

NO. 68056-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIS A. WHIPPLE,

Appellant.

2012 JUL 19 PM 1:22  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
*[Signature]*

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Evidence established that when S.T. was less than twelve years old she stayed at her grandmother's house in Monroe, Washington, every other weekend from September 1, 2009 through July 31, 2010. Whipple also lived at the house during that time period. On four separate and distinct occasions during this period Whipple contacted S.T.'s sexual organs with his mouth. S.T. has never been married to Whipple and he is at least twenty-four months older than her. Was the evidence sufficient for a rational trier of fact to find the essential elements of four counts of rape of a child in the 1<sup>st</sup> degree beyond a reasonable doubt?

2. In challenging statements made by the prosecutor in closing argument Whipple bears the burden. Has Whipple established that the prosecutor's conduct was both improper and prejudicial?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

S.T. was born in August 1999. She was twelve years old when she testified at trial. In the third grade S.T. was diagnosed with a mentally disability. She is slow and does not catch on in school, she attends special education classes, she cannot spell her

last name, she does not know what school she goes to, she cannot tell you the name of the city where she lives, and she refers to her genitalia as her penis.<sup>1</sup> Her disability made S.T. an easy target; she was sexually abused by several male relatives.<sup>2</sup> 1RP 15-18, 24-25, 32, 48-50, 63, 65, 71-76, 79, 84, 87-88, 105-106.<sup>3</sup>

Starting in September 2009, and continuing through June 2010, S.T. spent every other weekend at her grandmother's house in Monroe, Washington. Willis Allen Whipple, lived at the same house between November 2009 and January 2011. Whipple is at least 41 years old. S.T. and Whipple have never been married. 1RP 23, 40-41, 80-81, 83-84; 2RP 176-178, 187-189.

S.T. likes chocolate and sweets. She was not allowed to get into them and would get in trouble if she did. One night while S.T. was at her grandmother's house in Monroe, Whipple woke her up

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<sup>1</sup> S.T.'s description of where on her body her "penis" is located corresponded with the location of her sex organs. 1RP 48-49.

<sup>2</sup> Whipple's claim that the others were not prosecuted is misleading. Appellant's Brief 1, 4. Charges were not filed in 2004 because S.T. was not competent to testify. One relative was convicted of 1<sup>st</sup> Degree Child Molestation on 11/30/2011 and is currently serving 15 to 36 weeks in JRA. Another was not charged due to the fact that he was under twelve years old at the time of the offense. The statute of limitations has not run on offenses that occurred when S.T. was nine years old.

<sup>3</sup> The report of proceedings for the trial and sentencing consists of two consecutively paginated volumes; "1RP" and "2RP." A third volume contains jury selection and opening statements; "3RP."

and told her to come into the bedroom and he would give her chocolate. S.T. went with him. To get the chocolate she had to take off her clothes and let Whipple touch her in “wrong places<sup>4</sup> ... my penis, my butt, and my boobies.” When asked why she took her clothes off S.T. replied, “How else am I going to get chocolate?” Whipple was the only person who offered S.T. chocolate before abusing her sexually. 1RP 27-33, 63, 127-128, 133-136; 2RP 184, 189-190.

On a different night, S.T. got up to go to the bathroom and Whipple followed her. Whipple again offered S.T. chocolate. While they were in the bathroom Whipple licked S.T.’s “pee-pee.”<sup>5</sup> S.T. was standing, Whipple was on his knees. The licking happened on more than three different days or nights.<sup>6</sup> The licking only happened in the bathroom and the licking never involved anyone other than Whipple. 1RP 39-40, 51-55, 76.

S.T. was scared to tell about what happened with Whipple. When asked by the court if she swore and promised to tell the truth

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<sup>4</sup> S.T.’s mother told her that genitals are “don’t touch areas.” 1RP 85, 89.

<sup>5</sup> S.T. described “pee-pee” as “a private place where no one should be touching you.” 1RP 30.

<sup>6</sup> S.T. also said it happened more than ten times. She knows that she has ten fingers on her hands. 1RP 40.

