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70937-2

No. 70937-2-I

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COURT OF APPEALS, DIVISION ONE  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL LAVELY,

Appellant,

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APPELLANT'S OPENING BRIEF

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## TABLE OF CONTENTS

<u>Heading</u>	<u>Page No.</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2-3
IV. STATEMENT OF THE CASE	3-14
1. Overview	3
2. Trial Testimony	3-12
3. Closing Arguments	12-14
4. Deliberations and Verdict	14
V. ARGUMENT	14-48
1. Was the State’s evidence insufficient to support a finding of guilt for Custodial Sexual Misconduct in the first degree where the evidence failed to support the element that the alleged victim was “detained” when the allegation of sexual intercourse occurred?	14-29
2. Did the prosecutor commit misconduct?	29-48
A. Standards	30-31
B. Did the prosecutor improperly vouch for the State’s chief complaining witness, M.M., and thereby express to the jury his personal and professional opinion she was a credible witness, when he injected into her testimony, and argued in closing argument, the alleged fact that she never asked the prosecutor for any “deal” on	

her criminal charges and incarceration in exchange for testimony against Mr. Lavelly?	32-36
C. Did the prosecutor violate the advocate-witness Rule where, in addition to the testimony and argument above (B) the prosecutor injected into M.M.s testimony that he allegedly told her several times that she needed to tell the truth at trial?	36-43
D. Did the prosecutor improperly switch the burden of proof onto Mr. Lavelly and place the burden of proving reasonable doubt onto him by arguing to the jury that after cross examining M.M. the defense had failed to poke any holes into the elements the prosecutor was required to prove to convict Mr. Lavelly?	43-47
E. Did the several errors described above (B-D) collectively prejudice Mr. Lavelly's right to a fair trial?	47-48
VI. CONCLUSION	48-49

## TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page No.</u>
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)	47
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	16
<i>State v. Avila-Avina</i> , 99 Wn. App. 9, 991 P.2d 720 (2000)	23, 24
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	25
<i>State v. Barron</i> , 170 Wn. App. 742, 285 P.3d 231 (2012)	23
<i>State v. Belanger</i> , 36 Wn. App. 818, 677 P.2d 781 (1984)	19
<i>State v. Camara</i> , 113 Wn.2d 631, 781 P.2d 483 (1989)	43
<i>State v. Caton</i> , 174 Wn.2d 239, 273 P.3d 980 (2012)	14
<i>State v. Charlton</i> , 90 Wn.2d 657, 585 P.2d 142 (1978)	29
<i>State v. Cleveland</i> , 58 Wn. App. 634, 794 P.2d 546 (1990)	43
<i>State v. Coyne</i> , 99 Wn. App. 566, 995 P.2d 78 (2000)	19, 22
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	15
<i>State v. Denton</i> , 58 Wn. App. 251, 729 P.2d 537 (1990)	37
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012)	31, 42, 45, 46
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009)	29
<i>State v. Fleming</i> , 83 Wn. App. 209, 921 P.2d 1076 (1996)	35, 36
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	43, 44
<i>State v. Hendrickson</i> , 177 Wn. App. 67, 311 P.3d 41 (2013)	27
<i>State v. Hosier</i> , 157 Wn.2d 1, 133 P.3d 936 (2006)	15
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	31, 32, 33, 35
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010)	35, 47
<i>State v. Mau</i> , 178 Wn.2d 308, 308 P.3d 629 (2013)	28
<i>State v. Miles</i> , 139 Wn. App. 879, 162 P.3d 1169 (2007)	43, 44, 45, 46, 47
<i>State v. Nettles</i> , 70 Wn. App. 706, 855 P.2d 699 (1993)	19, 21
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	16, 18
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984)	30
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)	31
<i>State v. Sargent</i> , 40 Wn. App. 340, 698 P.2d 598 (1985)	38
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	30, 31
<i>State v. Thomas</i> , 91 Wn. App. 195, 955 P.2d 420 (1998)	20
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.3d 43 (2011)	31, 44
<i>State v. Thorn</i> , 129 Wn.2d 347, 917 P.2d 108 (1996)	17, 18, 21
<i>State v. Torres</i> , 151 Wn. App. 378, 212 P.3d 573 (2009)	15, 16
<i>State v. Walton</i> , 64 Wn. App. 410, 824 P.2d 533 (1992)	15

<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008)	32
<i>State v. Whitaker</i> , 58 Wn. App. 851, 795 P.2d 182 (1990)	16
<i>State v. Yoakum</i> , 37 Wn.2d 137, 222 P.2d 181 (1950)	37
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998)	16, 17
<i>State v. Zeferino-Lopez</i> , --- Wn. App. ---, 319 P.3d 94 (2014)	25, 26

### **United States Supreme Court Cases**

### **Page No.**

<i>Brower v. County of Inyo</i> , 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989)	20
<i>INS v. Delgado</i> , 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984)	17, 18, 22
<i>Schneekloth v. Bustamonte</i> , 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)	18
<i>Terry v. Ohio</i> , 384 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	15, 29
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	16, 17, 18, 19

### **Federal Cases**

### **Page No.**

<i>United States v. Cunningham</i> , 672 F.2d 1064 (2 <sup>nd</sup> Circ. 1982)	41
<i>United States v. Edwards</i> , 154 F.3d 915 (9 <sup>th</sup> Circ. 1998)	37, 39, 40, 41, 42
<i>United States v. Hosford</i> , 782 F.2d 936 (11 <sup>th</sup> Circ. 1986)	37
<i>United States v. Kwang Fu Peng</i> , 766 F.2d 82 (2 <sup>nd</sup> Circ. 1985)	41
<i>United States v. Molina</i> , 934 F.2d 1440 (9 <sup>th</sup> Circ. 1991)	35
<i>United States v. Prantil</i> , 756 F.2d 758 (9 <sup>th</sup> Cir. 1985)	39

### **Washington Constitution**

### **Page No.**

Art. I, §7	15
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### **United States Constitution**

### **Page No.**

Fourth Amendment	15, 20
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### **Washington Statutes**

### **Page No.**

RCW 9A.44.160(1)(b)	15
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## **I. INTRODUCTION**

Daniel Lavelly, a former City of Edmonds Police Officer, was convicted following jury trial of Custodial Sexual Misconduct in the first degree. He was alleged to have had sexual intercourse while on duty with a woman identified herein as M.M., whom he had detained.

The State's case was premised on the testimony of M.M. She alleged she had sexual intercourse with Mr. Lavelly behind a Burlington Coat Factory store off Aurora Avenue after the officer had removed her from a motel room. The State presented witnesses to corroborate M.M.'s testimony, as well as to describe Mr. Lavelly's actions with regard to this incident. However, only M.M. could provide testimony that the act of sexual intercourse took place. Mr. Lavelly denied having sex with M.M.

The present appeal addresses whether the State presented sufficient evidence to prove the criminal act of Custodial Sexual Misconduct. Further, this appeal addresses whether several incidents of prosecutorial misconduct occurred at trial, and whether the conviction should be reversed and remanded to the trial court for new trial.

