Supreme Court No. ____
(COA No. 84950-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL ZWALD,

Petitioner.

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

CORRECTED PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND DECISION BELOW 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 8

1. This Court should grant review because the Court of Appeals has repeatedly ruled it lacks authority to address the impropriety of the no-corroboration instruction because it is bound by this Court's 1949 decision in Clayton 8

a. The no-corroboration instruction improperly signals the jurors should give less scrutiny to the alleged victim's testimony and comments on the evidence . 8

b. Many other states reject this type of instruction due to its impermissible impact on jurors 14

c. The instruction in this case was wrong and misleading, confused the jury, and the court did not issue any clarification 15

d. This Court should grant review of the published Court of Appeals decision on this significant issue 17

2. The Court of Appeals agreed the prosecution made improper arguments but it disregarded the thematic nature of these improprieties, contrary to Loughbom . 19

E. CONCLUSION 25

TABLE OF AUTHORITIES

Washington Supreme Court

Laudermilk v. Carpenter, 78 Wn.2d 92, 457 P.2d 1004 (1969). 12

State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).. 9, 10, 14, 15, 18

State v. Crossguns, 199 Wn.2d 282, 505 P.3d 529 (2022) 18

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006)..... 9

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009)..... 15

State v. LaFaber, 128 Wn.2d 896, 913 P.2d 369 (1996) 15

State v. Loughbom, 196 Wn.2d 64, 470 P.3d 499 (2020).. 2, 20, 21

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 23

State v. Pierce, 169 Wn. App. 533, 280 P.3d 1158 (2012)..... 23

State v. Svaleson, 195 Wn.2d 1008, 458 P.3d 790 (2020)..... 18

State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932) 8

Washington Court of Appeals

City of Kirkland v. O'Connor, 40 Wn. App. 521, 698 P.2d 1128 (1985)..... 13

In re Det. of RW, 98 Wn. App. 140, 988 P2d 1034 (1999)..... 12

State v. Chenoweth, 188 Wn. App 521, 354 P.3d 13 (2015)... 11

State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002) 24

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 24

State v. Jackson, 185 Wn. App. 1052, 2015 WL 563963 (2015) 24

State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009)..... 11

State v. Kovalenko, 30 Wn. App. 2d 729, 746, 546 P.3d 514 (2024),..... 10

State v. Painter, 27 Wn. App. 708, 620 P.2d 1001 (1980) 13

State v. Rohleder, _Wn. App. 2d _, 550 P.3d 1042 (2024) 10, 18

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994)..... 23

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011)..... 25

State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008)..... 24

State v. Zimmerman, 130 Wn. App. 170, 121 P.3d 1216 (2005) 11

Federal Decisions

Burke v. State, 624 P.2d 1240 (Alaska 1980) 14

United States v. Garza, 608 F.2d 659 (5th Cir.1979) 23

United States Constitution

Fourteenth Amendment 17, 19

Washington Constitution

Article I, section 3 ..... 17, 19

Article IV, section 16 ..... 8, 19

Statutes

RCW 9A.44.020 19

Court Rules

RAP 13.3(a)(1) 1

RAP 13.4(b) 1, 25

Other Authorities

Garza v. State, 231 P.3d 884 (Wyo. 2010) 15

Gutierrez v. State, 177 So. 3d 226 (Fla. 2015) 14

Ludy v. State, 784 N.E.2d 459 (Ind. 2003) 14

State v. Kraai, 969 N.W.2d 487 (Iowa 2022) 14

State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) 15

State v. Williams, 363 N.W.2d 911 (Minn. Ct. App. 1985)..... 15

A. IDENTITY OF PETITIONER AND DECISION BELOW

Joel Zwald, petitioner here and appellant below, asks this Court to grant review of the published Court of Appeals decision terminating review pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). The Court of Appeals issued its decision on August 5, 2026, amended on August 26, 2022.[1] It denied Mr. Zwald's motion for reconsideration on August 28, 2024. Copies are attached.

B. ISSUES PRESENTED FOR REVIEW

1. In *Clayton*,[2] this Court approved of an instruction telling jurors the State is not required to corroborate the alleged victim's testimony in a sexual assault case. Many Court of Appeals decisions have expressed doubt about *Clayton* while saying they are bound by it. Numerous other states have

---

[1] This direct appeal was consolidated with a petition for post-sentence review filed by the Department of Corrections. This petition does not raise any issues involving the sentence.

[2] *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949)

rejected similar no-corroboration instructions because of the likelihood they improperly impact jurors.

This Court should grant review of the published Court of Appeals decision because the Court of Appeals cannot overrule *Clayton*, *Clayton* is based on outmoded perceptions, and a court's instruction that singles out the complaining witness's testimony and indicates it gets less rigorous scrutiny than other witnesses unfairly sways jurors' assessment of the evidence.

2. It is well-established that prosecutors may not encourage jurors to convict based on the prosecutor's desire to be the victim's voice, the prosecutor's knowledge of law enforcement tactics that are not in evidence, or the prosecutor's opinion of the defense as a "game." The Court of Appeals recognized the prosecution's closing argument consisted of a "theme" that relied on multiple improper tactics. Disregarding this Court's opinion in *Loughbom* and other cases, the Court of Appeals called the prosecutor's argument "self-aggrandizing"

but not prejudicial. The published Court of Appeals decision is contrary to established law and merits review.

C. STATEMENT OF THE CASE

While Joel Zwald was dating Taylor Richardson's mother, Ms. Richardson chafed under their strict rules and tried to run away from home. RP 249-50, 499. Her mother disapproved of Ms. Richardson's older boyfriend, Dillon Harrison, who she believed used drugs and posed with guns, so Ms. Richardson would sneak out to see him. RP 294, 517.

Ms. Richardson told her boyfriend that Mr. Zwald had been touching her inappropriately. RP 264. Mr. Harrison encouraged Ms. Richardson to tell her school counselor. *Id.* Ms. Richardson's school counselor contacted the police. RP 264, 332. The police removed Ms. Richardson from her home, placing her with her grandmother. RP 310. Ms. Richardson wanted to live with her boyfriend but could not because he was 18. RP 295.

The prosecution charged Mr. Zwald with child molestation in the third degree, child molestation in the second degree, and rape of a child in the second degree. CP 1. Mr. Zwald testified at trial and denied the allegations. RP 495. The prosecution's case hinged solely on Ms. Richardson's descriptions of events. RP 240.

Over objection, the court instructed the jury that no corroboration of Ms. Richardson's testimony was necessary to convict Mr. Zwald of two charged offenses. RP 546, 572. Mr. Zwald contended the prosecution's proposed instruction was unconstitutional, prejudicial, and impacted the burden of proof. RP 546.