S.T. said, "I'll try my best." Several times S.T. responded to questions that she did not remember or she did not know. Twice she responded that nothing happened in the laundry room. S.T. clarified that what she meant by these answers was that she did not want to talk about what happened. 1RP 15, 19-20, 36, 38-39, 46, 48, 51, 53, 58, 76, 77, 99.

The first person S.T. told about Whipple's sexual contact with her was her friend S.B.<sup>7</sup> while visiting in Arkansas in the fall of 2010. S.B. told her mother, who spoke with S.T., and then told S.T.'s mother. The authorities were contacted. 1RP 92-103, 111-114, 119-121, 127, 135.

## **B. PROCEDURAL HISTORY.**

The State charged Whipple with four counts of rape of a child in the 1<sup>st</sup> degree. A jury convicted Whipple on all four counts. Whipple received a standard range sentence including life time community custody under the supervision of the Department of Corrections. The presentencing report recommended thirty-one conditions for community supervision. The prosecutor objected to fourteen of the proposed conditions and requested one other

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<sup>7</sup> S.T. and S.B. are close in chronological age; however, the significant difference in their mental abilities is evident in their initial testimony. 1RP 15-18, 91-92.

condition be modified. Whipple agreed with the prosecutor's objections and additionally asked the court to strike condition number 7 as being vague and not related to the offenses. The court did not impose the fourteen conditions agreed to by the parties, modified condition 28, but imposed condition number 7. Whipple timely appealed. CP2-19, 23-25, 33-35, 49-52, 71-72; 2RP 244-248.

### **III. ARGUMENT**

#### **A. SUFFICIENCY OF THE EVIDENCE.**

Whipple argues the evidence was insufficient to support his convictions for rape of a child in the first degree; specifically that the evidence was insufficient to show that sexual intercourse occurred, the number of time sexual intercourse occurred, and the time period when the sexual intercourse occurred. Appellant's Brief 2, 7-16.

##### **1. Legal Standards.**

Sufficiency of the evidence is a question of constitutional magnitude which a defendant may raise for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995); State v. Atterton, 81 Wn. App. 470, 472, 915 P.2d 535 (1996). When reviewing a challenge to the sufficiency of the evidence, the court

determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006); State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005). All reasonable inferences are drawn in the prosecution's favor and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence."). The court need not be convinced of the defendant's guilt beyond a reasonable doubt; it is sufficient that substantial evidence supports the State's case. State v. Galisa, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) citing State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d

512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered); State v. Jackson, 62 Wn. App. 53, 58 n. 2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict). Whipple's mischaracterization of testimony by taking it out of context is little more than a guise to cast the evidence in a light favorable to the defense.

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight and persuasiveness of the evidence. State v. Delmarter, 94 Wn.2d at 638. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-416, 824 P.2d 533 (1992). The central issue in a child sexual abuse case is the victim's credibility. State v. Hayes, 81 Wn. App. 425, 433, 914 P.2d 788, 792 (1996). In the present case, the jury found S.T.'s testimony credible.

## 2. Rape Of A Child In The First Degree.

(1) A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(2) Rape of a child in the first degree is a class A felony.

RCW 9A.44.073. The information read:

COUNT I: RAPE OF A CHILD IN THE FIRST DEGREE, committed as follows: That the defendant, on or about the 1<sup>st</sup> day of September, 2009 through the 31<sup>st</sup> day of July, 2010, in an act separate and distinct from Counts II, III, and IV, did have sexual intercourse with S.T. (DOB: 8/.../99), who was less than twelve years old and not married to the defendant and not in a domestic partnership with the defendant, and the defendant was at least twenty-four months older than S.T.; proscribed by RCW 9A.44.073, a felony.<sup>8</sup>

CP 71-72; See also CP 63-66 (Jury Instructions 8, 9, 10, 11, WPIC 44.11-modified).

## 3. Definition Of Sexual Intercourse.

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and  
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(c) Also means 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.