## **II. ASSIGNMENTS OF ERROR**

1. The State's evidence was insufficient to support a finding of guilt for Custodial Sexual Misconduct in the first degree.
2. The prosecuting attorney committed acts of misconduct prejudicing Mr. Lavelly's right to a fair trial.
  - a. The prosecutor improperly vouched for the credibility of State's witness M.M. by informing the jury in direct examination and closing argument that she never asked for special favors from the State in exchange for her testimony against Mr. Lavelly.
  - b. The prosecutor violated the advocate-witness rule by injecting his special knowledge through the testimony of M.M. that she never asked for special favors from the State in exchange for her testimony against Mr. Lavelly and that he repeatedly told her to tell the truth at trial.
  - c. The prosecutor improperly shifted the burden of creating reasonable doubt onto Mr. Lavelly by arguing to the jury that the cross examination of M.M. failed to poke any holes in her testimony.
  - d. The cumulative effect of these errors requires new trial.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the State's evidence insufficient to support a finding of guilt for Custodial Sexual Misconduct in the first degree where the evidence failed to support the element that the alleged victim was "detained" when the allegation of sexual intercourse occurred?
2. Did the prosecutor improperly vouch for the State's chief complaining witness, M.M., and thereby express to the jury his personal and professional opinion she was a credible witness, when he injected into her testimony, and argued in closing argument, the alleged fact that she never asked the prosecutor for any "deal" on

her criminal charges and incarceration in exchange for testimony against Mr. Lavelly?

3. Did the prosecutor violate the advocate-witness rule where, in addition to the testimony and argument above (#2) the prosecutor injected into M.M.s testimony that he allegedly told her several times that she needed to tell the truth at trial?
4. Did the prosecutor improperly switch the burden of proof onto Mr. Lavelly and place the burden of proving reasonable doubt onto him by arguing to the jury that after cross examining M.M. the defense had failed to poke any holes into the elements the prosecutor was required to prove to convict Mr. Lavelly?
5. Did the several errors described above (#'s 2-4) collectively prejudice Mr. Lavelly's right to a fair trial?

#### **IV. STATEMENT OF THE CASE**

##### **1. Overview.**

The State charged Daniel Lavelly with the crime of Custodial Sexual Misconduct in the first degree.<sup>1</sup> A jury found him guilty.<sup>2</sup> Mr. Lavelly appeals.<sup>3</sup>

##### **2. Trial Testimony.**

It was undisputed that in the afternoon of May 6, 2012, Daniel Lavelly briefly detained M.M.<sup>4</sup> after watching her jay-walk on Aurora

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<sup>1</sup> CP 207

<sup>2</sup> CP37

<sup>3</sup> CP 1

<sup>4</sup> The alleged victim will be identified by her initials "M.M." throughout this brief.

Avenue in the City of Edmonds.<sup>5</sup> Based on her clothing and behavior he suspected she was a prostitute.<sup>6</sup> M.M. was admittedly high on methamphetamines at the time, and claimed another police officer had assaulted her earlier in the day.<sup>7</sup> Mr. Lavelly ran a warrants check and found she had an outstanding arrest warrant from Seattle.<sup>8</sup> When Seattle P.D. would not arrange to take custody of M.M., Mr. Lavelly released her.<sup>9</sup> He gave her a courtesy ride to a grocery store and according to M.M. told her that if he saw her again on Aurora he would arrest her.<sup>10</sup>

M.M. spent the next several hours at Andy's Motel on Aurora admittedly having sex with another man and injecting heroin.<sup>11</sup> Later, one of her acquaintances became worried about her behavior and walked her to a local hospital.<sup>12</sup> Police were called, but she left before they arrived and walked back to the motel.<sup>13</sup>

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<sup>5</sup> RP 324

<sup>6</sup> RP 905-906

<sup>7</sup> RP 324; 327

<sup>8</sup> RP 327

<sup>9</sup> RP 327-330

<sup>10</sup> RP 330-331

<sup>11</sup> RP 214; 334-335; 336

<sup>12</sup> RP 240

<sup>13</sup> RP 241; 337

Mr. Lavelly was on duty and heard the call.<sup>14</sup> He responded to the hospital and eventually made his way to Andy's Motel.<sup>15</sup> He spoke with the acquaintance, Derrick Wheeler, who said that M.M. was in his motel room and he wanted her to leave.<sup>16</sup> Mr. Lavelly walked up to the second floor and entered the room.<sup>17</sup> According to M.M, Mr. Lavelly told her she had to come with him.<sup>18</sup> She asked if she was under arrest and he said she was not.<sup>19</sup> She asked if she could leave, and he said no; she had to come with him.<sup>20</sup> Mr. Lavelly walked M.M. down to his patrol car.<sup>21</sup> M.M. did not recall ever being touched, although Wheeler recalled that the officer held her arm to escort her down the stairs.<sup>22</sup> Mr. Lavelly did not pat down M.M. or restrain her in handcuffs.<sup>23</sup> M.M. sat in the back seat of the patrol car, and eventually Mr. Lavelly shut the door.<sup>24</sup>

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<sup>14</sup> RP 916

<sup>15</sup> RP 920

<sup>16</sup> RP 241-244

<sup>17</sup> RP 243; 338

<sup>18</sup> RP 244; 339

<sup>19</sup> RP 339

<sup>20</sup> RP 339

<sup>21</sup> RP 339

<sup>22</sup> RP 245; 339-340

<sup>23</sup> RP 353

<sup>24</sup> RP 353

According to M.M., Mr. Lavelly drove south down Aurora.<sup>25</sup> She thought he was driving her to a hospital.<sup>26</sup> There was no handle to open the car door.<sup>27</sup> She thought she was in custody.<sup>28</sup>

The officer turned into the parking lot of the Burlington Coat Factory; eventually parking next to a loading dock.<sup>29</sup> Mr. Lavelly told her to exit the patrol car and put her hands on the side of the car.<sup>30</sup> She got out and placed a bag of personal belongings on the trunk.<sup>31</sup> The officer stood behind her and began touching her breasts and vagina under her clothing.<sup>32</sup> The officer asked her if he could make her cum, and she replied he could.<sup>33</sup> He asked if she had a condom.<sup>34</sup> She said she did, and she retrieved one from her bag.<sup>35</sup> She put the condom on the officer and they had sex.<sup>36</sup> Afterwards she tried to hug him but he resisted.<sup>37</sup> She walked away.<sup>38</sup>

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<sup>25</sup> RP 340

<sup>26</sup> RP 339

<sup>27</sup> RP 353

<sup>28</sup> RP 353

<sup>29</sup> RP 343

<sup>30</sup> RP 353

<sup>31</sup> RP 356

<sup>32</sup> RP 354-35

<sup>33</sup> RP 355

<sup>34</sup> RP 356

<sup>35</sup> RP 356

<sup>36</sup> RP 356-359

<sup>37</sup> RP 359-360

<sup>38</sup> RP 360

As M.M. made her way to the front of the store she encountered a street sweeper. She said she was hysterical and told him she had just been raped.<sup>39</sup> The street sweeper, however, testified she never said she had been raped.<sup>40</sup> She never asked to call police.<sup>41</sup>

M.M. spent the next hour with another man in his car.<sup>42</sup> She was spotted in a surveillance video at a 7-11 store on Aurora.<sup>43</sup> Mr. Lavelly did not follow protocol with his contact with M.M. and belatedly called dispatch to note the interaction at the time M.M. appeared on the video.<sup>44</sup>

M.M. returned to Andy's Motel and told Wheeler she had been raped by a cop.<sup>45</sup> Wheeler thought she was joking.<sup>46</sup> M.M. went to sleep in another man's room.<sup>47</sup> M.M. told this man she had been raped by a cop.<sup>48</sup> No one called the police.<sup>49</sup>