The trial court said it was required to give this instruction, even though it had doubts about it, because no appellate court had said this instruction should not be given. RP 546.

The instruction did not mention a third charge, child molestation in the third degree. CP 39. The deliberating jury

noticed this discrepancy and sought clarification. CP 47. The court realized its instruction was wrong and could cause confusion but told the jurors that the instructions are "complete" and to "consider them as a whole." RP 625-26; CP 48.

In closing argument, the prosecutor argued he stood in a "long line of public servants who have served and provide a voice for Taylor Millar [Richardson]." RP 577. He then argued this voice was used for the "children being violated by the people they trust the most." *Id.*

The prosecutor argued Ms. Richardson's "tragedy turned to courage when she ha[d] a safe place to disclose." RP 578. It was here, the prosecutor argued, that Ms. Richardson found "her voice." RP 579. He argued that the public servants, including the police, were "going to hear her and not doubt her." RP 580. This, the prosecutor asserted, showed "courage." RP 381. The prosecutor argued Ms. Richardson had been "safe

since the day she disclosed" and that the trial was the culmination of what happened once she disclosed. RP 592.

In rebuttal, the prosecutor began his argument by speaking about facts not in evidence, arguing that the rules of evidence prevented him from introducing Ms. Richardson's previously made statements. RP 611. He told the jury, "We want our child victims to have a voice in our community." RP 612. The trial, he argued, was the opportunity for Ms. Richardson to have her voice. *Id.*

The prosecutor described Mr. Zwald's defense as a "game" by using the "classic defense tactic" of saying he was sorry but that Ms. Richardson was "essentially a liar." RP 613.

The prosecutor told jurors to excuse the lack of investigation in the case because it was due to the police department's other cases they had to investigate. RP 614. He argued that he personally would not be happy with law enforcement if they spent time talking to people they did not

need to be talking to or who would not be valuable to his case. RP 615.

The Court of Appeals agreed the theme of the prosecutor's closing argument was "self-aggrandizing and dramatic" but ruled it was not erroneous. Slip op. at 16. The Court of Appeals also ruled the prosecution made improper arguments during closing regarding facts not in evidence and denigrating the defense, but they were not so prejudicial that reversal was required. Slip op. at 19.

The facts are further explained in Appellant's Opening and Reply Briefs, in the relevant factual and argument sections, and are incorporated herein.

D. ARGUMENT

1. This Court should grant review because the Court of Appeals has repeatedly ruled it lacks authority to address the impropriety of the no-corroboration instruction because it is bound by this Court's 1949 decision in *Clayton*.

a. The no-corroboration instruction improperly signals the jurors should give less scrutiny to the alleged victim's testimony and comments on the evidence.

Because jurors are likely to be searching for and affected by signals from a judge, Washington has an especially restrictive rule barring the court from conveying its impressions of witness testimony or evidence in a criminal case. *State v. Vaughn*, 167 Wash. 420, 425-26, 9 P.2d 355 (1932).

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. This prohibits a judge from commenting on "matters of fact" to a jury or "conveying to the jury his or her personal attitudes toward the merits of the case." *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). A

comment on the evidence may occur through mere implication. *Id*. at 744.

In *Clayton*, this Court ruled that an instruction which said the defendant "may be convicted upon the uncorroborated testimony of the prosecutrix alone," was not a comment on the evidence. 32 Wn.2d at 577-78.

In the case at bar, the trial court used more mandatory language, telling jurors that "to convict a person of child molestation in the second degree or rape of a child in the second degree it is not necessary that the testimony of the alleged victims be corroborated." CP 39.

Yet the Court of Appeals relied *Clayton*, and prior Court of Appeals rulings saying they are bound by Clayton, to hold the instruction is legally valid. Slip op. at 8.

Since *Clayton*, the Washington Pattern Jury Instruction Committee has specifically disapproved of such an instruction. WPIC 45.02 Rape—No Corroboration Necessary, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.02 (5th Ed). WPIC

45.02 explains that "corroboration is really a matter of sufficiency of the evidence," which is a factual issue for jurors, not a legal issue for instruction. *Id*.

On many occasions, the Court of Appeals has expressed concerns about *Clayton*. In *Rohleder*, the Court of Appeals said, "Rohleder's argument that the no corroboration instruction constitutes a comment on the evidence has merit and the better practice is not to give the instruction." *State v. Rohleder*, _Wn. App. 2d _, 550 P.3d 1042, 1044 (2024) (*petition for review pending*, S.Ct. No. 103265-0).[3]

But *Rohleder* also said "we are constrained by the Supreme Court's opinion in" *Clayton* "to conclude that giving such an instruction was not a comment on the evidence." *Id*.;

---

[3] The petition for review in *Rohleder* and another similar published decision expressing concern about a no-corroboration instruction are set for consideration on November 5, 2024. *State v. Kovalenko*, 30 Wn. App. 2d 729, 746, 546 P.3d 514 (2024), *pet. pending*, S.Ct. No. 103024-0 (noting "we are still bound by *Clayton* to hold that this no-corroboration instruction is constitutional").

see also State v. Johnson, 152 Wn. App. 924, 937, 219 P.3d 958 (2009) (ruling instruction "may be an impermissible comment on the evidence"); *State v. Chenoweth,* 188 Wn. App. 521, 537, 354 P.3d 13 (2015) (expressing "concern" about instruction); *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005) (noting "misgivings" about instruction); *see also Chenoweth,* 188 Wn. App. at 538 (Becker, J. concurring) ("If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction.").

Here, the court thought it was required to give this instruction and must do so until this Court tells it otherwise. RP 546. When the defense objected to the instruction, the court said, "I do have to give that instruction" because it is the "current law and I have no other direction from an appellate court telling me otherwise." *Id.*

The Court of Appeals insists that because the instruction is legally accurate, it is an appropriate instruction to provide

jurors. Slip op. at 8-9. But a legally correct statement of the law may impermissibly comment on the evidence based on how jurors may perceive it. *City of Kirkland v. O'Connor*, 40 Wn. App. 521, 523, 698 P.2d 1128 (1985) (instructing jurors not to consider lack of breathalyzer was comment on evidence).

When a court tells jurors that certain evidence is not necessary to convict, they essentially tell jurors not to consider the lack of this evidence. *O'Connor*, 40 Wn. App. at 523-24. Jurors likely believe the court wants them to give the prosecution "the benefit of the doubt" about the lack of this evidence. *Id.* at 524. Such an instruction is "a comment upon the evidence" requiring reversal. *Id.* at 523-24.

