOT MINIMIZE THE STATE'S BURDEN.

Stark next claims that the prosecutor misstated the reasonable doubt standard in his closing argument, thus misleading the jury. This claim, too, is without basis and should be dismissed.

At the conclusion of the evidence, the trial court provided the jury with WPIC 4.01 that contains language explaining reasonable doubt as having an "abiding belief in the truth of the charge." CP 34. In his closing argument, the prosecutor reiterated this standard in explaining the high level of confidence the jury had to

have in Stark's guilt before convicting him of the charges levied. 6RP 892-93. At no point did the prosecutor, as Stark alleges, argue—or even imply—that such an abiding belief should not be arrived at after “full, fair and careful consideration at the evidence or lack of evidence.” Quite the contrary: the prosecutor spent considerable time discussing with the jury how they should evaluate the testimony, consider the inconsistencies, evaluate credibility and address the motives of the various witnesses. 6RP 880-92. At no point did the prosecutor minimize, directly or indirectly, the State's burden in the case. Rather, he referred directly to WPIC 4.01, and used language directly from the instruction itself; the fact that he did not repeat the entire instruction word for word each time he addressed it is of no consequence. 6RP 892-93. The jury was provided with an accurate recitation of the burden of proof by both the instructions and the prosecutor himself. See, e.g., State v. Thorgerson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011) (holding that the prosecutor did not improperly argue the burden of proof when he urged the jury to convict the defendant if they believed the victim). There was no error.

13. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY INVOKING THE MISSING WITNESS DOCTRINE.

Stark next argues that the prosecutor committed misconduct by shifting the burden of proof in his closing argument when he commented on Stark's failure to call two witnesses. His assertion fails in the analysis.

To establish prosecutorial misconduct, a defendant must show that the conduct complained of was both improper and prejudicial. State v. Luvane, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Prejudice is established only if the defendant demonstrates a substantial likelihood that the alleged misconduct affected the jury's verdict. State v. Thach, 126 Wn. App. 297, 316, 106 P.3d 782 (2005). Moreover, absent a proper objection, a claim of prosecutorial misconduct is waived unless the misconduct was so flagrant and ill-intentioned and caused such enduring prejudice that it could not be neutralized with a curative instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's comments during closing argument must be viewed in the context of the total argument, the issues in the case, and the evidence addressed in the argument. State v. Dhaliwal, 150 Wn.2d

559, 578, 79 P.3d 432 (2003). “Courts afford a prosecutor wide latitude in closing argument to draw and express reasonable inferences from the evidence.” Thach, 126 Wn. App. at 316.

Here, the prosecutor—in response to an argument by defense counsel—argued in closing that Stark could have called two lay witnesses to whom C.W. reportedly told about the abuse if defense thought they would be helpful to their case. 6RP 921, 929. There was no objection by Stark when the argument was made. As such, in order to prevail on a misconduct claim here, Stark would need to establish that the prosecutor’s comments were flagrant and ill-intentioned and created incurable and enduring prejudice. Stark has failed to make such a showing. Moreover, Stark has failed to meet even the lower burden of demonstrating that the comments were either improper or prejudicial.

In fact, such comments in the context of the overall arguments in the case were not improper. While a prosecutor cannot normally comment on a defendant’s lack of evidence, under certain circumstances that rule does not apply. State v. Cheatam, 150 Wn.2d 626, 652-53, 81 P.3d 830 (2003). Here, because the defense had commented on the witnesses but had failed to call them, it was proper for the prosecutor to respond by pointing out

that the defense could have called the witnesses in their case, but chose not to. Id. Moreover, a prosecutor's improper remarks are not grounds for reversal if defense counsel invited or provoked the comments, they are a pertinent reply to defense counsel's arguments, and are not so prejudicial that a curative instruction would be ineffective. State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004) (citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 564 U.S. 1129 (1995)). That is clearly the case here.

In short, Stark has failed to establish any error at all, let alone any flagrant or ill-intentioned argument by the prosecutor. His assertion of misconduct should be rejected.

14. STARK'S CONVICTION FOR INCEST IN THE FIRST DEGREE WAS SUPPORTED BY THE EVIDENCE.

In his final argument, Stark claims that his conviction for incest in the first degree cannot stand because the State, in establishing sexual intercourse between Stark and C.W., failed to prove penetration of C.W.'s vagina by Stark's penis. However, Stark has failed to recognize that the applicable definition of sexual intercourse encompasses "any act of sexual contact between

persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex." RCW 9A.44.010(1)(c). Because there was clear and unequivocal evidence presented that Stark had licked C.W.'s genitals and because that was the act upon which the incest conviction was based, the State presented sufficient evidence to sustain the conviction. 2RP 231; 6RP 878. Stark's final claim, like the others, must fail.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Stark's conviction for attempted child molestation in the first degree, child molestation in the first degree, incest in the first degree and child molestation in the third degree as charged in the amended information.

DATED this 7th day of July, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

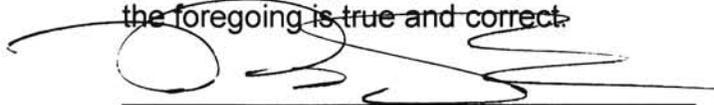
By: Christine W. Keating #18887
CHRISTINE W. KEATING, WSBA #30821
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

for

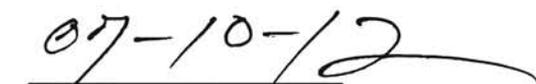
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Brian Stark, appellant, at Washington Correctional Center, P.O. Box 900, Shelton, WA 98584, containing a copy of the State's Response to Appellant's Statement of Additional Grounds and Motion to File Overlength Brief, in STATE V. BRIAN STARK, Cause No. 66766-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

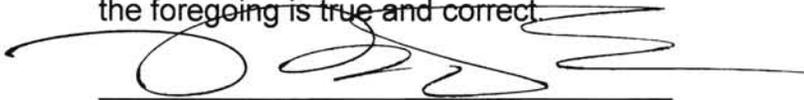


Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the State's Response to Appellant's Statement of Additional Grounds and Motion to File Overlength Brief, in STATE V. BRIAN STARK, Cause No. 66766-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

07-10-12

Date