Mr. Lavelly testified he found M.M. in Wheeler's room, and due to Wheeler's request he told M.M. she had to leave.<sup>50</sup> It was part of his duties

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<sup>39</sup> RP 360

<sup>40</sup> RP 394; 406

<sup>41</sup> RP 406

<sup>42</sup> RP 361

<sup>43</sup> RP 680-681

<sup>44</sup> RP 664-665; 730-731; 935

<sup>45</sup> RP 283; 362

<sup>46</sup> RP 284

<sup>47</sup> RP 363; 595

<sup>48</sup> RP 595

<sup>49</sup> RP 285; 600

<sup>50</sup> RP 923-924; 927-928

as an officer to remove persons from motel rooms at the request of the owner or renter.<sup>51</sup> The individual could leave on their own or he could offer them a ride.<sup>52</sup> He would not arrest the person unless they refused to leave.<sup>53</sup> He did not place M.M. in handcuffs because she was not being detained.<sup>54</sup>

M.M. asked where she was supposed go, and the officer told her he could give her a ride.<sup>55</sup> He held her arm as she walked down a flight of stairs to help her with her balance.<sup>56</sup> They walked to his patrol car and she asked for a ride.<sup>57</sup> He said he could drive her south towards Seattle.<sup>58</sup> She agreed and sat in the back of the patrol car for the ride.<sup>59</sup> M.M. kept possession of her bag of belongings.<sup>60</sup> Mr. Lavelly said M.M. was free to leave at any time.<sup>61</sup>

While driving Mr. Lavelly thought M.M. was propositioning him for sex.<sup>62</sup> Mr. Lavelly rejected the request.<sup>63</sup> M.M. asked to be dropped off

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<sup>51</sup> RP 930

<sup>52</sup> RP 930

<sup>53</sup> RP 930

<sup>54</sup> RP 932

<sup>55</sup> RP 930-931

<sup>56</sup> RP 932

<sup>57</sup> RP 931

<sup>58</sup> RP 931

<sup>59</sup> RP 932

<sup>60</sup> RP 935

<sup>61</sup> RP 934

<sup>62</sup> RP 936

at the Burlington Coat Factory.<sup>64</sup> The officer knew there was some kind of homeless camp in that area.<sup>65</sup> Mr. Lavelly opened the door for M.M. and she had a condom wrapper in her hand.<sup>66</sup> He had no further contact with her.

Mr. Lavelly admitted he violated several department policies when he incorrectly notified dispatch regarding his transport of M.M.<sup>67</sup> He admitted that he lied to the lead investigating officer, Detective Kowalchuk, regarding this incident.<sup>68</sup> At the time he was attempting to protect his good standing to become a sergeant.<sup>69</sup> When interviewed by the detective, he said he told M.M. at the motel, "Let's go get into the car. I'm going to take you down to the bus stop."<sup>70</sup>

M.M. first alleged to law enforcement she had sex with Mr. Lavelly two days after the incident.<sup>71</sup> She was scheduled for a sexual assault examination and during that examination said she was raped by an

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<sup>63</sup> RP 937

<sup>64</sup> RP 937

<sup>65</sup> RP 937

<sup>66</sup> RP 938

<sup>67</sup> RP 959-960; 986-989

<sup>68</sup> RP 963-966

<sup>69</sup> RP 895; 953; 985-986; 988

<sup>70</sup> RP 968

<sup>71</sup> RP 558-559

Edmonds police officer.<sup>72</sup> M.M. left before the exam could be completed.<sup>73</sup> Mr. Lavelly's DNA was not found on any of M.M.'s clothes.<sup>74</sup> A condom wrapper was found near the location of the alleged sex act.<sup>75</sup> No DNA was found on the wrapper.<sup>76</sup>

At trial, the prosecutor concluded M.M.'s direct examination by listing her various past criminal convictions, many involving crimes of dishonesty.<sup>77</sup> He then asked,<sup>78</sup>

“You understand the importance of telling the truth on the witness stand.”

M.M. answered, “Yes.”

The prosecutor then asked,

“Have you ever asked me or anyone in my office for any kind of deal on any of your other cases with respect to this case?”

M.M. answered, “No.”

Counsel for Mr. Lavelly did not object to this testimony.

On cross examination, defense counsel questioned M.M. regarding her claim she had been assaulted by a police officer prior to having contact

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<sup>72</sup> RP 809

<sup>73</sup> RP 811

<sup>74</sup> RP 776

<sup>75</sup> RP 572

<sup>76</sup> RP 755-757

<sup>77</sup> RP 367-368

<sup>78</sup> RP 369-370

with Mr. Lavelly and whether she had exaggerated the degree of her injuries.<sup>79</sup> Counsel questioned her on her appearance and clothing.<sup>80</sup> M.M. agreed she was high in meth when she was interviewed by police.<sup>81</sup>

In rebuttal, the prosecutor asked,<sup>82</sup>

“Has anyone ever told you, either me, Detective Kowalchyk, anybody from my office, has anybody ever told you what to say?”

M.M. responded, “No.”

The prosecutor then said,

“Actually, I have told you something before, haven’t I, about what happens on the witness stand.”

M.M. responded, “Yeah.”

He asked, “What did I tell you?”

She replied, “That – that they try to get you to say stuff you don’t ...”

Counsel objected, and the court sustained.

The prosecutor, however, continued. He asked, “Did I tell you to – did I ask – did I tell you -- ?”

M.M answered, “Tell the truth.”

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<sup>79</sup> RP 371-377

<sup>80</sup> RP 378-381

<sup>81</sup> RP 382

<sup>82</sup> RP 385-386

The prosecutor continued, “I told you to tell the truth. How many times have I told you that during this case?”

Counsel again objected, although on grounds that the response was “asked and answered.” The court sustained the objection.

### **3. Closing Arguments.**

The prosecutor argued to the jury that Mr. Lavelly’s statement to M.M., and to Detective Kowalchyk – “Let’s go. I’ll take you to the bus station.” – satisfied the “detained” element of the statute.<sup>83</sup>

“When he takes her down to the car, as [M.M.] says, she is sitting in the patrol car and feet are hanging out, he puts her feet in<sup>84</sup> and closes the door. Detained. She is detained. She is not going anywhere. She had been in police cars before. She knows you ain’t getting out.”<sup>85</sup>

The prosecutor summarized his case,<sup>86</sup>

“Now let’s talk about the evidence. If you believe [M.M.] ... then every element of the crime has been proven beyond a reasonable doubt.”

The prosecutor proceeded to list several reasons why the jury should find M.M. credible.<sup>87</sup> Within this list, the prosecutor asked the jury

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<sup>83</sup> RP 1046

<sup>84</sup> M.M. never offered this testimony. “Yes, he shut the door and I had to put my feet in the patrol car.” RP 340

<sup>85</sup> RP 1046

<sup>86</sup> RP 1042

<sup>87</sup> RP 1042-1050

to consider whether the defense created any doubt in M.M.'s story during cross examination.<sup>88</sup>

“You can believe what happened to [M.M.] because cross examination by counsel really didn't put holes in her story. After an hour plus interview with Detective Kowalchuk, after a two plus hour interview with the defense team, after an hour of direct examination, after at least half an hour of cross examination, what did that get the defense? What holes were so poked in what she said about the elements that I have to prove to you after all of those hours of talking about this, what did that reveal?”