Courts also comment on the evidence if they "buttress" on party's theory of the case over another. *Laudermilk v. Carpenter*, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969). Courts may not tell jurors to give evidence "great weight." *In re Det. of RW*, 98 Wn. App. 140, 144-45, 988 P2d 1034 (1999).

An instruction may be a comment on the evidence due to the facts of the case, even if not a comment in a different set of circumstances. *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980) (legally correct instruction defining great bodily harm was a comment on the evidence because, under the facts of the case, it "clearly indicated to the jury that the evidence presented at trial was insufficient to support the theory of self-defense").

Telling jurors that they "shall not" require corroboration of the complainant's testimony to convict the defendant tells the jurors that the complainant's testimony suffices in this case. It signals the court's belief that jurors should give the benefit of the doubt to the prosecution regarding the lack of corroboration. It does not further explain that no one's testimony requires corroboration, including the defendant's testimony.

This Court should grant review to address the propriety of this instruction in light of the many Court of Appeals decisions questioning its validity but believing they are bound

by *Clayton*, as well as the trial court's belief here that the instruction is mandatory until an appellate court rules otherwise. RP 546.

b. Many other states reject this type of instruction due to its impermissible impact on jurors.

Many jurisdictions have rejected no-corroboration instructions similar to the one issued in this case.

In *Gutierrez v. State*, 177 So. 3d 226, 230 (Fla. 2015), the court stated that a "special 'no corroboration' instruction has a high likelihood of confusing and misleading the jury regarding its duty to consider the weight and credibility of the testifying victim of a sexual battery." It has the "deleterious effect of singling out the testimony of one witness and providing a different test for evaluating that testimony than would be applied to all other witnesses." *Id.; see also State v. Kraai*, 969 N.W.2d 487, 491-94 (Iowa 2022); *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003); *Burke v. State*, 624 P.2d 1240, 1257 (Alaska 1980); *State v. Williams*, 363 N.W.2d 911, 914 (Minn.

Ct. App. 1985); *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480, 482–83 (2016); *Veteto v. State*, 8 S.W.3d 805, 816 (Tex. App. 2000), abrogated on other grounds *by State v. Crook*, 248 S.W.3d 172 (Tex. Crim. App. 2008); *Garza v. State*, 231 P.3d 884, 890–91 (Wyo. 2010).

These cases demonstrate the risk posed by this no-corroboration instruction to the fairness of the trial, which this Court has not considered since *Clayton*.

c. The instruction in this case was wrong and misleading, confused the jury, and the court did not issue any clarification.

Jury instructions must make the relevant law manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Jurors are not expected to parse instructions to construe their meaning when they are ambiguous or conflicting. *State v. LaFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996). They lack the "interpretive tools" of lawyers. *Id.* If an instruction could lead jurors to misapply the law, the instruction is erroneous. *Id.* at 902-03.

Instruction 13 said: "to convict a person of child molestation in the second degree or rape of a child in the second degree, it is not necessary that the testimony of the alleged victim be corroborated." CP 39.

It did not mention child molestation in the third degree. CP 1, 31. The deliberating jury noticed this discrepancy. CP 47. It asked the court whether third degree child molestation "require[s] corroboration," because "Instruction #13 specifically says victim testimony does not need to be corroborated for 2nd degree child molestation or rape." CP 47.

The court realized its instruction was wrong and could confuse the jury, but thought it was too late to change the instruction. RP 625-26. It left the matter unresolved, telling the jurors, "the Court's Instructions are complete. During your deliberations, you must consider the instructions as a whole." CP 48.

There can be no question that Instruction 13 is inaccurate, which the Court of Appeals ignored. At a minimum,

it signaled that a different requirement of corroboration applies to two of the three charged offenses. CP 39, 47-48. The jurors' request for guidance shows their reliance on this instruction and confusion about the governing law. *Id*.

The court did not make the law manifestly apparent to the jurors, as due process requires. U.S. Const. amend. XIV; Const. art. I, § 3. Instruction 13 diluted the State's burden of proof and commented on the type of evidence to convict Mr. Zwald. It confused the jurors by ignoring one charged offense even though it also rested solely on the complainant's allegations. Additionally, Mr. Zwald testified, denying the allegations, but the court did not tell jurors his testimony did not require corroboration. This instruction mislead the jury about how to evaluate the rest of the evidence in the case.

d. This Court should grant review of the published Court of Appeals decision on this significant issue.

Several years ago, this Court granted review of the constitutionality of this no-corroboration instruction in *State v.*

Svaleson, 195 Wn.2d 1008, 458 P.3d 790 (2020). But the petitioner died while the case was pending and this Court never reached its merits. The same reasons this Court granted review in *Svaleson* still apply.

As Division Two recently ruled in *Rohleder*

> Like our colleagues in the earlier cases discussed above, we have strong concerns about the giving of the no corroboration instruction. We emphasize that there is no need for a no corroboration instruction, and the better practice is for trial courts not to give one.
>
> *Until the Supreme Court addresses this issue*, we are constrained by *Clayton* to conclude that giving a no corroboration instruction is not a comment on the evidence.

550 P.3d at 1044 (emphasis added).

Clayton was decided over 70 years ago, when societal attitudes toward sexual assault were far different. *See, e.g.*, *State v. Crossguns*, 199 Wn.2d 282, 293, 505 P.3d 529 (2022) (recognizing that past court decisions in sexual assault cases have been based on "outdated, sexist assumptions and expectations"). No corroboration of a complainant's testimony has been required for over 100 years. RCW 9A.44.020(1).

Perhaps historically, it was appropriate to make clear that an alleged victim's testimony is entitled to the *same* consideration as that of other witnesses. But at present, this instruction implies such testimony is entitled to *special* consideration, thereby violating article IV, section 16 and misleading the jury about the prosecution's burden of proof. Review should be granted.

2. The Court of Appeals agreed the prosecution made improper arguments but it disregarded the thematic nature of these improprieties, contrary to *Loughbom*.

Incurable prejudice may result when the prosecution improperly frames the issues at stake and reinforces this theme, depriving an accused person of a fair trial. *State v. Loughbom*, 196 Wn.2d 64, 75, 470 P.3d 499 (2020); U.S. Const. amend. XIV; Const. art. I, § 3. In *Loughbom*, the prosecutor referred to the "war on drugs" three times, once in opening and twice in closing. *Id.* at 68. The defense never objected. But this Court ruled the prosecution's efforts to portray the case as part of a

larger effort to combat drugs in the community was flagrant and ill-intentioned misconduct. *Id*.

Based on these three improper references to the war on drugs, this Court ruled "we must conclude that the prosecutor's improper framing of Loughbom's prosecution as *representing* the war on drugs, and his reinforcing of this theme throughout, caused incurable prejudice such that his failure to object did not amount to a waiver of the prosecution's error." *Id*. at 75.