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<sup>8</sup> Counts II, III and IV read the same with the phrase "an act separate and distinct from" modified to list the other three counts.

RCW 9A.44.010 (1)(c). See also CP 67 (Jury Instruction 12, WPIC 45.01). The parties agreed that only the licking in the bathroom satisfied the legal definition of sexual intercourse. 2RP 207, 217-218.

To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. State v. Hayes, 81 Wn. App. 425, 430, 914 P.2d 788, 792 (1996) (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. Hayes, 81 Wn. App. at 430; Petrich, 101 Wn.2d at 572.

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.

Hayes, 81 Wn. App. at 431 (citations omitted). In the present case, the evidence shows specific and distinct acts of sexual intercourse during the charging period. The trial court complied with the

requirement to properly instruct the jury. CP 58, 59, 63-66 (Jury Instructions 3, WPIC 3.01; 4, WPIC 4.25; 8, 9, 10, 11, WPIC 44.11-modified).

#### **4. Generic Testimony.**

Washington courts have approved of “general” testimony in the context of its admissibility where the victim did not specify dates, but described in detail the defendant’s usual conduct. The court reiterated that “[t]o require [the victim] to pinpoint the exact dates of oft-repeated incidents of sexual contact would be contrary to reason.” Hayes, 81 Wn. App. at 435-436 (citing State v. Brown, 55 Wn. App. 738, 747, 780 P.2d 880 (1989), review denied, 114 Wn.2d 1014, 791 P.2d 897 (1990)). The court concluded that:

Rendering such testimony as was given here inadequate even under a unanimity instruction would force prosecutors to make an election that the Petrich court described as “impractical.” With the exception of those who happen to select victims with better memories or who are one act offenders, the most egregious child molesters effectively would be insulated from prosecution.

Brown, 55 Wn. App. at 749.

The use of generic testimony involving young victims of multiple sexual assaults requires balancing the due process rights of the accused against the inability of the young accuser to give

extensive details regarding multiple alleged assaults. The proper balance requires three things:

First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points.

Hayes, 81 Wn. App. at 438.

All three of the Hayes requirements were met in the present case. S.T.'s testimony that Whipple licked her pee-pee establishes the first prong of the requirement, specificity of description of the acts; Whipple's mouth contacting her sex organs. Her description of their respective positions when he licked her pee-pee in the bathroom of the Monroe house adds to the specificity prong tying the acts of sexual intercourse to the period of time when she was staying at the Monroe house every other weekend. Evidence showed that S.T. stayed at the Monroe house every other weekend during September 1, 2009 through July 31, 2010, and that Whipple lived at the Monroe house during November 2009 through January 2011. S.T.'s testimony that Whipple licked her pee-pee on more

than three different occasions establishes the second prong. S.T.'s testimony that these acts occurred when she was staying at the Monroe house on weekends is sufficient to establish the third prong. S.T.'s testimony described the type of act committed, the number of acts committed, and the general time period. The jurors were instructed that they were the sole judges of each witness' credibility. CP 55 (Jury Instruction 1, WPIC 1.02). S.T.'s testimony, though generic, was specific enough to sustain separately each of the four counts charged. See Hayes, 81 Wn. App. at 438-439.

Viewed in the light most favorable to the State, the evidence was sufficient to permit any rational trier of fact to find beyond a reasonable doubt that Whipple had sexual intercourse with S.T. on four separate and distinct occasions during the period from September 1, 2009 through July 31, 2010, while S.T. was less than twelve years old and not married to Whipple who was at least twenty-four months older than S.T., and that these acts occurred in the state of Washington. Accordingly, Whipple's convictions for four counts of 1<sup>st</sup> degree rape of a child should be affirmed.

## **B. PROSECUTOR'S STATEMENTS DURING CLOSING ARGUMENT.**

Whipple alleges that the prosecutor urged the jury to convict him even if the evidence did not establish when and how the elements of the offense occurred, and that the prosecutor's closing argument diluted the State's burden of proof and encouraged the jurors to rest their verdict on what they felt in their heart. Appellant's Brief 16-22.