In the defense closing, counsel agreed that, “It all boils down to [M.M.]”<sup>89</sup> The defense questioned M.M.'s credibility in part based upon her statements made at trial,<sup>90</sup> her criminal history,<sup>91</sup> potential financial motive,<sup>92</sup> the potential opportunity to plant the condom wrapper at the scene,<sup>93</sup> and drug use.<sup>94</sup>

In rebuttal, the prosecutor responded to the challenges to M.M.'s credibility by telling the jurors,

“I want you to consider (sic) [M.M.] told you she is serving a sentence. She is so desperate to get out, she never asked me for anything.”<sup>95</sup>

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<sup>88</sup> RP 1049

<sup>89</sup> RP 1058

<sup>90</sup> RP 1059

<sup>91</sup> RP 1063

<sup>92</sup> RP 1064

<sup>93</sup> RP 1065

<sup>94</sup> RP 1066

<sup>95</sup> RP 1077-1078

Counsel for Mr. Lavelly objected.<sup>96</sup> The trial judge instructed the jurors to recall the testimony.<sup>97</sup>

#### **4. Deliberations and Verdict.**

On the second day of deliberations,<sup>98</sup> the jury asked a question<sup>99</sup> whether the term “in custody” as stated in instruction #8<sup>100</sup> defining custodial sexual misconduct was to be included within the term “detained” used in the “to convict” instruction.<sup>101</sup> The court instructed the jury to consider only the language in the “to convict” instruction.<sup>102</sup> The following day the jury returned a guilty verdict.<sup>103</sup>

### **V. ARGUMENT**

#### **1. Was the State’s evidence insufficient to support a finding of guilt for Custodial Sexual Misconduct in the first degree where the evidence failed to support the element that the alleged victim was “detained” when the allegation of sexual intercourse occurred?**

An appellant challenging the sufficiency of the State's evidence “admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence.” *State v. Caton*, 174 Wn.2d 239, 241,

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<sup>96</sup> RP 1078

<sup>97</sup> RP 1078

<sup>98</sup> RP 1089

<sup>99</sup> CP 53

<sup>100</sup> CP 48

<sup>101</sup> CP 49

<sup>102</sup> CP 53

<sup>103</sup> RP 1097

273 P.3d 980 (2012). Evidence is sufficient if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt; evidence is viewed in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers 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, 824 P.2d 533 (1992).

To convict Mr. Lavelly, the State had to prove the element of detention; that is, that M.M. was “being detained” by Mr. Lavelly at the time the alleged sex act occurred. See RCW 9A.44.160(1)(b). This Court has held that the Legislature intended this element to encompass the type of detention comparable to a *Terry*<sup>104</sup> stop or detention under the Fourth Amendment and Art. I, §7 of the State Constitution. See *State v. Torres*, 151 Wn. App. 378, 386-387, 212 P.3d 573 (2009).

“[n]ot every encounter between an officer and an individual amounts to a seizure.” Rather, “[a] person is ‘seized’ [or detained] under the Fourth Amendment only if, ‘in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ ” “ ‘Whether a reasonable person would believe he was detained depends on the particular, objective facts

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<sup>104</sup> *Terry v. Ohio*, 384 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

surrounding the encounter.’ *Torres*, at 386; citing *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997); *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Accordingly, the Court in *Torres* held that the trial court correctly instructed the jury on this element of the crime;

“Being ‘detained by’ or ‘in the custody of a law enforcement officer’ means restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave.” *Torres*, at 385.

Here, the trial court gave the jury an almost identical instruction;

“Being ‘detained by’ means restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave.”<sup>105</sup>

The evaluation of whether a detention occurred is a “purely objective one,” looking to the actions of the law enforcement officer. *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). This determination does not depend on the subjective perceptions of the person alleging they were detained. *State v. Whitaker*, 58 Wn. App. 851, 854, 795 P.2d 182 (1990).

The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. *State v. O'Neill*, 148 Wn.2d 564, 581, 62 P.3d 489 (2003). An encounter between

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<sup>105</sup> CP 50

a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away. *United States v. Mendenhall*, 446 U.S. at 554. It is largely irrelevant that a person may find it inconvenient to leave the presence of the officer. See *State v. Thorn*, 129 Wn.2d 347, 353, 917 P.2d 108 (1996);<sup>106</sup> citing *INS v. Delgado*, 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984). The question is not merely whether a person felt free to leave, but whether he or she felt free to terminate the encounter, refuse to answer the officer's question, or otherwise go about his business. *Thorn*, supra.

Washington courts have recognized a nonexclusive list of police actions likely resulting in seizure: (1) The threatening presence of several officers; (2) The display of a weapon by an officer, (3) Some physical touching of the person of the citizen, or (4) The use of language or tone of voice indicating that compliance with the officer's request might be compelled. *State v. Young*, 135 Wn.2d at 512; quoting *Mendenhall*, 446 U.S. at 554-555.

A police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention. *State v. Young*, 135 Wn.2d at 511.

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<sup>106</sup> Reversed on other grounds.

While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. *INS v. Delgado*, 466 U.S. at 216; *Schneckloth v. Bustamonte*, 412 U.S. 218, 231-234, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

An officer's words used towards a person may indicate a detention. Where an officer commands a person to halt or demands information from the person, a seizure occurs. *State v. O'Neill*, 148 Wn.2d at 577; citing *United States v. Mendenhall*, 446 U.S. at 554. But no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. *State v. O'Neill*, supra. A person is free to engage the officer in conversation, and equally free to ignore the officer. *O'Neill*, supra.

An officer's tone of voice can also determine whether a seizure occurred. In *State v. Thorn*, supra, the Court declined to rule that an officer's question to a person seated in a car, "Where's the pipe?" *Thorn*, at 349. Looking at the totality of the circumstances, it was impossible to determine whether the officer's manner of speech was pleasant or

indicative of coercion. At 353-354. In *State v. Nettles*,<sup>107</sup> the Court likewise declined to find there was a seizure when an officer asked to speak with a suspect but ordered him to remove his hands from his pockets. *Nettles*, at 711-12. A request to see a person's hands does not immobilize the individual. *Id.* In *State v. Coyne*,<sup>108</sup> An officer's directive for a person to sit on the hood of a patrol car was a detention. At 573. But the facts of the case were unique. The officer was investigating the return of lost property and took Coyne's identification to perform a warrant check. *Id.* Due to the retention of property (ID) and running of a warrant check without statutory authority, combined with the directive to sit on the hood, compelled the Court to find that the defendant had been detained. *Id.*

The fact an officer is in uniform and armed, without more, does not convert a social encounter to a seizure. *State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984); *Mendenhall*, *supra*.

Once an officer retains the suspect's identification or driver's license and takes it with him to conduct a warrants check, a seizure within

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<sup>107</sup> 70 Wn. App. 706, 855 P.2d 699 (1993).

<sup>108</sup> 99 Wn. App. 566, 995 P.2d 78 (2000).

the meaning of the Fourth Amendment has occurred. *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420 (1998).

“A person is ‘seized’ within the meaning of the Fourth Amendment when the government terminates his or her freedom of movement through means intentionally applied.” *Brower v. County of Inyo*, 489 U.S. 593-596, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989). As the Court noted in *Brower*, a seizure under the Fourth Amendment would not occur if a police vehicle slipped its brakes and accidentally pinned a passerby against a wall. *Brower*, at 596. The intent to detain must be implicit in the acts of the law enforcement officer. Under the present charge of custodial sexual misconduct, if a police officer propositioned a prostitute to enter his patrol vehicle to engage in a sex act, it could hardly be said that the prostitute has been “detained” by entering the vehicle. Likewise, if an officer’s spouse or significant other entered the patrol car to engage in a sex act, this too could not be construed as a detention. The reason is clear: there is an absence of any intentional act by the officer to detain the other person as contemplated by the Fourth Amendment.

