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Division II
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STATE OF WASHINGTON
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NO. ____ Case #: 1037538
(COA NO. 58144-2-II)

THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY NICHOLS,

Petitioner.

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUE PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE	2
E. WHY REVIEW SHOULD BE GRANTED	7
1. This Court should accept review under RAP 13.4(b)(1) and (2) because the State committed prejudicial and incurable misconduct in closing argument by vouching for the credibility of its witnesses and lowering the standard of proof	7
a. <i>The Court of Appeals’ finding that it was “dispositive” that the prosecutor opined that J.B. and R.B. were speaking “their” truth, not “the” truth, fails to distinguish the prosecutor’s vouching from precedent</i>	<i>10</i>
b. <i>The prosecutor lowered the standard of proof by arguing that the State’s reliance on children as witnesses permitted the jurors to draw broad inferences in the State’s favor</i>	<i>16</i>
c. <i>The Court of Appeals should have reversed, and the issue presented merits this Court’s review</i>	<i>20</i>
F. CONCLUSION	22

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

<i>State v. Allen</i> , 182 Wn.2d 364, 341 P.3d 268 (2015)	9
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	17
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	7, 23
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012)	9, 15, 20
<i>In re Glasman</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)	21, 22
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	7, 10, 12, 13, 23
<i>State v. Johnson</i> , 158 Wn. App. 677, 243 P.3d 936 (2010)	16
<i>State v. Lindsay</i> , 180 Wn.2d 423, 326 P.3d 125 (2014)	8, 16, 24
<i>State v. Monday</i> , 171 Wn.2d 667, 297 P.2d 1285 (1996)	8
<i>State v. Reed</i> , 102 Wn.2d 140, 684 P.2d 699 (1984)	9, 23
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994) ..	14
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 258 P.2d 43 (2011)	7, 9, 19, 23

<i>State v. Walker</i> , 164 Wn. App. 724, 265 P.3d 191 (2011)	21
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WASHINGTON COURT OF APPEALS

<i>State v. Coleman</i> , 155 Wn. App. 951, 231 P.3d 212 (2010)	10, 12
<i>State v. Ramos</i> , 164 Wn. App. 327, 263 P.3d 1268 (2011)	8, 13, 23
<i>State v. Thierry</i> , 190 Wn. App. 680, 360 P.3d 940 (2015)	19

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V	8
U.S. Const. amend. XIV	8
Const. art. 1 § 3	8
Const. art. 1 § 21	8
Const. art. 1 § 22	8

COURT RULES

RAP 13.4(b)(1)	8, 22, 24
RAP 13.4(b)(2)	8, 22, 24

A. IDENTITY OF PETITIONER

Mr. Rodney Nichols, petitioner here and below, asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Nichols asks for review of the Court of Appeals' decision in *State v. Nichols*, No. 58144-2-II (Wash. Ct. App. Dec. 3, 2024), pursuant to RAP 13.4(b). App. A.

C. ISSUE PRESENTED FOR REVIEW

Whether a witness testifies truthfully is an issue within the sole province of the jury. Where the State presents no physical evidence, the verdict may hinge squarely on the jury's assessment of the witnesses' credibility. To that end, the due process rights of the accused strictly prohibit the State from pressing its thumb on the scales by vouching for the credibility of its witnesses, or by pressuring the jury to apply a lower standard of proof than the law requires.

This Court should take review pursuant to RAP 13.4(b)(1) and (2) to determine whether the prosecutor committed prejudicial and incurable misconduct by (a) vouching for the State's witnesses, including by arguing that they were "speaking their truth . . . and that truth is that the defendant raped and molested them," and (b) lowering the standard of proof by arguing that the testimony of children should receive less scrutiny and "enforce a belief" in a defendant's guilt.

D. STATEMENT OF THE CASE

Rodney Nichols suffered a stroke in his mid-60s, leaving him largely homebound. RP 616, 584, 599; CP 59-65. Reliant on a wheelchair, Mr. Nichols was looked after by his wife, Samantha. RP 615-18. Mrs. Nichols' adult daughter Melissa Murdock joined the older couple for meals, sometimes bringing her three young

daughters. RP 608-09, 615. Mrs. Nichols testified that the children were not left to Mr. Nichols' own supervision because of his immobility. RP 617-18.

Two of Ms. Murdock's daughters, J.B. and R.B., were in and out of foster care beginning when they were toddlers. RP 461-62, 610. Foster parents Jan and Marty Blair eventually began the lengthy process of seeking to formally adopt them in 2020. RP 75, 464-66, 477-81. The Blairs observed that, by their pre-teens, J.B. and R.B. had developed behavioral difficulties, struggled to follow rules, lied, and stole. RP 47-48, 70, 467, 489-90.

In 2020, J.B. told Mr. Blair that approximately six years before, her step-grandfather Mr. Nichols had repeatedly sexually assaulted J.B. and R.B. over the course of several years. RP 483-87. J.B. and R.B. said that they had reported these incidents to both their

mother and grandmother, but Mrs. Nichols and Ms. Murdock both testified that the girls never made any mention of such incidents. RP 610, 613, 620. The CPS workers who were regularly involved with the girls over the years confirmed that neither girl ever mentioned any sexual abuse. RP 513-14.

Though no physical evidence supported the accusations, the State charged Mr. Nichols with four counts – one count of first-degree rape of a child and one count of first-degree child molestation each, as to both J.B. and R.B. CP 123-25.

The girls' accounts varied, both between each other and over time. For example, J.B. first claimed that Mr. Nichols had the girls sit in his lap and the abuse included vaginal penetration. RP 483-84. She later denied that vaginal penetration occurred, but said that Mr. Nichols performed oral sex on her. RP 581,

573. At trial, she then denied that Mr. Nichols performed oral sex on her. RP 419-20. R.B. testified that she would fight back when these assaults occurred, but J.B. testified that neither girl ever offered physical resistance. RP 441, 402.