In a challenge to a prosecutor's statement during closing argument, the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995) (reversal is not required if the error could have been obviated by a curative instruction which the defense did not request). To establish prejudice, a defendant must show that there is a substantial likelihood that the jury would not have convicted absent the misconduct. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Moreover, closing argument is, after all, *argument*. In that context, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the

jury. State v. Stenson, 132 Wn.2d at 727. Allegedly improper argument must be reviewed in the context of the entire argument, the issues and evidence in the case, and the instructions given. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Counsel has latitude in closing argument to draw and express reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983). Counsel may not, mislead the jury by misstating the evidence; this is particularly true of a prosecutor, a quasi-judicial officer, who has a duty to see that the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Since Whipple challenges statements made by the prosecutor during closing argument, he has the burden of showing both the impropriety of the prosecutor's remarks and their prejudicial effect. Harvey, 34 Wn. App. at 740. Where impropriety is present, reversal is required only if a substantial likelihood exists that the misconduct affected the jury's verdict, thereby depriving the defendant of a fair trial. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Whipple attempts to meet his burden of showing impropriety by mischaracterizing statements and taking the prosecutor's closing argument out of context.

## **1. Determining Witness Credibility.**

Victim credibility is the true issue in cases where the accused child molester has virtually unchecked access to the victim and neither alibi nor misidentification is raised as a defense. Hayes, 81 Wn. App. at 433. In the present case, the prosecutor was addressing the jurors' duty to judge credibility when he asked what the jurors felt when they heard S.T. testify, "How else am I going to get the chocolate." 2RP 204-206.

S.T.'s credibility was central in the present case. During voir dire both sides asked questions about determining credibility. 3RP 54-59, 72-78, 88-90. In opening statement the prosecutor focused on S.T., "Her testimony is what this case is all about." 3RP 109. Defense counsel agreed, "the only testimony you will hear that this actually happened comes from [S.T.] ... that evidence isn't enough." 3RP 117. Defense counsel concluded closing argument saying, "What you have is simply not enough to convict Mr. Whipple beyond a reasonable doubt of this charge ..." 2RP 230.

The prosecutor's closing argument must be reviewed in that context; the centrality of S.T.'s credibility. The prosecutor started closing argument as follows:

[S.T.] is an easy target. That's what I told you Monday. Everything you have heard between then and now just shows it. She has a simple mind. She's not a complex person. She's not that difficult to evaluate or assess on the witness stand. ... You have to look at her and decide whether or not you believe what she told you. \*\*\*

Remember [S.T.] sitting in the chair ... you got a good look at what [S.T.] was all about. She can't spell her own name, she doesn't know what school she goes to, she can't tell you what city she lives in.

2RP 203-204. Asking the jurors to assess S.T.'s credibility the prosecutor directed their attention to a moment in the trial:

She ... told you how he touched her. So I asked her about her clothes at that point. They're off. Who took them off? "I did." Why did you take your clothes off?

This is the moment. This is the moment you cannot ignore. She said, through that blank little stare towards the back of the courtroom, in her just kind of monotone, simple voice, "How else am I going to get the chocolate?"

If that didn't shock you, I'm probably wasting my time. If that didn't mean anything to you, I'll expect not guilty verdicts in this case. That should have meant everything to you, and everything else about this case should be viewed through a prism that includes those few moments.

2RP 204-205. The prosecutor made it clear that he was not asking the jurors to ignore everything else that happened during the trial, he was just asking them to pay particular attention to that moment in assessing S.T.'s credibility. 2RP 205. The prosecutor reminded the jurors of their duty to judge the witness' credibility:

You have to watch the witness carefully. I asked you to do that, in my opening statement, because it's all you're going to get. ... So I ask you, what did you feel in your heart, what did you feel in your stomach, when you heard that answer? At that moment in time, did you have any doubt whatsoever that what she just said was the truth?

