Supreme Court No. ____
(COA No. 85277-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRANDON COMBS,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Cases

Washington Court of Appeals Cases

United States Supreme Court Cases

Federal Court of Appeals Cases

Other Jurisdictions

Constitutional Provisions

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Brandon Combs asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Combs appealed his convictions, challenging the trial court's admission of evidence under the "hue and cry" rule and arguing the prosecutor committed reversible misconduct in closing. The Court of Appeals affirmed. *State v. Combs*, No. 85277-9-I, 2025 WL 304579 (Wash. Ct. App. Jan. 27, 2025).

C. ISSUES PRESENTED FOR REVIEW

1. Out-of-court statements are generally inadmissible at trial. But under the common law "hue and cry" rule, the court may admit a complainant's statement that they were sexually assaulted. This archaic rule contravenes due process and fundamental fairness, and this Court should abandon it. This Court should accept review to address this important constitutional issue of broad import. RAP 13.4(b)(3), (4).

2. Even if the doctrine is permitted, a statement is only admissible as "hue and cry" if it is timely. It is timely where the complainant made it immediately. In this case, because the complainant made her statements at least four months later, they were not timely. The Court of Appeals decision affirming the trial court's erroneous application of the "hue and cry" doctrine conflicts with published decisions and violates Mr. Combs's constitutional rights. This Court should accept review. RAP 13.4(b)(1), (2), (3).

3. The State bears the burden to prove every element of the offense beyond a reasonable doubt. It is misconduct for a prosecutor to they tell the jury to decide a case based on who it believes is lying or telling the truth. In this case, the prosecutor committed reversible misconduct when they told the jury its "job" was to decide whether it believed the complainant. The Court of Appeals decision affirming the convictions conflicts with published decisions and violates Mr. Combs's

constitutional rights. This Court should accept review. RAP 13.4(b)(1), (2), (3).

D. STATEMENT OF THE CASE

In the summer of 2018, Brandon Combs was 19 years old. CP 11. He lived in Kent with his family and spent the summer playing video games and hanging out. RP 687, 709-10. Mr. Combs occasionally joined the neighborhood youth playing outside. RP 878, 887.

Haylee McCafferty lived nearby with her mother and her mother's boyfriend, who was Mr. Comb's uncle. RP 656, 662. Ms. McCafferty was 13 years old, and she spent her summer outside with the neighborhood youth. RP 1281.

In August 2018, Ms. McCafferty and her mother moved to Issaquah. RP 1136, 1188. Later that year, Ms. McCafferty told some people she was raped over the summer. The State charged Mr. Combs with three counts of second-degree child rape and one count of second-degree child molestation. CP 11-12.

Prior to trial, defense counsel moved to exclude "hue and cry" evidence from three witnesses that Ms. McCafferty told them she was raped, arguing the statements were not timely. RP 78-79, 84-85. The State acknowledged the timing of each statement was unclear: "it's 4 months at the outset. It could have been further . . . or could have been sooner. Some of the witnesses are a little unsure as to the timing." RP 82.

The trial court bemoaned the "antiquated [hue and cry] rule" and "reluctantly" admitted the statements under the doctrine. RP 89-90; CP 18. The court never instructed the jury about how to consider the evidence. *See* CP 23-49. Ms. McCafferty's grandmother, mother, and a classmate (Kimberly Woods) testified about their vague and conflicting recollections about when Ms. McCafferty told them she was raped.

Throughout closing argument, the prosecutor repeatedly told the jury to convict Mr. Combs if it believed Ms. McCafferty was telling the truth:

> And if you listen to that evidence, if you listen to her testimony, and you believe her, you're done. You've already found Mr. Combs guilty because you found that I met my burden on all five of those elements. RP 1532.
>
> . . . it's your job to decide what makes sense about [the evidence], who to believe and why. RP 1532.
>
> Beginning of this trial I told you that at the end of it I would stand here and I would tell you that I'm really only ever going to ask you one question: Whether or not, having heard all the evidence, do you believe Haylee? Because in Washington state if you look at all the evidence and you find the victim to be credible, if you believe them in light of that evidence, that's enough. RP 1540.
>
> . . . and I mentioned this before but it's really the biggest issue. Lying. Defense said that they're not here to say that Haylee is lying but it's a false accusation. Seems like a lie to me. So is she lying? RP 1587.
>
> The jury convicted Mr. Combs on all counts. CP 50-53.