During closing arguments, the prosecutor argued that despite the inconsistencies, J.B. and R.B. were “speaking their truth . . . and that truth is that the defendant raped and molested them.” RP 677. The prosecutor argued that it was exceedingly difficult for the two pre-teen girls to testify, and that “[t]here’s no motive whatsoever to make this up.” *Id.*

The prosecutor also urged the jurors to adopt a distinction between a case which is “not perfect,” versus one for which there is an “actual reasonable doubt.” RP 681-82. The prosecutor suggested that the jurors should not count the girls’ inconsistencies

against the State's case, opining that inconsistencies are "natural" and "normal." RP 679. The prosecutor argued that inconsistencies should especially not be a barrier where the complaining witnesses are children:

Especially, how accurate is the memory of a child? It's not perfect when you're that age. It doesn't have to be.

RP 680. The prosecutor argued that because the girls summoned the courage to testify, their testimony "enforce[s] a belief" in Mr. Nichols' guilt that the jury must respect:

Tell me that what they said and how they said it doesn't **enforce belief** that this happened.

When you watched [J.B.] on the video uncomfortably tell a stranger about the abuse, tell me that doesn't **enforce a belief** that this happened.

Now, remember when you heard Marty recount what [J.B.] told him and how it affected him. Tell me that doesn't **enforce a belief** that this happened.

RP 682 (emphasis added).

Mr. Nichols was convicted as charged and sentenced to life in prison, with the possibility of release after 26 years. CP 66-87. Currently 66, the sentence ensures Mr. Nichols will die in prison.

The Court of Appeals affirmed. Slip op. at 1.

E. WHY REVIEW SHOULD BE GRANTED

- 1. This Court should accept review under RAP 13.4(b)(1) and (2) because the State committed prejudicial and incurable misconduct in closing argument by vouching for the credibility of its witnesses and lowering the standard of proof.**

Review of this case is warranted because the Court of Appeals' decision conflicts with multiple decisions of this Court, as well as a decision of the Court of the Appeals, prohibiting prosecutors from improperly vouching for the credibility of government witnesses. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010); *State v. Thorgerson*, 172 Wn.2d 438, 443-50, 258 P.2d 43 (2011); *State v. Dhaliwal*, 150 Wn.2d

559, 576-81, 79 P.3d 432 (2003); *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011); RAP 13.4(b)(1), (2).

Review is also warranted because the Court of Appeals' decision conflicts with this Court's precedent prohibiting prosecutors from making arguments to the jury that misstate the law or mislead the jury into holding the State to a lower standard of proof. *State v. Lindsay*, 180 Wn.2d 423, 435, 326 P.3d 125 (2014); RAP 13.4(b)(1).

The due process rights set forth in the state and federal constitutions protect the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Const. art. 1 §§ 3, 21, 22. A prosecutor's improper argument may deny a defendant the right to a fair trial. *State v. Monday*, 171 Wn.2d 667, 676-77, 297 P.2d 1285 (1996). A prosecutor is a

quasi-judicial officer and therefore has a duty to act impartially and to seek a verdict based only on the jurors' reasoned consideration of the evidence. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015).

A prosecutor engages in misconduct by making comments which are improper, if the reviewing court finds a "substantial likelihood" that the comments affected the jury's deliberations. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defendant bears the burden on appeal. *Thorgerson*, 172 Wn.2d at 442. Where defense counsel did not object to the comments at trial, the reviewing court should nevertheless reverse if a jury instruction would have failed to cure the resulting prejudice, as is the case where the misconduct was "flagrant and ill-intentioned." *State v. Emery*, 174 Wn.2d 741, 760-62, 278 P.3d 653 (2012).

a. *The Court of Appeals’ finding that it was “dispositive” that the prosecutor opined that J.B. and R.B. were speaking “their” truth, not “the” truth, fails to distinguish the prosecutor’s vouching from precedent.*

This Court has recognized that a prosecutor engages in misconduct by “vouching” for the State’s witnesses. *Ish*, 170 Wn.2d at 196. Vouching includes argument or opinion that a government witness testified truthfully. *Id.* Vouching generally occurs in two ways – where the prosecutor suggests their own opinion as to the credibility of a witness, or makes comments that imply that “information not presented to the jury supports the witness’s testimony.” *Id.* Suggesting a personal opinion endangers the jury’s independent assessment of credibility because the prosecutor thereby places “the prestige of the government behind the witness.” *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010).

Here, the Court of Appeals acknowledged that Mr. Nichols might have a meritorious claim of impermissible vouching if the prosecutor had opined that J.B. and R.B. spoke “the truth.” Slip op. at 16. The prosecutor opined in closing that the two alleged victims were “speaking their truth . . . and that truth is that the defendant raped and molested them.” RP 677. The Court held that the fact that the prosecutor referred to “their truth,” rather than “the truth,” was a “dispositive” distinction that rendered the comments proper. Slip op. at 16.

This purported distinction finds no support in this Court’s precedent, and runs contrary to that precedent’s reasoning. Vouching is prohibited because a prosecutor’s indication of their personal belief as to a witness’s credibility encourages the jury to reach that conclusion based on influences other than the jurors’

own reasoned evaluation of the evidence, such as the imputation of the government's own credibility or prestige, or the implication that the prosecutor is privy to information beyond what the jury received at trial. *See Ish*, 170 Wn.2d at 196; *Coleman*, 155 Wn. App. at 957.

The prosecutor's attestation to the jury here introduced that very dynamic into the factfinding process. The prosecutor did not simply summarize or direct the jurors' attention towards key points from the testimony, or make argument as to what conclusions would follow from that testimony if true; instead, the prosecutor flatly opined that the witnesses testified honestly. RP 677.

Even if the Court of Appeals were correct that the prosecutor was referring to "the children's view of their own testimony" rather than the prosecutor's belief

about what actually happened, slip op. at 16, it is still the prosecutor's "personal belief as to the credibility of a witness" to declare that the witness is testifying honestly or in good faith. *See Ish*, 170 Wn.2d at 196, 199; *Ramos*, 164 Wn. App. at 341, n. 4.