2RP 205-206. The prosecutor's argument did not dilute the State's burden of proof:

Let's forget about beyond a reasonable doubt. Let's go right to 100 percent certainty. Did you have any doubt whatsoever that what she was telling you was true at that moment? You shouldn't have. That's how you get beyond a reasonable doubt when you listen to a child's testimony. You knew it. You can't ignore everything else, because you can't find somebody guilty until you have analyzed all the evidence, or the lack of evidence, and decide beyond a reasonable doubt that it's true and that you are satisfied that all the elements have been proved.<sup>9</sup>

2RP 206. The prosecutor further clarified that he was not suggesting the jurors base their verdict on sympathy, passion or prejudice:

This case comes down to [S.T.], and that's why it comes down to that moment. And when I said, you know in your heart of hearts, I didn't not mean to say use sympathy or passion or prejudice to reach a verdict in this case, because that's absolutely right; you cannot do that. When I said heart of hearts, I just meant the certainty. It's not about rendering the verdict, it's about assessing credibility, because first

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<sup>9</sup> The prosecutor repeatedly directed the jurors to the court's instruction on reasonable doubt. 2RP 215, 230, 234, 235.

you have to assess the credibility before you can render a verdict. And you should know beyond all doubt whatsoever, and that' all I really meant by heart of hearts. I'm not asking you to convict somebody based on passion or emotion. But you know, and you knew right then, that it was the absolute truth.

2RP 234-235. The prosecutor's closing argument neither diluted the State's burden of proof nor encouraged the jurors to rest their verdict on sympathy, passion or prejudice. Whipple has not met his burden to establish that this argument was improper.

## **2. The Evidence Was Sufficient.**

Whipple's alleges that the prosecutor urged the jury to convict him even if the evidence did not establish the elements of when, where and how the offenses occurred.<sup>10</sup> Again Whipple takes statements out of context and mischaracterizes<sup>11</sup> the prosecutor's arguments in his attempt to show impropriety.

Whipple claims that the prosecutor implied that the defendant has a burden to create a reasonable doubt by telling the jury it should consider whether the evidence "create[s] a reasonable doubt." Appellant's Brief 20 (citing 2RP 208). First, what the

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<sup>10</sup> See III, A, above regarding the sufficiency of evidence.

<sup>11</sup> Taking into account the fact that S.T. was scared to testify about what happened, the reasonable inference of her response, "I'll try my best," when asked if she promised to tell the truth, is that she would try to talk about the incidents, not that she did not know what the truth was.

prosecutor said: “Now there’s one small piece of evidence that you are going to have to analyze, and you will have to decide for yourselves whether that creates a reasonable doubt in this case ...” 2RP 208. The prosecutor was addressing whether the word “they” in S.B.’s letter regarding chocolate and licking contradicted the fact that S.T. never said anybody but Whipple licked her and never said anybody but Whipple gave her chocolate.

Second, the jury was instructed to consider all of the evidence relating to a proposition in deciding whether any proposition has been proved. CP 55 (Jury Instruction 1). The court also instructed the jury that “a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. CP 60 (Jury Instruction 5; WPIC 4.01). This argument was not improper. Whipple has not met his burden.

### **3. The Petrich Instruction.**

Whipple’s alleges that even though the evidence did not indicate when, where, or how separate incidents occurred the prosecutor put the onus of the burden of proof on the jury when he told the jurors to “find” four separate occurrences. Appellant’s Brief 5, 20 (citing 2RP 214). Again Whipple mischaracterizes the prosecutor’s arguments by ignoring the context. The context was

explaining the Petrich instruction. 2RP 213-214; see CP 59 (Jury Instruction 4, WPIC 4.25). What the prosecutor said:

He is charged with four counts. You heard the evidence ... with respect to the licking ... How many times did that happen? "More than three."

From that, you know it's four or more. It may just be four, it may be even more than four; but it's at least four. If you decide that it was more than four, you don't have to unanimously agree that each and every one was committed. That's what the last line of this instruction is about. But the line before it says you do have to agree on which ones. You can pick any ones you want. ...But when ... it all happened certain way, or similar, or there's no delineating mark, necessarily, between each and every separate act, 'it's up to you, and you can only find him guilty if you unanimously agree.