Here, the State’s evidence failed to meet any of the criteria for the definition of being detained. According to M.M., Mr. Lavelly entered the

motel room and told her she had to leave.<sup>109</sup> She was not under arrest.<sup>110</sup> While he was in the process of getting her to leave she said she asked if she could leave, and he said no; she had to come with him.<sup>111</sup> This testimony is consistent with the officer's duty to remove an unwanted guest and does not suggest she was not free to leave; the officer merely had to ensure M.M. left the premises.

There is nothing in the record to suggest Mr. Lavelly used a tone of voice communicating coercion. His statements to her were no different than that in *Thorn* or *Nettles*. It is immaterial whether he asked M.M. if she wanted a ride, or told her he would give her a ride.<sup>112</sup> As expressed in *Thorn*, the real issue is whether the officer spoke in such a way as to communicate to a reasonable person in M.M.'s situation that she was not free to terminate the encounter. Simply telling M.M. that he was going to give her a ride somewhere would not communicate to a reasonable person that she had no choice to refuse. The simple fact that M.M., like most people, may respond to a police request and was not specifically told she

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<sup>109</sup> RP 339

<sup>110</sup> RP 339

<sup>111</sup> RP 339

<sup>112</sup> RP 339; 930-931; 968

was not required to, hardly eliminates the consensual nature of her actions. *INS v. Delgado*, 466 U.S. at 216.

Mr. Lavelly applied no force upon M.M. to communicate she had been detained. Briefly holding her arm so she did not fall is not the equivalent of handcuffs or any other physical force used to restrain a person. Mr. Lavelly never patted M.M. down for weapons prior to her entering the patrol car. While this may have been a department policy violation, M.M. would not be aware of that. However, the failure to pat her down would be an indication to a reasonable person that they were not being detained.

Mr. Lavelly never removed M.M.'s property from her. This was a key factor in finding a detention in *Coyne*. There, the officer took Coyne's identification, leading the Court to find that a reasonable person would feel compelled to stay. This was not the case here.

It is important to note that Mr. Lavelly, at the time of this alleged incident, was not investigating any alleged criminal activity related to M.M. There was no intent to detain her for law enforcement purposes.

In two cases, Courts have found that a person was detained for Fourth Amendment purposes when they were placed in the back of a patrol car. However, there are key distinctions to these cases that render

them irrelevant to this case. In *State v. Avila-Avina*,<sup>113</sup> police were actively investigating a murder involving Hispanic suspects. An officer approached Avila-Avina, a Hispanic male, who had connections to the murder scene and asked him to stay with him and placed him in his patrol car. He was kept in a patrol car for several hours, and officers said he was not free to leave. Officers either sat in the car with him or stood next to the car. The Court found that police detained Avila-Avina when they placed him in the patrol car. *Avila-Avina*, at 14. The record was clear, however, that his placement in the patrol car was related to the criminal investigation, and due to the actions of the officers he was not free to leave. *Id.*

In *State v. Barron*,<sup>114</sup> police were called to the scene of an assault involving a knife. An officer on scene found Barron bleeding from a wound. He placed her in his patrol car and locked the door. He placed her purse in the front seat, denying her access to it. The Court found the actions of placing Barron in the patrol car and denying her access to her property to be a detention. *Barron*, at 748-749.

Here, M.M.'s interaction with Mr. Lavelly is distinguishable for a number of reasons. He was not investigating any criminal activity. He did

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<sup>113</sup> 99 Wn. App. 9, 991 P.2d 720 (2000); reversed on other grounds.

<sup>114</sup> 170 Wn. App. 742, 285 P.3d 231 (2012).

not deny her access to her personal property. He did not keep her in a parked patrol car for several hours. There were no other officers involved. According to his testimony, she was free to leave at any time. M.M. took no actions to terminate the encounter with Mr. Lavelly. This testimony was not refuted. While the defendant in *Avila-Avina* took no actions to terminate the encounter with the officer in his case, it was clear from the record of that case that his efforts would have been rebuffed. But in the present case, had M.M. testified that she attempted to walk away or ask to be removed from the patrol car and was denied, this would have been actual evidence she had been detained. As it is, the State in this case relied on her subjective perception she had been detained because she acquiesced to Mr. Lavelly's statements and did nothing to try to terminate the encounter. But her subjective perceptions are irrelevant to the issue of detention.

The jurors' question to the judge indicates the jurors focused on the "detained by" element. They were told that custodial sexual misconduct involved a person who was either being detained by, under arrest, or in the custody of a police officer.<sup>115</sup> Jurors asked if the term "custody" was included in the "to convict" instruction, and if so asked for

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<sup>115</sup> CP 48

a definition.<sup>116</sup> The jury was instructed that the only term and only definition at issue was “being detained.”

Due process requires the State to prove every element of a crime beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Recently, three appellate cases have reversed convictions based on insufficiency of evidence. Each case required the Court to clarify previously defined statutory elements defining the criminal acts. By clarifying the defined terms at issue, the Courts concluded the State failed to present evidence meeting the specific element of the crime.

In *State v. Zeferino-Lopez*,<sup>117</sup> the Court reversed a conviction for second degree identity theft. The defendant had purchased a social security card bearing his name, but it was later revealed the social security number belonged to another person. To convict the defendant the State was required to prove that he knowingly possessed or used a means of identification of another person, living or dead. *Zeferino-Lopez*, at 96. In closing argument, the prosecutor argued that all the State needed to prove was that the defendant knowingly possessed the social security card.

So my next argument focuses on grammar, if there's any English majors in here you'll understand what I'm

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<sup>116</sup> CP 50

<sup>117</sup> --- Wn. App. ---, 319 P.3d 94 (2014).

talking about. The requirement is that the defendant knowingly possessed identification of another person. Knowingly is an adverb. It applies to the verb that follows, which is possession or use. Knowing applies and refers to possession or use. The phrase that comes after it is the object. And knowingly does not apply to that grammatically speaking.... He didn't have to know that that number was specifically assigned to another individual. He didn't. He had to know that he was in possession of it and the number. He had to know he was using the number and clearly he did. *Zeferino-Lopez*, at 95-96.

At issue was whether the element of knowledge applied only to whether the defendant knowingly possessed or used a means of identification, or that he knowingly possessed or used a means of identification or financial information “of another person, living or dead.”

The Court held that;

In keeping with the above authorities, we conclude that the element of knowledge in second degree identity theft does not refer only to the defendant's knowledge that he is using or possessing a means of identification or financial information. It also refers to his knowledge that it was “a means of identification or financial information of another person, living or dead.” *Zeferino-Lopez*, at 97.

This clarification on the application of the knowledge element fundamentally changed the nature of the State’s case. The Court held that the evidence was insufficient to find the defendant had knowledge he possessed a social security card and number of another person. *Id.*

In *State v. Hendrickson*,<sup>118</sup> the Court reversed two convictions for intimidating a public servant. The defendant made threats to two candidates for a judicial position. Public servant was defined by statute as;

[A]ny person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function. *Hendrickson*, at 74.