Moreover, the Court of Appeals' analysis fails outright to address the prosecutor's further assertion that "that truth is that the defendant raped and molested them." Slip op. at 15-16; RP 677. The decision also took no notice of the fact that the prosecutor articulated what that truth "**is**," indicating an opinion about the objective truth, rather than what the truth "was" to the complaining witnesses themselves. *Id.* Such argument bolsters both the honesty *and* accuracy of the witnesses' testimony, and suggests either the prosecutor's personal opinion, or that he has a more

complete knowledge of the circumstances than what he was able to present at trial.

A novel distinction between “their truth” and “the truth” does not mitigate this exertion of government influence on the jurors, especially because this statement was part of a broader pattern of express or implied opinion about witness credibility. *See State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (“Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given.”).

The prosecutor stated repeatedly, without identifying any apparent basis for such a conclusion, that the jurors should believe J.B. and R.B. because it was exceedingly difficult for them to testify, and “[t]here’s no motive whatsoever to make this up.” RP

677. In addition to placing governmental prestige behind the witnesses and making assertions that implied information beyond the evidence presented, the prosecutor applied moral pressure on the jurors to treat the inconsistent witness accounts as credible, challenging the jurors to “[t]ell me that what they said and how they said it doesn’t enforce belief that this happened.” RP 682.

A jury instruction by the trial court would not have cured the resulting prejudice, so the lack of an objection by defense counsel does not excuse the violation of Mr. Nichols’ right to a fair trial. *See Emery*, 174 Wn.2d at 760-62. The prosecutor’s vouching sought to influence the jurors’ perception of both complaining witnesses’ credibility in general, as opposed to the kind of misconduct that might plausibly be remedied by an instruction, such as where a prosecutor makes a

discrete misstatement of law or fact. This vouching was a bell that no instruction could be realistically expected to unring.

b. The prosecutor lowered the standard of proof by arguing that the State's reliance on children as witnesses permitted the jurors to draw broad inferences in the State's favor.

“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.” *Lindsay*, 180 Wn.2d at 435 (quoting *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010)).

Here, the prosecutor first primed the jury by insisting that it adopt a false distinction between a case for guilt which is “not perfect,” and a charge for which there is an “actual reasonable doubt.” RP 681-82.

This dismissive explanation obscured the reasonable doubt standard, which is already difficult to define and may therefore be confused by novel articulations which “shift[], perhaps ever so slightly, the emphasis” of the proper definition. *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007) (also observing that “the presumption of innocence is simply too fundamental ... not to require adherence to a clear, simple, accepted, and uniform” definition).

From this starting point, the prosecutor proceeded to suggest that, especially where the State had to rely on witnesses who were children, the jury needed to refrain from scrutinizing issues of credibility or proof. *See* RP 680-82. Tacitly admitting that the adequacy of the State’s case depended on the jury drawing favorable inferences from inconsistent testimony, the prosecutor argued,

Especially, how accurate is the memory of a child? It's not perfect when you're that age. It doesn't have to be.

RP 680. The prosecutor then articulated a novel legal concept about how testimony by such witnesses “enforce[s] a belief” in favor of the State, etching this incorrect and forceful legal standard into the jurors’ minds:

Tell me that what they said and how they said it doesn't **enforce belief** that this happened.

When you watched [J.B.] on the video uncomfortably tell a stranger about the abuse, tell me that doesn't **enforce a belief** that this happened.

Now, remember when you heard Marty recount what [J.B.] told him and how it affected him. Tell me that doesn't **enforce a belief** that this happened.

RP 682 (emphasis added). Especially where a defendant is charged with sexual abuse of children, the inherently inflammatory nature of the allegations and the sympathetic nature of child witnesses underscore

the need for the defendant's right to a fair trial to be respected. This Court has recognized that both the federal and state constitutions require prosecutors to "subdue courtroom zeal for the sake of fairness to the defendant," in order to ensure that the jury reaches its verdict based only on reasoned consideration of the evidence, not in response to the prosecutor slanting the legal standard in the State's favor or exerting moral pressure on the jurors to reach a desired conclusion. *Thorgerson*, 172 Wn.2d at 443. *See also State v. Thierry*, 190 Wn. App. 680, 689-692, 360 P.3d 940 (2015) (prejudicial misconduct where the prosecutor suggested that disbelieving a child witness due to inconsistencies would mean that "the law might as well say that [t]he word of a child is not enough").

The prosecutor's undermining of the inflexible requirement of proof beyond a reasonable, in particular

by implying a presumption of credibility or factual sufficiency to a child's testimony, provided the jurors with a lenient alternative standard on which to convict. The prosecutor's consistent efforts towards this end suggest that the misconduct was "flagrant and ill-intentioned." *Emery*, 174 Wn.2d at 760-62. Even if a jury instruction might have mitigated certain of these instances in isolation, the difficulty of precisely articulating proof beyond a reasonable doubt to begin with makes it unlikely that an instruction by the court could have cured the prejudice that resulted from the totality of the State's argument.

c. The Court of Appeals should have reversed, and the issue presented merits this Court's review.

"The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their

combined prejudicial effect.” *In re Glasman*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Here, the prosecutor’s consistent strategy throughout closing statements was to supplement the State’s shaky evidence with the opinion and rhetoric of the prosecutor himself, and to move the goalposts closer by refashioning the standard of weighing proof to the State’s advantage.

The misconduct was prejudicial because the complaining witnesses’ inconsistent, contradictory testimony was virtually the State’s entire case, in the absence of any eyewitnesses or physical evidence. And because the misconduct consisted not of discrete, one-off remarks, but rather a systematic campaign of leveling the constitutional obstacles between the State’s skeletal case and the conviction it sought, the

misconduct was flagrant and ill-intentioned, and could not have been cured by instructions. *See Glasman*, 175 Wn.2d at 707.