Here, the prosecutor made several improper, thematic arguments urging the jury to rely on the State's endorsement of these otherwise uncorroborated accusations. The Court of Appeals' refusal to acknowledge the harmful impact of these arguments is contrary to *Loughbom*. The Court of Appeals agreed the prosecutor used a "theme" that he, his office, and the police stood in Ms. Richardson's shoes and served the role of being her "voice." RP 577, 579-80, 586, 592

Throughout the argument, it thematically presented its role, along with other government agents, as being the "voice"

of Ms. Richardson and explaining they did "not doubt her." RP 579-80. The prosecutor told jurors there was a "chain of public service that were going to serve to amplify Taylor's voice" in prosecuting the case. RP 579, *accord* RP 586 ("these public servants have come forward to amplify her voice"). It described the trial as the "culmination" of its effort to "amplify that voice and give her an opportunity to stand here before you and tell her story." RP 592. Then the prosecutor praised her truthfulness directly, saying, "after what she has been through to do that with grace and poise and authenticity, that she did that was an incredible act of courage and perseverance." *Id.*

The prosecutor also inserted facts not in evidence, about himself, into the jury's deliberations. The prosecutor argued that the police did not do a follow-up investigation because they were busy with other investigations and because "I am not going to be happy with law enforcement" if they interviewed witnesses who are not "valuable" to "our case." RP 614-15. But this information was not in the record -- even the prosecution

agreed it was improper vouching on appeal. Slip op. at 19. And it was contrary to the record because the police did interview people like Ms. Richardson's grandmother even though she was not a witness to any of the incidents.

A prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *United States v. Garza*, 608 F.2d 659, 663 (5th Cir.1979)).

The Court of Appeals deemed most of the prosecutor's tactics "self-aggrandizing" but insisted they were not error or prejudicial. Slip op. at 16. However, calling it self-aggrandizing acknowledges the prosecutor was trying to make himself seem more powerful or important, as the definition of self-aggrandizing demonstrates. Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/self-aggrandizing.

Prosecutors are not representatives of the victims or vehicles channeling their voices. *State v. Pierce*, 169 Wn. App. 533, 557-58, 280 P.3d 1158 (2012). It "is improper for the prosecutor to step into the victim's shoes and become his representative." *Id.* at 554; *see also State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011)) (prosecutor is quasi-judicial officer who represents public as well as accused).

In an unpublished case, the prosecutor committed misconduct by arguing victims need a "voice" and someone to stand up for them. *State v. Jackson*, 185 Wn. App. 1052, 2015 WL 563963, *9 (2015) (unpublished, cited pursuant to GR 14.1). Prosecutors may not "draw a cloak of righteousness" around its role. *State v. Gonzales*, 111 Wn. App. 276, 282, 45 P.3d 205 (2002), *overruled on other grounds*, *State v. Talbott*, 200 Wn.2d 731 (2022). They may not vouch for the honesty of their witnesses. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

The prosecutor made a litany of improper arguments designed to send the message that jurors should convict based on their trust in the government and the government's sympathy for Ms. Richardson. Given the case law prohibiting prosecutors from claiming they are the voice of the victim, or putting the prestige of the government behind the witness and presenting facts not in evidence, and the repeated nature of this misconduct, no court instruction could cure this impropriety, contrary to the Court of Appeals. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011) (improper comments used to develop theme in closing argument impervious to curative instruction).

This Court should grant review to address these errors.

E. CONCLUSION

Based on the foregoing, Petitioner Joel Zwald respectfully requests that review be granted pursuant to RAP 13.4(b).

Counsel certifies this document contains 3856 words and complies with RAP 18.17(b).

DATED this 27th day of September 2024.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner
nancy@washapp.org

APPENDIX A

FILED
8/26/2024
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Appellant, v. JOEL DUANE ZWALD, Respondent.	No. 84950-6-I (consolidated with No. 85332-5-I) PUBLISHED OPINION

BOWMAN, J. — Joel Duane Zwald appeals his jury convictions for third degree child molestation, second degree child molestation, and second degree child rape. He argues that the trial court commented on the evidence by instructing the jury that to convict Zwald, it need not corroborate the victim's testimony, and that the prosecutor committed misconduct during closing argument. He also asks us to remand for the trial court to strike the nonmandatory legal financial obligations (LFOs) imposed at sentencing based on his indigency. The Department of Corrections filed a postsentence petition, alleging the trial court erred in sentencing Zwald on count 3, second degree child rape. We affirm Zwald's convictions but remand for the court to determine whether he is indigent and reconsider the LFOs and to resentence Zwald on count 3.

FACTS

Zwald and M.C. started dating in 2007. In 2014, M.C., her son J.C., and her youngest daughter T.R.[1] moved in with Zwald.[2]

When T.R. was about 11 or 12 years old, Zwald began sexually assaulting her. In 2019, T.R. disclosed the abuse to her school counselor, Tracee Mullen.[3] Mullen reported the abuse to Child Protective Services (CPS) and the high school. The school contacted the police. On November 19, 2019, the State charged Zwald with one count of third degree child molestation, one count of second degree child molestation, and one count of second degree child rape of T.R.

A jury trial began in October 2022. T.R. testified in detail about her nonexistent relationship with her biological father and her strained relationship with her mother during her childhood. T.R. described M.C. as "a very closed-off person" and said that she and M.C. "would fight a lot." T.R. admitted that she "act[ed] out quite a lot," including running away from home. T.R. also said that after they moved in with Zwald, she "just kind of stopped getting along with everyone in my family," including Zwald, because "[h]e was molesting me." T.R. testified that after she disclosed the abuse, she moved in with her grandma and had not spoken to her mother in the three years since.

[1] Formerly known as T.M.

[2] M.C.'s oldest daughter, K.C., also moved in with Zwald, but left the home when she graduated high school.

[3] Formerly known as Tracee Smith.

T.R. then testified about the assaults, which "happened almost on a daily basis, . . . either in [her] room or [Zwald's]." T.R. said that she did not disclose the abuse sooner because she feared no one would believe her. But she did tell her then-boyfriend D.H., and he eventually encouraged her to disclose the abuse to her school counselor, Mullen. On cross-examination, defense counsel tried to impeach T.R.'s credibility by questioning her "chronic running away," stealing money from M.C. and Zwald, and "sneaking out to spend time with [D.H.]."