The Court held that under this statutory definition a person's candidacy for office did not amount to being a "public servant" as the candidate has yet to assume office. *Hendrickson*, at 75. Therefore the evidence did not support a conviction for this count. On a second count, however, the other candidate was a sitting judge and thus was a public servant. However, the intimidating a public servant statute required that a person use a threat to influence an "official act" of the public servant. *Hendrickson*, at 75. The Court concluded that the act of running for office was not an "official act" related to the office held by the public servant. *Hendrickson*, at 76. Therefore, the evidence was insufficient to meet the statutory elements for this count.

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<sup>118</sup> 177 Wn. App. 67, 311 P.3d 41 (2013).

Last, in *State v. Mau*,<sup>119</sup> the Court reversed a conviction for making a false insurance claim. Mau rented a U-Haul truck and purchased a liability contract from U-Haul for her belongings in the truck. Mau claimed her belongings were damaged and filed a claim. The claim was rejected under her liability contract, but was investigated by U-Haul's insurance company under a general liability claim. At issue was whether the defendant submitted a false claim on a "contract of insurance." *Mau*, at 313.

The State conceded that Mau had not filed a claim under a specific insurance policy with U-Haul. Washington law defined insurance as;

"a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." *Mau*, at 316.

The Court could find no instance where "contract of insurance" could be construed in a manner different from a contract that transferred risk from insured to insurer. *Mau*, at 316. Therefore, since Mau was not a party to any agreement between U-Haul and its insurance company, an agreement between U-Haul and its insurance company not related to Ms. Mau could not be used a contract of insurance to prosecute Mau. The evidence was therefore insufficient to support the conviction.

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<sup>119</sup> 178 Wn.2d 308, 308 P.3d 629 (2013).

Here, this Court has defined the “detained by” element for custodial sexual misconduct to mean restraint associated with a *Terry* detention. See *State v. Torres*, 151 Wn. App. at 386. The parameters of such a detention have been defined for over forty years since the *Terry* decision was published.

The State’s evidence and argument to the jury rested on the notion that M.M. believed she was detained when she entered Mr. Lavelly’s patrol car and acquiesced to his statements. But case law shows that a detention is not defined by the subjective perceptions of the person alleging detention. After review of these cases, as argued herein, the State’s evidence failed to establish M.M. was ever detained by Mr. Lavelly once she left Andy’s motel. Therefore, the conviction must be reversed.

## **2. Did the prosecutor commit misconduct?**

A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. *Fisher*, supra. The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Here, Mr. Lavelly contends the prosecutor committed misconduct that prejudiced his right to a fair trial. First, the prosecutor improperly vouched for the truthfulness of the testimony of M.M. by injecting into evidence and argument the fact she asked for no special favors in criminal cases against her in exchange for her testimony. Second, the prosecutor violated the “advocate-witness rule” by injecting his own testimony into evidence via M.M.. Third, the prosecutor argued Mr. Lavelly had the burden to establish reasonable doubt in the State’s case. These arguments, singularly and combined, caused prejudice requiring a new trial.

**A. Standards.**

An appellant bears the burden of demonstrating prosecutorial misconduct on appeal. He or she must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). If the appellant objected at trial, appellant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Where appellant failed to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have

been neutralized by an admonition to the jury. *Stenson*, at 719. Under this heightened standard of review appellant 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. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The focus is "less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, at 762.

Arguments alleged to be improper should be reviewed in context of the total argument, the issues in the case, the evidence addressed in the argument, and the court's jury instructions. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

**B. Did the prosecutor improperly vouch for the State's chief complaining witness, M.M., and thereby express to the jury his personal and professional opinion she was a credible witness, when he injected into her testimony, and argued in closing argument, the alleged fact that she never asked the prosecutor for any "deal" on her criminal charges and incarceration in exchange for testimony against Mr. Lavelly?**

A prosecutor commits improper vouching by expressing a personal opinion as to a witness's veracity. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Prosecutors may not give their personal opinions regarding the

defendant's guilt or a witness's credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). Whether a witness has testified truthfully is entirely for the jury to determine. *Ish*, at 196.

*Ish* is instructive. There, the Supreme Court concluded that the State's introduction of a witness's plea agreement promising a reduction in unrelated charges in exchange for truthful testimony amounted to improper vouching. This testimony created the inference of trustworthiness and that prosecutors could somehow verify that the testimony was truthful. Referencing the out-of-court promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the state behind the witness's testimony. *Ish*, at 199. The Court left open the possibility the State could introduce the plea agreement after the witness's credibility has been challenged. *Ish*, at 198-199.

Here, Mr. Lavelly contends the prosecutor improperly vouched for M.M.'s truthfulness. In rebuttal argument the prosecutor told the jurors,

“I want you to consider (sic) [M.M.] told you she is serving a sentence. She is so desperate to get out, she never asked me for anything.”<sup>120</sup>

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<sup>120</sup> RP 1077-1078

Counsel for Mr. Lavelly objected.<sup>121</sup> The trial judge instructed the jurors to recall the testimony.<sup>122</sup>

The testimony was clear on this point. Towards the end of M.M.'s direct examination, the prosecutor brought out M.M.'s extensive criminal history including crimes of dishonesty.<sup>123</sup> M.M. was presently in prison serving time on a conviction.<sup>124</sup> The prosecutor asked M.M.,<sup>125</sup>

“You understand the importance of telling the truth on the witness stand.”

M.M. answered, “Yes.”

The prosecutor then asked,

“Have you ever asked me or anyone in my office for any kind of deal on any of your other cases with respect to this case?”

M.M. answered, “No.”

Counsel for Mr. Lavelly did not object to this testimony.

This testimony, and argument, amounted to improper vouching. This testimony is similar to the improper vouching in *Ish*. While *Ish* involved the introduction of an agreement for truthful testimony, the

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<sup>121</sup> RP 1078

<sup>122</sup> RP 1078

<sup>123</sup> RP 367-368

<sup>124</sup> RP 367

<sup>125</sup> RP 369

prosecutor here used the absence of such an agreement to serve the same purpose. This statement was meant to place the State's seal of approval on M.M.'s testimony because she sought no favors in exchange for it. However, only the prosecutor could verify the truthfulness of this statement. Thus, the power of this testimony came not from what M.M. said, but came from the fact that the prosecutor knew that it was true.

Counsel objected to the prosecutor's argument.<sup>126</sup> The prosecutor's argument was prejudicial and had a substantial likelihood to affect the verdict. This trial, at its core, was about credibility. The prosecutor correctly summarized his case when he said,

"If you believe [M.M.] ... then every element of the crime has been proven beyond a reasonable doubt."<sup>127</sup>

Much of the State's case was centered around corroborating M.M.'s version of events: from when she first had contact with Officer Lavelly during the jay-walking incident all the way through to her return to the motel after the alleged sexual encounter behind the Burlington Coat Factory. Witnesses were presented to corroborate what she did and said before and after. But the State had to rely solely on M.M.'s testimony to

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<sup>126</sup> RP 1078

<sup>127</sup> RP 1042

prove she had sex with Mr. Lavelly. Therefore, it was critical to establish she was a reliable witness to prove the case.

When the credibility of witnesses is crucial, improper vouching is particularly likely to jeopardize the fundamental fairness of the trial. *United States v. Molina*, 934 F.2d 1440, 1445 (9<sup>th</sup> Circ. 1991). The appellate courts have found prosecutorial misconduct to be prejudicial and likely to affect a verdict in cases where evidence was not overwhelming showing guilt. In *State v. Johnson*,<sup>128</sup> the Court reversed a conviction where the testimony of the arresting officer and defendant was starkly different. *Johnson*, at 680; 686. In *State v. Fleming*,<sup>129</sup> the Court reversed a conviction where the State relied exclusively on the allege sexual assault victim's testimony to prove rape. *Fleming*, at 211-213; 215-216. In contrast, the Court found no prejudicial error in *Ish* where other evidence in the record supported the allegations sought to be proven by the improper evidence. *Ish*, at 200-201.