Because the Court of Appeals' decision placed an imprimatur of law on these cumulative errors, and in so doing undermined several long-standing precedents, this Court should accept review to clarify the prohibitions against prosecutorial misconduct, and the constitutional guarantee of a fair trial. RAP 13.4(b)(1), (2).

F. CONCLUSION

The prosecutor committed multiple acts of misconduct by vouching for the credibility of the complaining witnesses, J.B. and R.B., most notably (though not exclusively) by offering his opinion that the two children were “speaking their truth... and that truth is that the defendant raped and molested them.”

RP 677. Approving of such argument leaves a crack in the foundation of multiple long-standing precedents which articulate the constitutional limits on a prosecutor supplementing the evidence with opinion. *See Ish*, 170 Wn.2d at 196; *Thorgerson*, 172 Wn.2d at 443-50; *Dhaliwal*, 150 Wn.2d at 576-81; *Ramos*, 164 Wn. App. at 341 n.4.

The prosecutor sought to ensure the success of this vouching by suggesting a duty to give the State's witnesses the benefit of the doubt because they were children, couching this duty in the manufactured legal terminology of testimony which "enforce[s] a belief." RP 680-82. This obscured the reasonable doubt standard and usurped the jury's exclusive authority to determine what, if any, abiding belief the evidence supports. *Reed*, 102 Wn.2d at 145. Approving of such argument

likewise undermines this Court's precedent. *See Lindsay*, 180 Wn.2d at 435.

This Court should grant review, reverse the decision of the Court of Appeals, and grant Mr. Nichols a new trial untainted by this misconduct. RAP 13.4(b)(1), (2).

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 3,197 words.

DATED this 2nd day of January, 2025.



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APPENDIX A:
Opinion of the Court of Appeals

December 3, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent

v.

RODNEY LARRY NICHOLS,

Appellant.

No. 58144-2-II

UNPUBLISHED OPINION

PRICE, J. — Rodney L. Nichols appeals his convictions for raping and molesting his grandchildren, J.B. and R.B. Nichols argues that the trial court erred in admitting unfairly prejudicial and irrelevant evidence in violation of the trial court’s in limine ruling. Nichols also argues that the State committed prosecutorial misconduct in closing arguments and that the cumulative effect of the trial court’s errors denied him a fair trial. In addition, Nichols contends that the trial court erroneously imposed the crime victim penalty assessment (VPA) and the DNA collection fee.

We affirm Nichols’ convictions but remand for the trial court to strike the VPA and the DNA collection fee.

FACTS

I. BACKGROUND

In 2020, J.B. and R.B. told their adoptive parents that Nichols, their biological grandfather, had sexually abused them in the past. The parents reported the allegations to law enforcement.

As part of the investigation, J.B. and R.B. were interviewed by a forensic interviewer. During J.B.'s forensic interview, J.B. explained her account of how Nichols had sexually abused her and her sister, R.B.

The State ultimately charged Nichols with two counts of first degree child molestation and two counts of first degree rape of a child for conduct that allegedly occurred between 2014 and 2018. Each count also alleged aggravating circumstances of abuse of trust or confidence and an ongoing pattern of sexual abuse of the same minor victim.

II. MOTIONS IN LIMINE

The case proceeded to a jury trial. In a pretrial motion in limine, Nichols sought to exclude evidence of prior bad acts and any testimony regarding allegations of drug use by Nichols. As part of this motion, Nichols sought to exclude evidence that as a result of Child Protective Services (CPS) investigations, J.B. and R.B. were not permitted to live with Nichols and his wife.

The State responded that it had no objection to excluding testimony about Nichols' drug use. However, the State sought to call CPS workers to testify that they observed J.B. and R.B. at Nichols' home. According to the State, the CPS workers would testify that they were working on J.B. and R.B.'s cases and that, in the course of this work, they had interactions with Nichols at his home. The State also wanted to introduce testimony from the workers that because of an existing parenting plan, the children were not permitted to be at Nichols' home, arguing that the testimony was relevant to show why "CPS workers were so familiar and checking so often on the home." Verbatim Rep. of Proc. (VRP) at 194.

The trial court ruled that CPS workers could testify that they observed J.B. and R.B. at Nichols' home during the charged time period because it showed that Nichols had an opportunity

to commit the crimes. However, the trial court ruled that other aspects of their testimony, including whether J.B. and R.B. were not supposed to be staying with Nichols, would be excluded. The trial court stated,

The information has a relatively limited purpose. It goes to opportunity. . . . So, the information is admissible only for the limited purpose of showing that, during the period of time when the allegations are supposed to have occurred, that Mr. Nichols and the children were in contact with each other at his home. *So, people can testify, we went to his home, the kids were there.* You know? We saw the kids in this house. That sort of thing. During this time period. *That's all people can testify about.* Whether or not they were living there, well, s[t]aying there or not doesn't sound like it would be relevant. *And the reasons why they were or weren't supposed to be there don't sound to be relevant. And so, that is excluded.*

VRP at 194-95 (emphasis added).

The case proceeded to jury selection and opening statements.

III. TRIAL

Following opening statements, the State began its case. J.B., R.B., their adoptive parents, a law enforcement officer, and the forensic interviewer testified consistently with the facts set forth above. The video of J.B.'s forensic interview was admitted into evidence.

J.B. and R.B. testified at length about how Nichols repeatedly raped and molested them while they were alone with him at his home over several years. Both children were under the age of 12 at the time of the sexual abuse. J.B. said that she told her biological mother, Melissa Murdock, and Nichols' wife, Samantha¹ (J.B. and R.B.'s grandmother), about the abuse, but J.B. was not believed.

¹ We refer to Nichols' wife by her first name to avoid confusion. No disrespect is intended.

In addition to detailing the sexual abuse allegations, R.B. testified that CPS “followed” Murdock when Murdock had picked up her younger sister A. after school. VRP at 454. Nichols did not object.