2RP 213-214. This is what instruction 4 told the jury to do. Whipple has not shown that this argument was improper.

#### **4. The Jury Was Not Told To Assume Nothing Happened.**

Whipple alleges that the prosecutor told the jury it should not assume nothing happened. Appellant's Brief 4, 18-20 (citing 2RP 231-232). Again the context is necessary to evaluate the prosecutor's statement. The statement was made during the prosecutor's rebuttal argument responding to statements made by defense counsel. The prosecutor summarized his rebuttal argument saying, "Remember what the evidence was, not what

[defense counsel] said it was. There are subtle distinctions and you have to be careful.” 2RP 230.

The prosecutor then addressed defense counsel’s argument about whether S.T. said “it happened hundreds of times.” (See 2RP 218.) “Who used that phrase? [S.T.] or [defense counsel]? So you have to be careful about what the actual evidence is. [S.T.] did not say that.” 2RP 231.

The prosecutor went on to address counsel’s argument about what S.T. said happened in the bathroom. (See 2RP 218.)

Was it always the same? And the answer was, It was different in the bathroom. She said that the licking occurred more than three times. That’s four or more. Yes she said it was different each time, in her mind. You did not get a good description from her what made it different. \*\*\*

She made clear there was a lot more that happened, but she didn’t describe it, so you don’t have that evidence. But don’t assume from that that it didn’t happen.

2RP 231-232. During S.T.’s testimony regarding what happened in the bathroom she responded to questions three times “I don’t know” and once “I don’t remember.” She clarified that what she meant was that she did not want to talk about it. 1RP 36, 38, 51, 58.

The prosecutor next addressed defense counsel’s argument that [S.T.] said nothing happened in the laundry room. (See 2RP

222.) During S.T.'s testimony regarding the laundry room she responded twice to questions, "I don't know." She clarified that she meant she did not want to talk about it. 1RP 46, 48. In response to two other questions about the laundry room S.T. replied that nothing happened in the laundry room. She clarified that she meant she did not want to talk about it. 1RP 58, 76, 77. The prosecutor explained:

So you can't just assume that at one point when she says "nothing," that that means nothing happened. Sometimes that might be the right conclusion, or sometimes you might not know, which means there's reasonable doubt; or sometimes it means, I don't want to talk about it; nothing happened.

2RP 232-233. The prosecutor was telling the jurors to carefully examine what the witness said in the context of when the statement was made. A prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Stenson, 132 Wn.2d at 727; State v. Harvey, 34 Wn. App. at 739. The prosecutor's argument was not improper. Whipple has not met his burden.

#### **5. Mitigating Jury Instructions.**

Whipple did not object to the prosecutor's closing argument. He did not request curative instructions. Reversal is not required if a curative instruction was not requested. State v. Gentry, 125

Wn.2d at 640. Since Whipple did not object at trial, he is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Emery, \_\_\_ Wn.2d \_\_\_, 278 P.3d 653, 664 (2012) (citing State v. Stenson, 132 Wn.2d at 727). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." Emery, 278 P.3d at 664 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). The reviewing court's focus is on whether the resulting prejudice could have been cured. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" State v. Emery, 278 P.3d at 665 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Whipple failed to object and has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice in the mind of the jury. Nevertheless, the court mitigated any potential prejudice by instructing the jury that counsels' statements are not evidence and should not be so considered.

State v. Rice, 120 Wn.2d 549, 573, 844 P.2d 416 (1993). The statements and remarks by counsel are not evidence. State v. Huber, 129 Wn. App. 499, 504, 119 P.3d 388 (2005) (citing State v. Rice, 120 Wn.2d at 573. The court may mitigate potential prejudice by instructing the jury that such statements are not evidence and should not be so considered. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991). In the present case the trial court instructed the jury that the prosecutor's statement was argument, not evidence, and that the jury "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 55 (Jury Instruction 1, WPIC 1.02). The jurors were also instructed that they were the sole judges of the credibility of each witness and what things they may consider in assessing a witness' testimony. Id. Further the jury was instructed: "You must not let your emotions overcome you rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference." CP 56 (Jury Instruction 1; WPIC 1.02). Both counsel referred to the language in this instruction during closing argument. 2RP 208, 225, 227, 234-235. The jury is presumed to follow the court's

instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). The court's instructions eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's remarks.