The State called Mullen to testify about T.R.'s disclosure and explain that as a mandatory reporter, she had to report the abuse to CPS and the high school. The State also called several law enforcement officers. Former Everson Police Department Officer Jordan Bryant testified that he responded to the high school's initial call to police. Officer Bryant interviewed T.R. and then transferred the case to the Whatcom County Sheriff's Office. Whatcom County Sheriff's Office Detective Erik Francis testified that he interviewed T.R. several days later, which he "audio video recorded." Detective Francis explained that he tried to contact T.R.'s brother, J.C., but he did not respond, and that he did not try to interview T.R.'s former boyfriend, D.H.

Zwald challenged both officers' investigations on cross-examination. Defense counsel criticized Officer Bryant for not interviewing witnesses other than T.R., including D.H., J.C., and one of T.R.'s friends. And he criticized Detective Francis' investigation for the same reason, eliciting testimony that along with D.H. and J.C., Detective Francis did not interview another high school

counselor or high school teachers. Zwald testified on his own behalf and denied ever touching T.R. in an inappropriate manner.

The trial court instructed the jury before closing arguments. Over Zwald's objection, it gave a no-corroboration instruction that stated, "In order to convict a person of child molestation in the second degree or rape of a child in the second degree, it is not necessary that the testimony of the alleged victim be corroborated."[4]

In closing, the prosecutor focused on how Mullen and law enforcement helped T.R. "find her voice" and how the State is "going to tell her story" to the jury. In his closing argument, defense counsel told the jury that T.R. had a "truth problem" and that she was motivated to lie because she wanted to leave home to be with D.H. And he claimed that the police investigation was inadequate because the officers failed to interview several potential witnesses. In rebuttal, the prosecutor argued that the potential witnesses did not have "material" information and noted that he would not "be happy with law enforcement out there talking to people that they don't need to be talking to."

[4] The court did not include the third degree child molestation charge in the instruction, and the parties did not address the issue at trial. During deliberations, the jury asked whether the no-corroboration instruction also applied to the third degree child molestation charge. The trial court declined to answer the question directly and told the jury to "consider the instructions as a whole."

The jury convicted Zwald as charged. The court sentenced Zwald to a 170-month sentence[5] with 36 months of community custody and imposed several LFOs, including the $500 victim penalty assessment (VPA), the $100 DNA[6] collection fee, and $450 in court costs.

Zwald appeals.

ANALYSIS

Zwald argues that the trial court erred by giving a no-corroboration jury instruction and that the prosecutor committed misconduct during closing argument. He also asks us to remand to the trial court to strike the nonmandatory LFOs due to his indigency. We address each argument in turn.

1. No-Corroboration Jury Instruction

Zwald argues that the trial court's no-corroboration instruction was an unconstitutional comment on the evidence, requiring reversal, and that it violated his due process rights.

A. Comment on the Evidence

Zwald argues that the trial court unconstitutionally commented on the evidence by instructing the jury that the State need not corroborate T.R.'s testimony. We disagree.

[5] The sentencing court imposed consecutive determinate sentences for all three counts but also imposed a mandatory minimum of 146 months on count 3, second degree rape of a child, as well as an indeterminate sentence of 146 months to life for count 3.

[6] Deoxyribonucleic acid.

Article IV, section 16 of our state constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This is so a judge does not influence a jury by conveying "the court's opinion of the evidence submitted." *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). A jury instruction that does no more than accurately state the law pertaining to an issue does not amount to an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). We review whether a jury instruction amounts to a judicial comment on the evidence de novo and in the context of the instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

To determine whether a trial court's statement amounts to a comment on the evidence, we "look to the facts and circumstances of the case." *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). The fundamental question underlying our analysis is whether the mention of a fact in a jury instruction "conveys the idea that the fact has been accepted by the court as true." *Levy*, 156 Wn.2d at 726. Article IV, section 16's prohibition on such comments "forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." *Jacobsen*, 78 Wn.2d at 495.

In 1907, the legislature enacted Remington & Ballinger's Code section 2155, which required the State to corroborate a victim's testimony in sex cases. LAWS OF 1907, p. 396, § 1; *see State v. Gibson*, 64 Wash. 131, 132, 116 P. 872 (1911). But even before the legislature passed the 1907 act, our Supreme Court

repeatedly held that corroboration of the prosecuting witness in sex cases is unnecessary. *State v. Morden*, 87 Wash. 465, 468, 151 P. 832 (1915). Then, in 1913, the legislature repealed the corroboration statute under Remington & Ballinger's Code section 2443. LAWS OF 1913, ch. 100, § 1; *see Morden*, 87 Wash. at 467. Since then, corroboration of a prosecuting witness in sex cases has not been required by law. *State v. Thomas*, 52 Wn.2d 255, 256, 324 P.2d 821 (1958).

After several amendments, our legislature codified the no-corroboration common law rule in former RCW 9.79.150 (1975). LAWS OF 1975, 1st Ex. Sess., ch. 14, § 2. That statute says, "In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." Former RCW 9.79.150(1). The legislature uses that same language in the current statute, RCW 9A.44.020(1). *See* LAWS OF 1979, Ex. Sess., ch. 244, § 17 (recodifying former RCW 9.79.150 as RCW 9A.44.020).

For decades, trial courts have been asked to instruct juries in sex cases that the law does not require corroboration of an alleged victim's testimony. Our Supreme Court addressed whether a no-corroboration jury instruction amounts to a comment on the evidence 75 years ago in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). In that child sexual assault case, the trial court told the jury:

> "You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the [victim] alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that

> there be no direct corroboration of her testimony as to the commission of the act."

Id. at 572. The defendant argued that the instruction was an improper comment on the evidence, but our Supreme Court held that the instruction

> expressed no opinion as to the truth or falsity of the testimony of the [victim], or as to the weight which the court attached to her testimony, but submitted all questions involving the credibility and weight of the evidence to the jury for its decision.

Id. at 573-74.

Since our Supreme Court decided *Clayton*, we have consistently held that a no-corroboration jury instruction does not amount to a judicial comment on the evidence. *See State v. Chenoweth*, 188 Wn. App. 521, 537, 354 P.3d 13 (2015) (because sex crimes " 'are rarely[,] if ever[,] committed under circumstances permitting knowledge and observation by persons other than the accused and the complaining witness,' . . . it is permissible to instruct the jury that there is no corroboration requirement," and it does not amount to a comment on the evidence)[7] (quoting *State v. Galbreath*, 69 Wn.2d 664, 669-70, 419 P.2d 800 (1966)); *State v. Zimmerman*, 130 Wn. App. 170, 181-82, 121 P.3d 1216 (2005) (holding that under *Clayton*, a no-corroboration instruction "correctly stated the law and was not an improper comment on the evidence"), *remanded on other grounds*, 157 Wn.2d 1012, 138 P.3d 113 (2006).