Also testifying for the State were two CPS workers, Jay Redmond and Jennifer Gorder. Redmond testified about his familiarity with the children, the grandmother Samantha, and Murdock. Redmond testified that he knew the children because he was a CPS investigator for three intake investigations about them. Nichols did not object. Redmond also described his interactions with Samantha during the course of his investigations. Redmond explained that Samantha had an “oppositional demeanor” and was not cooperative in trying to locate J.B. and R.B. for his investigation. VRP at 508. Nichols did not object on the basis that the testimony violated the trial court’s in limine ruling or that it was unfairly prejudicial.²

Redmond also testified about his interactions with Murdock. Redmond stated that he had interviewed the children at their school and that he had also had contact with them at Murdock’s house. Redmond further testified that he went to, and drove by, Nichols’ home on several occasions looking for J.B. and R.B. After not locating J.B., R.B., and their younger sister A. for a period of time, Redmond showed up at their school at their usual pickup time. According to Redmond, he saw Murdock in the parking lot and asked where A. was. Murdock became angry and quickly left with J.B. and R.B. Shortly afterward, Redmond went to the Nichols’ home and observed Murdock running away from the house with A. At that point, CPS called law

² Nichols, however, did object to part of Redmond’s testimony as being nonresponsive. The trial court overruled Nichols’ objection.

enforcement and all the children were placed in protective custody. Nichols did not object to this testimony.

Gorder then testified and explained that she knew J.B. and R.B. were at the Nichols' home "[q]uite a bit." VRP at 533. Like Redmond, Gorder testified that she also interacted with Samantha. Gorder stated that Samantha did not like CPS and she "let [Gorder] know it." VRP at 541. Nichols did not object to this testimony.

Following Gorder's testimony about Samantha not liking CPS, the State asked Gorder if she had made any findings on the children's case. Gorder responded, "Yes. I did." VRP at 541. Nichols did not object to that question. The State then began to ask another question, "And what was . . ." when Nichols objected, stating that the question was irrelevant and had "been ruled in a motion in limine." VRP at 541. Before the trial court made any ruling on the objection, the State moved on to ask a different question.

The State rested.

The defense case included the testimony of Murdock and Samantha. Nichols did not testify.

IV. JURY INSTRUCTIONS AND CLOSING ARGUMENTS

The trial proceeded to jury instructions. With respect to the first degree child rape counts, the trial court gave jury instruction 11, which told the jury:

To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree as to that count must be proved beyond a reasonable doubt. And you must unanimously agree as to which act has been proved.

You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

VRP at 639-40. The trial court also gave jury instruction 17, which was a similar unanimity instruction with respect to the child molestation counts.

Following the instructions to the jury, the parties gave their closing arguments. As part of its closing, the State discussed the reasonable doubt standard. The State explained that to convict Nichols of each charge that the jury must be satisfied beyond a reasonable doubt that Nichols committed each charge. The State then reiterated the definition of reasonable doubt as

one for which a reason exists and may arise from the evidence or a lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or a lack of evidence. If from such consideration you have an abiding belief in the . . . truth of the charge, you are satisfied beyond a reasonable doubt.

VRP at 649.

Following its discussion of the reasonable doubt standard, the State argued that the evidence showed that Nichols raped and molested the children in many different ways over several years and explained how, in its view, that evidence was tied to the specific charges. The State next argued that the exact number of sexual assaults that Nichols had committed did not matter, stating,

The exact number of sexual assaults the defendant committed doesn't matter. Jury [i]nstructions 11 and 17 tell you, *you all need to unanimously agree that one instance of a particular sexual assault occurred for each count.* And that one makes him guilty of that count. Pick which one unanimous on one count [sic]. One instance, that's a guilty on those counts.

VRP at 650 (emphasis added).

The State then recounted J.B.'s and R.B.'s detailed testimony about each time they were raped by Nichols. When the State finished discussing this extensive testimony about the rapes, the State argued,

Ladies and gentlemen, the defendant committed multiple acts of rape of a child in the first degree—in the first degree over the span of several years. *The exact*

number doesn't matter. If you believe the defendant committed any of these acts, he's guilty of this count

VRP at 657 (emphasis added). Nichols did not object.

The State made similar comments about the child molestation counts, arguing,

Again, the defendant committed multiple acts of child molestation in the first degree over a span of several years. *Exact number doesn't matter. If you believe the defendant committed any one of those acts we just talked about[,] [h]e's guilty of child molestation in the first degree against [R.B.] and [J.B].*

VRP at 660 (emphasis added). Nichols did not object.

In the defense's closing argument, Nichols attacked the credibility of the children. Nichols argued that aspects of their accounts were inconsistent with each other and changed over time. He also suggested that the children had a motive to fabricate the allegations about Nichols because they did not like Nichols or Murdock and wanted to stay with their adoptive parents.

In its rebuttal, the State responded to Nichols' suggestion that the children had a motive to fabricate their allegations by emphasizing that they had been speaking *their* truth. The State argued,

There's no motive whatsoever to make this up. They've been speaking *their truth* since 2020 at a great emotional cost to them and *that truth* is that the defendant raped and molested them.

VRP at 677 (emphasis added). Nichols did not object.

Responding to Nichols' argument that J.B.'s and R.B.'s accounts were inconsistent, the State argued that the inconsistencies were "natural" and "normal" and that their testimony was actually consistent when they testified about what Nichols actually did to them. VRP at 679. The State also suggested that the memory of a child is not perfect and that it did not need to be perfect. The State argued,

Especially, how accurate is a memory of a child? It's not perfect when you're that age. It doesn't have to be.

VRP at 680. The State further argued that although the children's "accounts were not perfect," there were too many similarities for children their age "who should not know about the sexual things they're talking about." VRP at 681.

The State then contended that it was not required to have a "perfect case" and witnesses were not required to be perfect because "[w]itnesses make mistakes, time passes, [and] memories fade." VRP at 681. The State argued,

What defense [counsel] is confusing is the difference between things that create an actual reasonable doubt and things that make the State's case *not perfect*. Some of the things the defense has raised show the case of the State is *not perfect*. That every detail wasn't remembered or maybe people didn't act the way you or I would have in their situation.