Here, evidence was not overwhelming and witness credibility was critical. The only evidence of sexual contact between M.M. and Mr. Lavelly came through M.M.'s testimony. The prosecutor sought to enhance

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<sup>128</sup> 158 Wn. App. 677, 243 P.3d 936 (2010).

<sup>129</sup> 83 Wn. App. 209, 921 P.2d 1076 (1996).

her credibility in the eyes of the jurors by injecting into the trial evidence something that only he knew – that she apparently never sought special treatment in exchange for testimony. In this regard the case resembles *Fleming*. There, the Court observed,

We agree with the comment of defendant Lee's counsel in his brief that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Appellant Lee's Brief at 30. *Fleming*, at 215-216.

Here, there was evidence that M.M. and Officer Lavelly were in close proximity to one another, and he transported her away from the motel in his patrol car. But the evidence was hardly overwhelming the two had sex. The State's case was built on circumstantial evidence and M.M.'s testimony. The prosecutor's improper vouching testimony and argument should result in reversal of conviction and a new trial.

**C. Did the prosecutor violate the advocate-witness rule where, in addition to the testimony and argument above (B) the prosecutor injected into M.M.s testimony that he allegedly told her several times that she needed to tell the truth at trial?**

Lawyers are not permitted to impart to the jury personal knowledge about an issue in the case under the guise of either direct or cross-examination when such information is not otherwise admissible in

evidence. *State v. Denton*, 58 Wn. App. 251, 257, 729 P.2d 537 (1990); citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950). Assertions of personal knowledge run afoul of the advocate-witness rule, which prohibits attorneys from testifying in cases they are litigating. *United States v. Edwards*, 154 F.3d 915, 921 (9<sup>th</sup> Circ. 1998).

The advocate-witness rule applies when a prosecutor implicitly testifies to personal knowledge or otherwise attains “witness verity” in a case in which he appears as an advocate for the government. Thus, it would be improper for a government attorney who has independent personal knowledge about facts that will be controverted at the trial to act as prosecutor (1) if he uses that inside information to testify indirectly by implying to the jury that he has special knowledge or insight, or (2) if he is selected as prosecutor when it is obvious he is the sole witness whose testimony is necessary to establish essential facts otherwise not ascertainable. *United States v. Hosford*, 782 F.2d 936, 939 (11<sup>th</sup> Circ. 1986).

Here, the prosecutor violated the advocate-witness rule twice. First, as stated above, the prosecutor injected into evidence his knowledge that M.M. had never sought any favors in exchange for her testimony. Second, in re-direct examination the prosecutor injected more personal

knowledge regarding his belief in M.M.'s truthfulness. After initially asking her if he or anyone else told her what to say at trial, he asked, "Actually, I have told you something before, haven't I, about what happens on the witness stand."<sup>130</sup>

M.M. responded, "Yeah."

He asked, "What did I tell you?"

She replied, "That – that they try to get you to say stuff you don't ..."

Counsel objected, and the court sustained.

The prosecutor, however, continued. He asked, "Did I tell you to – did I ask – did I tell you -- ?"

M.M answered, "Tell the truth."

The prosecutor continued, "I told you to tell the truth. How many times have I told you that during this case?"

Counsel again objected, although on grounds that the response was "asked and answered." The court sustained the objection.

A prosecutor may not place the integrity or prestige of her office on the side of a witness's credibility. *State v. Sargent*, 40. Wn. App. 340,343-44,698 P.2d 598 (1985). The particular "danger in having a

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<sup>130</sup> RP 385-386

prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be credible and will not consider critically any evidence that may suggest otherwise." *United States v. Edwards*, 154 F.3d at 921.

In *United States v. Prantil*,<sup>131</sup> the Ninth Circuit Court of Appeals elaborated on the importance of adhering to this long standing rule so a defendant may obtain a fair and unbiased trial:

Accordingly, adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundations of our system of justice. Other, more specific, policies are served by the advocate-witness rule in the context of a criminal prosecution. First, barring testimony by the participating prosecutor eliminates the risk that a testifying prosecutor will not be a fully objective witness given his position as an advocate for the government." Second, the rule prevents the prestige and prominence of the prosecutor's office from being attributed to testimony by a testifying prosecutor. Third, the rule obviates the possibility of jury confusion from the dual role of the prosecutor wherein the trier-of-fact is asked to segregate the exhortations of the advocate from the testimonial accounts of the witness. Naturally, the potential for jury confusion is perhaps at its height during final argument when the prosecutor must marshal all the evidence, including his own testimony, cast it in a favorable light, and then urge the jury to accept the government's claims. Hence there is a very real risk that the jury, faced with the exhortations of a witness, may accord testimonial credit to the prosecutor's closing argument. Finally, the rule expresses an institutional concern, especially pronounced when the government is a litigant,

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<sup>131</sup> 756 F.2d 758 (9th Cir. 1985).

that public confidence in our criminal justice system not be eroded by even the appearance of impropriety. *Prantil*, 756 F.2d at 764-65.

In *Edwards*, a prosecutor, in the midst of trial, searched a bag that had been held in evidence and found a scrap of paper bearing the defendant's name. *Edwards*, at 918-919. This was crucial to establish the defendant's knowledge of the contents of the bag. *Id.* The prosecutor was permitted to introduce the scrap of paper into evidence by questioning officers who were present when the prosecutor performed the search. At 919. The witnesses explained to the jury how the prosecutor found the paper. *Id.* The Court reversed the conviction finding the prosecutor's testimony via the officers on the stand to be improper as it conveyed the prosecutor's special knowledge as to the contents of the bag, and in particular conveyed the impression that the evidence was not planted there by the officers. At 922-923. This prejudiced the defense because little evidence established the Government's case except the existence of the scrap of paper. *Id.*

Here, the State may respond that the above interaction occurred after cross examination where M.M.s credibility had been challenged. But it is un-mistakable that the prosecutor sought to resurrect her credibility through the prosecutor's words and actions, not hers. He told her that the

defense would try to get her to say things. He told her to tell the truth. He injected himself, and his title as a prosecutor, into her testimony as a means to assure the jury that she was telling the truth. As stated above, only he could verify that M.M. never asked for any favors, and only he could confirm that he told M.M. to tell the truth. Thus, he advocated for the truth of his case by acting as a witness to M.M.'s credibility.

Vouching by a prosecutor from personal knowledge, as distinguished from personal opinion, is particularly problematic. As observed in *Edwards*,

“[a]n improper message conveyed in this manner is even more prejudicial to the defense than the usual vouching message,” because it suggests that the prosecutor has special knowledge pertaining to the defendant's guilt and personally believes in his own observations. *Edwards*, 154 F.3d at 922.

Analyzing the problem in witness-advocate conflict terms, the Second Circuit has recognized implicit testimony by a prosecutor as especially prejudicial because “ ‘an unsworn witness [is not] subject to cross-examination or explicit impeachment.’ ” *United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2<sup>nd</sup> Circ. 1985); *United States v. Cunningham*, 672 F.2d 1064, 1075 (2<sup>nd</sup> Circ. 1982). The danger in having a prosecutor testify as an implicit witness is that “jurors will automatically presume the

prosecutor to be credible and will not consider critically any evidence that may suggest otherwise.” *Edwards*, at 921.