Whipple has failed to demonstrate that the prosecutor's statements were improper and has failed to show that the prosecutor's comments engendered an incurable feeling of prejudice. Any prejudice from the prosecutor's statements was mitigated by the court's instruction to the jury.

**C. THE CONDITION OF COMMUNITY CUSTODY WAS NOT VAGUE AND WAS CRIME RELATED.**

The sentencing court imposed seventeen conditions of community custody. Whipple argues that the court lacked authority to impose conditions 7 and 8. Appellant's Brief 1-3, 23-26.

**1. Condition 7.**

Whipple objects to this community custody condition on the basis that the condition is vague and not related to his convictions. These are the same objections he raised below at the time of sentencing. 2RP 246-247.

On the issue of vagueness the Court's decision in Bahl is controlling. There the Court held that the condition prohibiting the defendant from frequenting "establishments whose primary

business pertains to sexually explicit or erotic material” was not unconstitutionally vague. Bahl, 164 Wn.2d at 760. The condition prohibiting Whipple from possessing or accessing sexually explicit<sup>12</sup> materials and from frequenting establishments whose primary business pertains to sexually explicit or erotic material is not unconstitutionally vague.

Whipple’s argument that there was no evidence that any particular stimulus influenced him to commit rape misses the point of the trial court’s concern about the circumstances of his crimes. The circumstances of his crimes show Whipple to be egregiously unable to control himself when in a state of sexual stimulus. An order limiting Whipple’s access to sexually stimulating materials and environments relates directly to that aspect of his crime. State v. Bahl, 137 Wn. App. 709, 715, 159 P.3d 416, 419 (2007) rev’d in part, 164 Wn. 2d 739, 193 P.3d 678 (2008).

A sentencing court has discretion to impose crime-related prohibitions as a condition of supervision. RCW 9.94A.703(3)(a) and (f); Bahl, 164 Wn.2d at 744. A “crime-related prohibition” is a court order directly relating to the circumstances of the crime for

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<sup>12</sup> Condition 7 (CP 33) does not use the term “pornographic” that the Court found unconstitutionally vague. Bahl, 164 Wn. 2d at 758.

which the offender was convicted. RCW 9.94A.030(10). The prevention of coerced rehabilitation is the main concern when reviewing crime-related prohibitions. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Otherwise, the assignment of crime-related prohibitions has “traditionally been left to the discretion of the sentencing judge.” State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989). A sentence will be reversed only if it is “manifestly unreasonable” such that “no reasonable man would take the view adopted by the trial court.” Riley, 121 Wn.2d at 37 (citing State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)). “A condition that constitutes a ‘[l]imitation[ ] upon fundamental rights’ is ‘permissible, provided [it is] imposed sensitively.’ In accord with the federal rule, a convict’s First Amendment right “may be restricted if reasonably necessary to accomplish the essential needs of the state and public order.”” Bahl, 164 Wn.2d at 757 (citing Riley, 121 Wn.2d at 37–38, quoting Malone v. United States, 502 F.2d 554, 556 (9<sup>th</sup> Cir. 1974)). The sentencing court had discretion to impose condition 7.

## **2. Condition 8.**

The State concedes that the court’s imposition of condition 8 was error. In State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2010),

the Court held that the same language was unconstitutionally vague. Bahl, 164 Wn.2d at 761. Accordingly, the State asks this court to reverse the community custody condition 8 of Whipple's sentence and remand for resentencing in accord with State v. Bahl.

#### **IV. CONCLUSION**

For the reasons stated above, the convictions should be affirmed; the community custody condition 8 portion of Whipple's sentence should be reversed and remand for resentencing.

Respectfully submitted on July 18, 2012.

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