Zwald tries to distinguish the instruction in his case from that given in *Clayton*. In Zwald's trial, the court instructed the jury in accordance with RCW

[7] First and second alterations in original.

9A.44.020(1) that "[i]n order to convict a person of Child Molestation in the Second Degree or Rape of a Child in the Second Degree, it is not necessary that the testimony of the alleged victim be corroborated."[8] Zwald points out that in *Clayton*, the trial court also told the jury in the same instruction that " 'the question is distinctly one for the jury,' " who must return a verdict of guilty " 'if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant.' " *Clayton*, 32 Wn.2d at 572.

According to Zwald, his no-corroboration instruction was different than *Clayton* and insufficient because it "did not emphasize that the jury's job was to determine guilt beyond a reasonable doubt." But the trial court did instruct the jury that it must be satisfied beyond a reasonable doubt to convict Zwald. In jury instruction 2, it told the jury that "[t]he State is the plaintiff and has the burden of proving each element of the crimes beyond a reasonable doubt." And in instruction 1, the court told the jurors that they "are the sole judges of the credibility of each witness" and "of the value or weight to be given to the testimony of each witness." It is immaterial that these admonishments do not appear in the same instruction because we review jury instructions as a whole

[8] In response to Zwald's objection to the instruction, the trial court said that it "[must] give that instruction" because it is the "current law." Zwald does not challenge that statement, so we do not address it here. But we note that the trial court has broad discretion to give or refuse a jury instruction that correctly states the law. *See State v. Stacy*, 181 Wn. App. 553, 569, 326 P.3d 136 (2014). Jury instructions are read as a whole and need not be given if the subject matter is adequately covered elsewhere in the instructions. *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). Indeed, the Washington Supreme Court Committee on Jury Instructions recommends against giving the no-corroboration instruction. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 45.02, at 1004 (5th ed. 2021).

and presume the jury follows the court's instructions. *See State v. Wiebe*, 195 Wn. App. 252, 256, 377 P.3d 290 (2016).

Zwald also argues that "[e]ven if *Clayton* were on point, it is no longer good law" under *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015). In *Brush*, the jury considered whether abuse over a two-month period amounted to "an ongoing pattern of psychological abuse of the victim 'manifested by multiple incidents over a prolonged period of time.' " *Id.* at 554-55 (quoting RCW 9.94A.535(3)(h)(i)). Using a pattern jury instruction, the trial court instructed the jury that the term "prolonged period of time" means " 'more than a few weeks.' " *Id.* Our Supreme Court determined that the instruction amounted to an improper comment on the evidence because it told the jury that abuse over a time period longer than a few weeks meets the definition of a " 'prolonged period of time.' " *Id.* at 559. As a result, the instruction resolved a contested factual issue for the jury. *Id.*

The instruction here is different. Unlike the instruction in *Brush*, the trial court did not resolve a factual issue for the jury. That is, the court did not tell the jury that the testimony offered by T.R. was sufficient to satisfy the elements of the charged crimes. Instead, the instruction told the jury only that it need not corroborate T.R.'s testimony to convict Zwald of second degree child molestation and second degree rape of a child. *Brush* does not overrule *Clayton*.

The trial court did not comment on the evidence by giving a no-corroboration jury instruction.

B. Due Process

Zwald argues that the no-corroboration jury instruction violates due process because it highlights a victim's testimony over other witnesses, including the defendant's, and suggests that the victim's testimony is subject to a different test for credibility. Because Zwald did not object to the instruction on those grounds, we decline to address the issue.

Zwald cites several out-of-state cases to support his due process argument. *See State v. Kraai*, 969 N.W.2d 487, 493 (Iowa 2022); *State v. Stukes*, 416 S.C. 493, 499, 787 S.E.2d 480 (2016); *Gutierrez v. State*, 40 Fla. Weekly S359, 177 So.3d 226, 232-33 (2015); *Ludy v. State*, 784 N.E.2d 459, 461 (Ind. 2003). And he says that "*Clayton* did not address any due process claim." But Zwald did not object to the no-corroboration instruction because it unduly highlights the victim's testimony. Instead, he argued that "we do take exception to [the no-corroboration instruction] to be inappropriate burden-shifting and unconstitutional on those grounds."

A party who fails to object to a jury instruction in the trial court waives any claim of error on appeal unless he can show manifest constitutional error. *State v. Edwards*, 171 Wn. App. 379, 387, 294 P.3d 708 (2012); RAP 2.5(a). And Zwald makes no effort to show manifest constitutional error. As a result, we do not address Zwald's due process argument.[9]

[9] Zwald also argues in passing that the no-corroboration jury instruction violates due process because it tells the jury that it may not acquit based on the absence of evidence. But Zwald did not object on that basis below, and he does not support the argument with legal analysis on appeal. So, we also decline to address that issue.

We reject Zwald's challenge to the no-corroboration jury instruction.

2. Prosecutorial Misconduct

Next, Zwald argues the prosecutor committed misconduct in closing argument by vouching for the State's witnesses and improperly appealing to the jury's emotions, arguing facts not in evidence, and denigrating defense counsel.

To prevail on a claim of prosecutorial misconduct, Zwald must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). "Prejudice" means that there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 442-43. But when, as here, a defendant does not object to the alleged misconduct below, he waives any error on appeal unless he can show that the conduct was " 'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.' " *Id.* at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

Generally, we reverse convictions based on flagrant and ill-intentioned misconduct in only " 'a narrow set of cases where we [are] concerned about the jury drawing improper inferences from the evidence.' " *State v. Loughbom*, 196 Wn.2d 64, 74, 470 P.3d 499 (2020) (quoting *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018)). Our analysis focuses on " 'whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been

cured with a timely objection.' " *Id.* at 75 (quoting *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015)).

A. Amplifying T.R.'s Voice

Zwald argues that the prosecutor committed misconduct in his closing argument because he vouched for T.R.'s credibility and appealed to the passion and prejudice of the jury when he argued that he and other public servants amplified T.R.'s "voice." We disagree.

It is misconduct for a prosecutor to express a personal belief in the veracity of a witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion). Vouching occurs if a prosecutor either (1) places the prestige of the government behind the witness or (2) suggests that information not presented to the jury supports the witness' testimony. *State v. Robinson*, 189 Wn. App. 877, 892-93, 359 P.3d 874 (2015). But prosecutors may "argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses." *Thorgerson*, 172 Wn.2d at 448. We will not find prejudicial error unless it is " 'clear and unmistakable' " from the record that counsel expressed a personal opinion. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Prosecutors also commit misconduct when they use arguments designed to incite the passions or prejudices of the jury. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (plurality opinion). These kinds of

arguments create a danger that the jury may convict for reasons other than the evidence produced at trial. *State v. Ramos*, 164 Wn. App. 327, 338-39, 263 P.3d 1268 (2011) (citing *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)).