When you're deliberating, the instructions don't ask if everything *was perfect*. They ask if you have an abiding belief in the truth of the charge, an abiding belief that this happened. When deliberating, be mindful of these arguments by defense [counsel] that shift the focus in a way that equates imperfections with reasonable doubt. Because, that's wrong.

VRP at 681-82 (emphasis added). Nichols did not object.

Immediately after these remarks, the State then returned to the trial testimony and suggested that the children were credible witnesses based on what they testified about, how they testified, their demeanor, and how the disclosure affected them. In so doing, the State used the phrase "enforce a belief" several times. VRP at 682. The State argued,

When you heard [R.B.] and [J.B.] testify to the abuse. Tell me that what they said and how they said it doesn't *enforce [a] belief* that this happened. When you watched [J.B.] on the video uncomfortably tell a stranger about the abuse, tell me that that doesn't *enforce a belief* that this happened.

Now, remember when you heard [the adoptive father] recount what [J.B.] told him and how it affected him. Tell me that doesn't *enforce a belief* that this happened.

If you 12 deliberate and say we have an abiding belief that these crimes happened, then it is your job to return a guilty verdict.

VRP at 682 (emphasis added). Nichols did not object.

V. VERDICT, SENTENCING, AND APPEAL

The jury found Nichols guilty as charged. The trial court imposed a sentence of 318 months to life. The trial court also found Nichols indigent, yet it imposed the VPA and DNA collection fee.

Nichols appeals.

ANALYSIS

Nichols makes four arguments. Nichols argues that (1) the trial court erred in admitting unfairly prejudicial and irrelevant evidence that violated its in limine ruling, which excluded evidence of previous CPS engagement with the family, (2) the State committed prosecutorial misconduct in closing argument, (3) the cumulative effect of the trial court's errors denied Nichols a fair trial, and (4) the trial court erroneously imposed the VPA and the DNA collection fee. We address each in turn.

I. EVIDENTIARY ERROR

Nichols argues that the trial court erred by admitting irrelevant and unfairly prejudicial evidence of "previous CPS engagement" with Murdock and Samantha in violation of the trial court's in limine ruling. Br. of Appellant at 15. The State responds that because Nichols failed to object to this evidence at trial, he may not raise it on appeal. We agree with the State.

A. LEGAL PRINCIPLES

In general, appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). This principle is embodied in RAP 2.5(a), which was adopted to encourage “ ‘the efficient use of judicial resources.’ ” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). The rule provides appellate courts with discretion to refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). This ensures that the trial court has the opportunity to correct any errors, “thereby avoiding unnecessary appeals.” *Robinson*, 171 Wn.2d at 304. In order to preserve evidentiary issues for appeal, trial counsel must generally object at the time the evidence is offered.³ *Kirkman*, 159 Wn.2d at 926.

But when an evidentiary ruling is made pursuant to motions in limine, the obligation to object may be affected. For example, when the trial court makes a final ruling *denying* a party’s motion in limine, that party generally has a standing objection and is not required to object during trial to preserve the issue unless the trial court indicates that further objections at trial are required. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The reason is because one of the purposes of motions in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial. *Id.*

³ A notable exception is that a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. *State v. J.W.M.*, 1 Wn.3d 58, 90, 524 P.3d 596 (2023). But in general, evidentiary errors are not of constitutional magnitude. *State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009).

However, when a party is *successful* in excluding evidence in limine, there is no standing objection. *State v. Sullivan*, 69 Wn. App. 167, 171-72, 847 P.2d 953, *review denied*, 122 Wn.2d 1002 (1993). The successful party is still required to object to the introduction of evidence that may violate the in limine ruling during trial in order to permit the trial court an opportunity to cure any potential prejudice and preserve the issue for appeal. *Id.* Otherwise, a party who wins a motion in limine but fails to point out potential violations at trial could “simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *Id.* at 172.

B. NICHOLS FAILED TO PRESERVE HIS CHALLENGE TO THE ALLEGED EVIDENTIARY ERRORS

Nichols argues that the trial court erred in admitting various evidence concerning CPS investigations. Nichols characterizes the nature of the trial court’s error as violating the ruling from his successful motion in limine—that is, “admit[ting] excluded evidence of ongoing CPS investigations” Br. of Appellant at 17. Nichols argues that such evidence was not probative of any charged element and was unfairly prejudicial.

Nichols points to several specific instances of testimony that he argues violates the in limine ruling. Nichols cites to (1) R.B.’s testimony that CPS “followed” her mother, (2) CPS worker Redmond’s testimony that he was familiar with the children because he was the CPS investigator on three intake investigations concerning them, that he visited the children’s school and the Nichols’ home, and that Samantha displayed an oppositional demeanor towards him, and (3) CPS worker Gorder’s testimony that she was at the Nichols’ home “quite a bit” and that she

had “made findings” in the children’s case. Br. of Appellant at 17, 19-20 (internal quotation marks omitted). In each instance, Nichols failed to object.⁴

The State argues that Nichols’ failure to object to this evidence is fatal to his claim. Because of this failure, the State contends that Nichols may only raise this issue for the first time on appeal if he can establish a manifest constitutional error under RAP 2.5(a)(3). The State asserts that we should decline to review this alleged error because, in general, evidentiary errors are not of constitutional magnitude.

Nichols does not address either manifest error or RAP 2.5 in his opening brief related to his evidentiary argument. In his reply brief, Nichols simply contends that RAP 2.5 does not apply because “this evidentiary issue was litigated in the trial court.” Reply Br. at 6. Although it is true that this issue was litigated pretrial through Nichols’ motion in limine, Nichols is mistaken that this means he did not need to object to preserve the error. Assuming Nichols’ characterization is accurate—that the alleged error was the admission of evidence that had been excluded by the trial court’s in limine ruling (that Nichols succeeded in obtaining), Nichols was required to object to preserve the issue. *Sullivan*, 69 Wn. App. at 171-73 (holding that when a party successfully moves

⁴ As noted above, the State asked Gorder if she had made any findings on the children’s case. Gorder responded, “Yes, I did.” VRP at 541. Nichols did not object to that question. But when the State then began to ask another question, “And what was . . . [.]” Nichols did object on the basis that the question allegedly violated the trial court’s in limine ruling. VRP at 541. Because the State immediately asked a different question, the question was not answered, and the trial court did not rule on the objection.