Here, certain testimony (asking for favors) was not objected to, whereas other testimony (telling the truth) was. With the latter testimony the objections were sustained. But the testimony must still be analyzed for its prejudicial affect and whether any prejudice could have been cured by instructions to the jury. *Emery*, at 762.

The State’s case depended on the jury finding M.M. credible. She was the only witness who could testify that she had sex with Mr. Lavelly. The prosecutor’s efforts to vouch for her credibility, both before and after cross examination, created a consistent theme related to her testimony that the prosecutor had special knowledge that she was telling the truth. As stated in *Edwards*, when a prosecutor can project this image to the jury, it is especially prejudicial. *Edwards*, at 922.

An instruction to the jury could not have cured this prejudice. Finding M.M. a credible witness was not a simple task. She was admittedly high on drugs at the time of this alleged incident. Witnesses described her erratic behavior prior to the alleged incident. Defense counsel pointed out that she exaggerated testimony related to a prior incident with law enforcement regarding injuries she sustained. The

prosecutor's statements left an enduring impression that he knew she was truthful in alleging having sex with Mr. Lavelly because of his knowledge M.M. never asked for favors, and he admonished her several time to tell the truth. This improper conduct merits a new trial.

**D. Did the prosecutor improperly switch the burden of proof onto Mr. Lavelly and place the burden of proving reasonable doubt onto him by arguing to the jury that after cross examining M.M. the defense had failed to poke any holes into the elements the prosecutor was required to prove to convict Mr. Lavelly?**

The State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. *State v. Camara*, 113 Wn.2d 631, 638, 781 P.2d 483 (1989). Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006); *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). A prosecutor commits misconduct when he, in closing argument, suggests that the defendant had an obligation to produce evidence of his innocence. *State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 546 (1990). While prosecutors have wide latitude to make inferences about witness credibility, it is error for a prosecutor to offer the "false choice" that the jury can find a defendant not guilty only if it believes his evidence. *Miles*, at 890.

Generally, a prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. Thorgerson*, 172 Wn.2d at 467. However, where a defendant does present evidence, it may not be improper for the prosecutor to comment on the quantity and quality of the evidence presented. *State v. Gregory*, 158 Wn.2d at 860.

Here, the improper comments did not address evidence presented by Mr. Lavelly. Instead, the prosecutor focused on defense counsel's apparent failure to create reasonable doubt when cross-examining M.M.<sup>132</sup>

“You can believe what happened to [M.M.] because cross examination by counsel really didn't put holes in her story. After an hour plus interview with Detective Kowalchuk, after a two plus hour interview with the defense team, after an hour of direct examination, after at least half an hour of cross examination, what did that get the defense? What holes were so poked in what she said about the elements that I have to prove to you after all of those hours of talking about this, what did that reveal?”

This issue is similar to the issue in *Miles*. Like *Miles*, here the jury heard mutually exclusive versions of events. *Miles*, at 889 (“If one is true, the other cannot be.”) In *Miles*, the State presented evidence the defendant made a controlled purchase of crack cocaine. Miles denied he bought the

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<sup>132</sup> RP 1049

drugs, and presented evidence that he could not have been involved in the transaction. In closing the prosecutor argued that,

[I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you.... You are being asked to use your experience and your common sense to decide which version of events that you have heard over in this courtroom over the course of this trial is more credible. *Miles*, at 890.

The Court found this argument improper and prejudicial because it presented to the jury a false choice; they could find Miles not guilty only if they believed his evidence. *Miles*, at 890. This logic, of course, was flawed because the jury was entitled to acquit Miles even if it did not necessarily believe his testimony if it was also not satisfied beyond a reasonable doubt that the State had proven its case. *Id.*

Here, the prosecutor's argument is similar to the "fill in the blank" argument. See *State v. Emery*, 174 Wn.2d at 759. Where a prosecutor argues that for a jury to acquit a defendant it must articulate reasonable doubt as "blank," it subverts the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him." *Emery*, at 759. This argument is inappropriate because the State bears the burden of proving its case beyond a reasonable doubt, and the

defendant bears no burden. *Id.* By suggesting otherwise, the State's fill-in-the-blank argument subtly shifts the burden to the defense. *Id.*

Here, the prosecutor's argument was the opposite of subtle. He clearly placed the burden on Mr. Lavelly and his counsel to "poke a hole" in M.M.'s testimony to create doubt. The prosecutor's argument was crucial because M.M. was the sole witness who could present evidence that a crime took place; i.e. sex. Accordingly, it was Mr. Lavelly's burden to reveal any doubt in her story. In the absence of a "poked hole" in her testimony, the jury was obligated to convict. However, as in *Miles*, this was false. Regardless of any "poked holes" the jury was entitled to acquit Mr. Lavelly if it was also not satisfied beyond a reasonable doubt that the State had proven its case.

Counsel did not object to this mis-statement on the burden of proof, and on appeal Mr. Lavelly must establish that prejudice could not be cured by a corrective instruction from the trial court. Here, case law shows that prejudice could not be cured by a court instruction. In *Johnson*, *supra*, the Court reversed a conviction where the prosecutor mis-stated the burden of proof.

Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury

followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the “bedrock upon which [our] criminal justice system stands,” constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights. *Johnson*, at 685-686.

The Court also noted the fact the trial contained conflicting evidence and found that with the inclusion of the “misstatement of the reasonable doubt standard and the presumption of innocence due Johnson, we cannot conclude that such misstatements did not affect the jury's verdict.” *Johnson*, at 686.

Here, as stated several times above, the State’s case depended on the jury finding M.M. credible. Consistent with *Johnson* and *Miles*, an argument placing the burden to establish reasonable doubt onto Mr. Lavelly could not be cured by an instruction.

**E. Did the several errors described above (B-D) collectively prejudice Mr. Lavelly’s right to a fair trial?**

The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction can erase their combined prejudicial effect. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012).

Here, the totality of misconduct demonstrates cumulative error. First, the prosecutor presented the jurors with the rhetorical question –

what holes did the defense poke in M.M.'s testimony – to create a burden on the defense to create reasonable doubt in the State's case. The State's case was premised on the testimony of M.M., since only she could testify that she had sexual intercourse with Mr. Lavelly. To bolster her credibility, the prosecutor vouched for her credibility by testifying through M.M. that she never asked for any favorable treatment in exchange for her testimony and he told her many times to tell the truth.

Collectively, this framework of misconduct denied Mr. Lavelly a fair trial. Essentially, the jury was told to convict Mr. Lavelly unless he could poke holes in her credibility. This, of course, would be difficult as the State vouched for her credibility. Despite a record of infrequent objections by defense counsel, these errors went to the heart of the issue of the burden of proof the State carries at all times – to prove each element beyond a reasonable doubt. The resulting prejudice could not be cured by further instructions. The conviction should be reversed.

## **VI. CONCLUSION**

For the reasons herein stated, Mr. Lavelly asks this Court to find that the State's evidence was insufficient to support the element M.M. was detained under the custodial sexual misconduct statute and reverse the conviction and dismiss the prosecution. Additionally, Mr. Lavelly asks this

Court to find the prosecutor committed misconduct a trial prejudicing his right to a fair trial, reverse the conviction, and remand for new trial.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of May, 2014.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245  
Attorney for Mr. Lavelly