Here, during closing argument, the prosecutor pursued a theme of amplifying T.R.'s voice:

> I stand here toward you one of a long line of public servants who have served and provide the voice of [T.R.]. Because in cases like these, cases where the alleged victim is a child of inappropriate sexual contact, there are no other witnesses, there is nobody else to tell [T.R.]'s story. There is no video cameras to tell [T.R.]'s story. There is no DNA to tell [T.R.]'s story. There is no forensic analysis to tell [T.R.]'s story. Why? Why? Because the alleged victims of child sex cases have no other witnesses. They are the only other person in the room when these acts occur and they are children. They are children being violated by the people they trust the most. How does a child find their voice in that set of circumstances? How does a child find the ability to come forward with their story?

The prosecutor described how T.R. first disclosed the abuse to her school counselor, Mullen:

> [T.R.] disclosed to her school counselor . . . in response to the school counselor saying have you suffered from sexual abuse. That is when everything changed for [T.R.]. That is when she had an opportunity to find her voice. To tell somebody what happened to her.

The prosecutor argued that by contacting CPS, Mullen "began the chain of public service [that was] going to serve to amplify [T.R.]'s voice."

The prosecutor then described how law enforcement investigated T.R.'s abuse. He said that the officers testified "how really their job is to give that child a voice, to let them tell their story." And he told the jury that law enforcement

created a "safe space for [T.R.] to tell her story," and that "[a]fter years of suffering abuse at the hands of [Zwald], . . . [law enforcement was] going to listen to her and let her tell her story."

Finally, the prosecutor told the jury, "I'm going to tell [T.R.]'s story to the individuals that finally opened up to her. I'm going to tell her story to the people who were willing to listen and to now come before you, 12 people she has never seen before." As the prosecutor described T.R.'s testimony, he commented that Zwald "took . . . away" T.R.'s choice to consent and questioned, how is "that girl going to find her voice? She doesn't at first. She keeps it in." The prosecutor argued that T.R. did not immediately disclose the abuse to avoid upsetting her mother. And he argued that T.R. showed "courage" by disclosing it to Mullen and then law enforcement and by testifying at trial.

First, Zwald contends the prosecutor's arguments amount to vouching for T.R.'s credibility. He likens this case to the prosecutor's comments in *Sargent*. In that case, we reversed based on the prosecutor's statement to the jury, " 'I believe [the witness]. I believe him when he tells us that he talked to the defendant.' " 40 Wn. App. at 353, 343.[10] We held that those statements were both improper and prejudicial because they bolstered the credibility of the only witness directly linking the defendant to the crime, and all the other evidence against the defendant was circumstantial. *Id.* at 345.

[10] Emphasis omitted.

This case is different. While we view the prosecutor's argument as self-aggrandizing and dramatic, he did not tell the jury that he believed T.R.'s testimony. Instead, the prosecutor argued that it was the job of public servants, including T.R.'s school counselor and law enforcement, to relay to the jury what T.R. told them. And it was his job as prosecutor to bring T.R.'s testimony to the jury. At the same time, the prosecutor affirmed to the jury that is was their "job" to "determine the credibility of the witnesses." As much as the prosecutor argued that the public servants "amplif[ied]" T.R.'s voice, he appears to be emphasizing their roles in the judicial process and how those roles brought the evidence before the jury.

Zwald fails to show that the prosecutor expressed his personal belief in T.R.'s allegations during closing argument. So, the prosecutor's argument did not amount to vouching.

Zwald also argues that the prosecutor's argument sought to enflame the passions and prejudices of the jury. Zwald likens his case to *State v. Bautista-Caldera*, 56 Wn. App. 186, 194, 783 P.2d 116 (1989). In *Bautista-Caldera*, the prosecutor stated, " '[D]o not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf.' " *Id.* at 194-95.[11] We determined the prosecutor impermissibly asked the jury to send a message to society by convicting the defendant. *Id.* at 195.

[11] Emphasis omitted; second alteration in original.

Zwald argues his case is similar to *Bautista-Caldera* because the prosecutor took on the role of T.R.'s "personal advocate," and he tried to align the jury with the State as public servants with a responsibility to protect T.R. But the prosecutor did not tell the jury he was a personal advocate for T.R. or that they should convict for any reason other than the evidence presented at trial. And, in any event, Zwald did not object to the argument and fails to show that the court could not cure any prejudice with a timely objection.

The prosecutor did not vouch for T.R.'s credibility or impermissibly appeal to the passions and prejudices of the jury during closing argument.

B. Law Enforcement Investigation

Zwald argues the prosecutor improperly relied on facts not in evidence regarding law enforcement's investigation and vouched for their credibility. We agree, but Zwald does not show prejudice.

A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty. *Russell*, 125 Wn.2d at 87. But a prosecutor may argue that the evidence does not support the defendant's theory. *Id.* And prosecutors may make a fair response to the arguments of defense counsel. *Id.* Further, a prosecutor has wide latitude in closing argument and may draw reasonable inferences from the evidence. *Thorgerson*, 172 Wn.2d at 448. We consider a prosecutor's comments in the context of the entire case. *Id.* at 443.

In closing, Zwald's attorney argued that law enforcement should have interviewed additional witnesses:

> [Mullen], school counselor, she filed a report. That's what she was supposed to do. She was not tasked, and I am not alleging she failed a task, she is not tasked with doing an investigation. She met her obligation. Box was checked. [T.R.] said, yes, I was sexually assaulted or whatever the phrase was, she called people, law enforcement responded, CPS responded. [Mullen] did her job. Interesting, law enforcement didn't interview her. [Officer] Bryant did not interview [Mullen]. Detective Francis did not interview [Mullen]. . . . Nobody talked to [another high school counselor]. . . .
>
> As I said, how hard would it be with this level of allegation, this much penalty in play, how hard would it be to go to the school and talk to the teachers? Hey, what do you think about [T.R.]? Did she show up? Is she a good student? Does she tell the truth? Nobody talked to [D.H.]. Nobody talked to [D.H.]. That's remarkable. It should be offensive to you that you are stuck with this emotional testimony and nothing to support it and you are left with the prosecutor saying [M.C.] is a bad mom, so you should convict.