Nichols characterizes this objection as pertaining to the State’s previous question as to whether Gorder had made any findings. But the transcript belies that characterization—Nichols’ objection appears to be anticipating a substantive answer about findings, and not attempting to retroactively address the previous question.

in limine to exclude evidence, it is still required to object to the introduction of that evidence at trial in order to allow the trial court an opportunity to cure any potential prejudice and preserve the matter for appeal). Nichols failed to do so. And he makes no argument that the trial court's alleged error was of a constitutional magnitude. Thus, Nichols did not preserve these claims of evidentiary error, and we decline to consider them.

II. PROSECUTORIAL MISCONDUCT

Nichols next argues that the State committed prosecutorial misconduct during closing argument. We disagree.

A. LEGAL PRINCIPLES

In a prosecutorial misconduct claim, the defendant bears the burden of showing that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Generally, we first evaluate whether the prosecutor's conduct was improper. *Id.* at 759. If the prosecutor's conduct was improper, we then determine if the conduct prejudiced the defendant. *Id.* at 760. Prejudice is established by showing a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.*

However, if the defendant fails to object to the State's remarks at trial, any error regarding prosecutorial misconduct is deemed to have been waived unless the misconduct was "so flagrant and ill[-]intentioned that [a jury] instruction could not have cured the resulting prejudice." *Id.* at 760-61. For this inquiry, we generally focus on whether the resulting prejudice could have been cured and less on whether the prosecutor's misconduct was flagrant and ill-intentioned. *Id.* at 762.

B. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT

Nichols argues that the State committed prosecutorial misconduct in closing argument on several occasions. First, Nichols asserts that the State misstated the law on jury unanimity when it purportedly argued that the jury was not required to unanimously agree on a particular act in order to convict Nichols. Second, Nichols argues that the State improperly vouched for the children's credibility. And lastly, Nichols argues that the State committed misconduct by misstating the burden of proof and inviting the jury to find him guilty based on a lower standard. On each occasion, Nichols failed to object.

1. The State did not misstate the law on jury unanimity

Nichols argues that the State misstated the law on unanimity and undermined his right to a unanimous verdict when it argued that “the exact number of sexual assaults ‘[did not] matter’ ” and that the jury should convict if they believed Nichols committed “ ‘any one of those acts we just talked about.’ ” Br. of Appellant at 23 (quoting VRP at 657, 660). According to Nichols, the prosecutor “flagrantly misstated the law when he told jurors they are not required to unanimously agree on a particular act in order to convict” and misled jurors “to understand if they believed any of the acts occurred, they should convict.” *Id.* at 24-25 (emphasis omitted). Nichols contends that each of the State's remarks allowed individual jurors to believe an act occurred “that may – or may not – be different from what a separate juror believed.” *Id.* at 25.

Viewed in a vacuum, the State's remarks specifically referenced by Nichols could be seen as potentially ambiguous. But when viewed in the context of the State's closing argument as a whole, the remarks were not improper. *See State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (explaining that “[w]hen reviewing a claim that prosecutorial misconduct requires

reversal, the court should review the statements in the context of the entire case”). Prior to the comments cited by Nichols, the State had already clearly and accurately told the jury that they needed to “unanimously agree that *one instance* of a particular sexual assault occurred for each count.” VRP at 650 (emphasis added). Against this backdrop, none of the State’s later remarks were actually inconsistent with this correct statement of the law. Telling the jury that “[t]he exact number” of assaults does not matter is true; neither this statement nor encouraging the jury to convict if Nichols committed “any one of” the alleged acts actually contradicts the duty of the jury to be unanimous on any one specific incident.⁵ VRP at 657, 660.

But even if the State’s remarks are viewed in isolation and characterized as ambiguous and, thus, potentially improper, Nichols failed to object. Accordingly, he must show that the alleged misconduct could not have been cured by an instruction from the trial court. *Emery*, 174 Wn.2d at 760-61. But here, given that the State’s comments were merely ambiguous, at best, any potential confusion in the minds of the jury could have been readily cured by a simple instruction from the trial court.

2. The State did not vouch for J.B. and R.B.

Nichols next argues that the State committed misconduct when it purportedly vouched for J.B.’s and R.B.’s credibility.⁶ Specifically, Nichols contends that the State improperly bolstered

⁵ Moreover, in addition to the State’s earlier articulation of the correct standard, the trial court gave jury instructions 11 and 17, which also accurately explained to the jury its obligation to be unanimous as to any given instance of abuse used to support a particular count. These instructions would have provided a further foundation for the jury to view the State’s later closing argument.

⁶ Improper vouching generally can occur in two ways. First, if the prosecutor expresses a personal belief as to the veracity of the witness. *Thorgerson*, 172 Wn.2d at 443. And second, if the prosecutor indicates that evidence not presented at trial supports the witness’s testimony. *Id.*

the children's testimony when the State argued in its rebuttal that J.B. and R.B. were " 'speaking their truth . . . and that truth is that the defendant raped and molested them.' " Br. of Appellant at 26 (emphasis omitted) (quoting VRP at 677). Nichols contends that this argument implied to the jurors that "the prosecutor knew some 'truth' based on information not presented at trial." Br. of Appellant at 26-27.

Nichols' argument ignores the actual language used by the State. If the State had argued that the witnesses spoke "the truth," perhaps the argument would have some merit. But that is not what the State said—the State argued that the children were speaking "*their* truth." VRP at 677 (emphasis added). This difference is dispositive; the State was clearly referring to the children's view of their own testimony, not the State's personal belief as to the veracity of testimony or that the State has some sort of independent information not presented at trial. Thus, Nichols' argument about improper vouching fails.