In the prosecutor's rebuttal, he argued:

> You know, in every case you can say should have talked to this person. Should have talked to this person. Should have taken that photo. Should have taken at that photo. What matters, we went through this on the stand, is if there is evidentiary value from what law enforcement sees and you heard from Detective Francis, yeah, I reached out to this person, I reached out to that person, they didn't get back to me and none of these people that defense counsel are suggesting should have been talked to were present. Right. They don't have information as to what really transpired in those rooms over those years. They don't have that information. They are not going to give us that information. What are we going to get from [D.H.]? (Unintelligible) an ex-boyfriend. It is not material value. We rely on our law enforcement investigators to make that determination, to use their time and resources efficiently. This is not the only case they're investigating. They are judicious with what they are doing, and I can tell you, I am not going to be happy with law enforcement out there talking to people that they don't need to be talking to, that's not going to be valuable to the presentation of our case.

Zwald argues that the prosecutor argued facts not in evidence by asserting that law enforcement did not interview certain witnesses because their testimony was "not [of] material value." He is correct. Neither party presented evidence at trial about the content of the other witnesses' testimony. So, his argument improperly referenced facts not in evidence. *See State v. Teas*, 10 Wn. App. 2d 111, 128, 447 P.3d 606 (2019) (a prosecutor commits misconduct by asking the jury to decide a case based on evidence outside the record). And the State concedes that "[t]he prosecutor's isolated reference that *he* would not be happy if investigators were talking to people that are not materially valuable to the case" amounts to improper vouching. We accept the State's concession; the comment was improper.

Still, Zwald did not object to the prosecutor's argument, and he fails to show that the court could not have alleviated any prejudice through a curative instruction. So, Zwald fails to show that the prosecutor's comments were so flagrant and ill intentioned that they caused an enduring and resulting prejudice that the trial court could not have cured by an admonition to the jury. Any error is waived.

C. Denigration of Counsel

Finally, Zwald argues that the prosecutor improperly denigrated defense counsel during his rebuttal argument. We agree in part, but again, Zwald does not show prejudice.

In general, it is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. *Thorgerson*, 172 Wn.2d at 451. Here, the prosecutor argued:

> We talked about truth issues, you know, tragedy alleged victim is a classic defense tactic and I'm sorry it happened in this case, but, you know, essentially, what he is trying to do is call her a liar. Right. That's his game. Right. I'm going [to] tell you guys she is lying. That's what he is trying to do. They bring up her past as a child. Okay. A child struggling with a broken home, struggling with not having a biological father there, struggling with the issues that have been presented with her and her mom. The child has truth issues. The child has family issues. She is acting out in ways that children do.

Zwald argues that the comments mischaracterized and impugned his attorney. The State characterizes the comments as "summarizing Zwald's argument that the victim was a liar who should not be believed." But because the prosecutor appears to make a personal reference to defense counsel, calling the trial strategy "his game," we tend to agree with Zwald. Still, again, because Zwald did not object to the argument and a curative instruction could have alleviated any potential prejudice, he waives any error.

We reject Zwald's argument that we must reverse his convictions due to prosecutorial misconduct.

3. LFOs

Finally, Zwald argues we should remand to the trial court to strike his LFOs based on indigency. The State agrees remand is necessary to allow the court to consider whether Zwald has the ability to pay the nonmandatory LFOs. We agree with the State.

When the court sentenced Zwald in January 2023, it imposed the $500 VPA, $100 DNA collection fee, $200 criminal filing fee, and $250 jury demand fee. At that time, the $500 VPA and $100 DNA collection fee were mandatory under former RCW 7.68.035(1)(a) (2018) and former RCW 43.43.7541 (2018). But while Zwald's appeal was pending, the legislature amended both statutes, eliminating those LFOs for indigent defendants. LAWS OF 2023, ch. 449, §§ 1, 4. And the amended statutes apply prospectively to cases pending appeal at the time of the amendments. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023) (citing *State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018)).

Further, under RCW 10.01.160(3), the court may not order an indigent defendant to pay court costs. At the time of Zwald's sentencing, the court did not inquire about his ability to pay the LFOs. But on appeal, the trial court found Zwald indigent and allowed him to proceed at public expense. We remand for the trial court to determine whether Zwald is indigent and reconsider imposition of the LFOs. *See Ellis*, 27 Wn. App. 2d at 16-18.

In sum, the trial court did not err by giving a no-corroboration jury instruction in accordance with RCW 9A.44.020(1). And we reject Zwald's argument that we must reverse his case due to prosecutorial misconduct. We

affirm Zwald's convictions, but remand for the trial court to consider whether he has the ability to pay his nonmandatory LFOs.[12]

Brennan, J.

WE CONCUR:

Coburn, J.

Smith, C.J.

[12] The Department of Corrections filed a postsentence petition under consolidated case No. 85332-5-I, alleging that the trial court erred by imposing a determinate sentence, a mandatory minimum sentence, and a 36-month fixed term of community custody on count 3, second degree rape of a child. The parties concede the error. Because RCW 9.94A.540 does not authorize a mandatory minimum sentence for second degree child rape, RCW 9.94A.507(1)(a)(i) mandates an indeterminate sentence for the charge, and RCW 9.94A.507(5) requires a community custody term "for any period of time the person is released from total confinement before the expiration of the maximum sentence," we also remand for the court to resentence on that count.

APPENDIX B

FILED
8/28/2024
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Appellant, v. JOEL DUANE ZWALD, Respondent.	No. 84950-6-I (consolidated w/ No. 85332-5-I) ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Mark Joel Zwald filed a motion for reconsideration of the opinion filed on August 5, 2024. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Corrected Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 84950-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kimberly Thulin, DPA
[kthulin@co.whatcom.wa.us]
Whatcom County Prosecutor's Office
[Appellate_Division@co.whatcom.wa.us]

☒ petitioner

☒ petitioner Holger Sonntag
[holger.sonntag@atg.wa.gov]
[correader@atg.wa.gov]
Office of the Attorney General - DOC

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: September 30, 2024

WASHINGTON APPELLATE PROJECT

September 30, 2024 - 11:20 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	84950-6
Appellate Court Case Title:	State of Washington, Respondent v. Joel Duane Zwald, Appellant
Superior Court Case Number:	19-1-01394-2

The following documents have been uploaded:

- 849506_Motion_20240930111734D1109985_5001.pdf
  This File Contains:
  Motion 1 - Consolidate
  The Original File Name was washapp.093024-02.pdf
- 849506_Petition_for_Review_20240930111734D1109985_1484.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.093024-01.pdf

A copy of the uploaded files will be sent to:

- Appellate_Division@co.whatcom.wa.us
- awebb@co.whatcom.wa.us
- correader@atg.wa.gov
- holger.sonntag@atg.wa.gov
- info@jrcpractice.com
- jcorkern@co.whatcom.wa.us
- kthulin@co.whatcom.wa.us

Comments:

*Both documents corrected only as to the COA case number.

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Nancy P Collins - Email: nancy@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20240930111734D1109985