3. The State did not lower the standard for conviction

Finally, Nichols argues that the State misstated the law by arguing that the jury should apply a lower standard of proof. Nichols bases this argument on two issues (1) the State's comments made about the children's testimony, and (2) the State's use of the phrase "enforce a belief." Br. of Appellant at 29.

a. Children's testimony and imperfect case.

Regarding the children's testimony, Nichols points to the State's comments made in rebuttal that the memories of children were imperfect. Nichols contends that the State "urged jurors to draw the false distinction between inconsistencies that make the State's case 'not perfect' and those that create an 'actual reasonable doubt.' " Br. of Appellant at 27-28 (quoting VRP at

681-82). According to Nichols, “[t]elling jurors to excuse [the children]’s imperfect memories and give them the benefit of the doubt because of their ages amounted to a lowering of the burden of proof.” Br. of Appellant at 28.

However, contrary to Nichols’ characterization, the State did not suggest that the jury should apply a lower burden of proof. Rather, the State was merely responding rhetorically to Nichols’ contention that the children’s testimony had some inconsistencies. The State argued that these inconsistencies were “natural” and “normal” and that their testimony was actually consistent about the core facts of what Nichols actually did to them. VRP at 679. The State also argued, that although the children’s “accounts were not perfect,” their accounts had too many similarities for children their age “who should not know about the sexual things they’re talking about.” VRP at 681. The State argued that it was not required to have a “perfect case” and witnesses were not required to be perfect because “[w]itnesses make mistakes, time passes, [and] memories fade.” VRP at 681.

Viewing the State’s rebuttal as a whole, the State’s remarks were valid argument in response to defense counsel’s closing argument. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (“[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.”). The State was responding to defense counsel’s claim that the children’s testimony was inconsistent and explaining why those inconsistencies should be viewed in context. None of the State’s remarks about the imperfect nature of its case or children’s testimony can fairly be said to be a misstatement, or lowering, of the reasonable doubt standard. Nichols fails to show any prosecutorial misconduct related to these remarks.

b. “Enforcing a belief”

Nichols further argues that the State’s repeated uses of the phrase “enforce a belief” was improper. Br. of Appellant at 29. The State used this phrase when it was discussing the children’s testimony, J.B.’s demeanor in her forensic interview, and her adoptive father’s testimony. The State argued,

When you heard [R.B.] and [J.B.] testify to the abuse. Tell me that what they said and how they said it doesn’t *enforce [a] belief* that this happened. When you watched [J.B.] on the video uncomfortably tell a stranger about the abuse, tell me that that doesn’t *enforce a belief* that this happened.

Now, remember when you heard [the adoptive father] recount what [J.B.] told him and how it affected him. Tell me that doesn’t *enforce a belief* that this happened.

If you 12 deliberate and say we have an abiding belief that these crimes happened, then it is your job to return a guilty verdict.

VRP at 682 (emphasis added).

Nichols argues that the phrase “enforce a belief” is not found in the jury instructions and represents an incorrect standard. Br. of Appellant at 29. Nichols appears to argue that because the correct standard for reasonable doubt involves the phrase “abiding belief,” the phrase “enforcing a belief” represents a flagrant and ill-intentioned attempt by the State to mischaracterize the burden of proof.

Nichols exaggerates the effect of the State’s language. Read in context, the State’s comments can be seen as further explaining how to apply the standard of “an abiding belief” rather than the creation of an entirely new standard. Prior to using the “enforcing a belief” phrase, the State had already explained to the jury that the instructions focused on an abiding belief in the truth of each charge. And, as shown above, the State correctly used the complete phrase “abiding belief” immediately after the series of comments cited by Nichols. VRP at 682. Given that the correct

standard was made clear to the jury both before and after the “enforcing a belief” phrase, the State’s comments can be fairly seen as argument tied to the proper articulation of the abiding belief standard.⁷

But just as with all of the State’s comments during closing arguments, Nichols failed to object. So, here again, even if the State’s remarks could be considered improper, a simple curative instruction from the trial court would certainly have clarified that the State’s phrasing was not somehow reducing the reasonable doubt burden. *See Emery*, 174 Wn.2d at 760-61. Accordingly, Nichols’ prosecutorial misconduct argument fails.

III. CUMULATIVE ERROR

Nichols argues that the cumulative error doctrine warrants reversal of his convictions. We disagree.

The cumulative error doctrine provides that a defendant may be entitled to a new trial when cumulative errors result in a fundamentally unfair trial. *Emery*, 174 Wn.2d at 766. Under the cumulative error doctrine, the defendant must show that the combined effect of multiple errors requires a new trial. *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). The cumulative error doctrine may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). This doctrine does not apply when “the errors are few and have little or no effect on the outcome of the trial.” *Id.*

⁷ A natural extension of Nichols’ argument would be that the word “belief” could never be used in a closing argument unless it was always accompanied by the adjective “abiding.” Nichols offers no support for such a holding.

Nichols has not demonstrated any error. Therefore, we hold that the cumulative error doctrine is inapplicable.

IV. LEGAL FINANCIAL OBLIGATIONS

Nichols argues that after the trial court found him indigent, his judgment and sentence erroneously imposed the VPA, and therefore, we should remand for the trial court to strike this reference. He also argues that the DNA collection fee should be stricken. The State concedes that the case should be remanded for the trial court to strike the VPA and the DNA collection fee.

We accept the State's concessions. The VPA is no longer authorized for indigent defendants. *State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023). Moreover, the DNA collection fee is no longer authorized by statute. *Id.* at 17. Accordingly, we remand to the trial court to strike the VPA and the DNA collection fee.

CONCLUSION

We affirm Nichols' convictions but remand for the trial court to strike the VPA and the DNA collection fee.

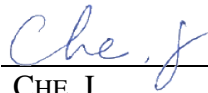
No. 58144-2-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


PRICE, J.

We concur:


LEE, P.J.


CHE, J.

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