The Court of Appeals affirmed the convictions. App. 1-11.

E. ARGUMENT

1. This Court should abandon the "hue and cry" rule.

The common law "hue and cry" rule is outdated, perpetuates rape myths, and conflicts with the rules of evidence.

It also violates due process and the accused's right to a fair trial, is not necessary to prove any element of the offense, and does not serve any legitimate purpose.

This Court should abandon the "hue and cry" doctrine. This Court should accept review of this important constitutional issue of broad import. RAP 13.4(b)(3), (4).

a. The "hue and cry" rule is an outdated common law rule that perpetuates misconceptions about sex offenses and conflicts with the rules of evidence.

The "hue and cry" doctrine is a vestige of common law that is outside the rules of evidence and perpetuates deeply offensive beliefs about sex offenses. The doctrine is premised on the expectation that a victim would report a violent crime at the first opportunity. Dawn M. DuBois, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 Brook L.Rev. 1087, 1087 (1988). Traditionally, this common law expectation applied to all violent crimes. *Id.* Evidence the victim reported the crime at first opportunity—that they raised a "hue and cry"—was admitted at trial to prove the offense. *Id.*

All other criminal prosecutions have abandoned the "hue and cry" requirement, but it still persists in present day prosecutions of sex offenses. It allows the State to admit into evidence a complainant's statements to another person that they were sexually assaulted in its case-in-chief.

The "hue and cry" rule is outdated, deeply sexist, and perpetuates rape myths about how a victim should act. *See generally* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C.Davis L.Rev. 1013 (1991). It is premised on the belief that, if a sexual assault actually occurred, the victim would report it. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L.Rev. 945, 978 & n.198 (2004). If they "went about as if nothing had happened, [it] was in effect an assertion that nothing violent had been done." *Id.*

The "hue and cry" rule is also rooted in racist beliefs about who is a "true" victim. Historically, it was only available to white women, leaving people of color and other genders with no way to pursue claims of sexual violence. *See State v. Martinez*, 196 Wn.2d 605, 610 n.2, 476 P.3d 189 (2020). (citations omitted); *id.* at 619 (Gordon McCloud, J., dissenting) (citations omitted).

In addition, "hue and cry" conflicts with the rules of evidence, which broadly exclude all hearsay statements unless they meet a narrowly-tailored exception. ER 802. "Hue and cry" is the "*only* common law hearsay exception among an otherwise exclusive list of officially enacted exceptions." *Martinez*, 196 Wn.2d at 621 (Gordon McCloud, J., dissenting) (emphasis in original).

The "hue and cry" rule is also contrary to the evidentiary rule that prohibits bolstering a witness's credibility before any attempted impeachment. ER 801(d)(1)(ii); *State v. Thomas*, 150 Wn.2d 821, 867, 83 P.3d 970 (2004); *State v. Osborn*, 59

Wn.App. 1, 4, 795 P.2d 1174 (1990). Yet "hue and cry" allows the State to presumptively bolster the complainant's testimony even before their credibility has been called into question. Anderson, *supra*, at 966 (and cases cited).

Moreover, "hue and cry" is not necessary to prove any element of any offense. *Martinez*, 196 Wn.2d at 619 (Gordon McCloud, J., dissenting). It only reinforces inaccurate beliefs about sexual violence and "has no basis in reality." *Id.* at 620 (Gordon McCloud, J., dissenting). "Hue and cry" is offensive to survivors of sexual assault, unfair to the accused, contrary to the rules of evidence, and undermines confidence in our legal system. This Court should abandon the rule.

b. The "hue and cry" rule violates due process and serves no legitimate purpose

"Hue and cry" also violates the accused's rights to due process and a fair trial, and it is arbitrary and disproportionate to any legitimate purpose the rule is purported to serve.

All persons accused of a crime are entitled to due process and a fair trial. U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 21, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Evidentiary rules must comport with due process, which is based on principles of fundamental fairness that are "essential to the very concept of justice." *Lisenba v. People of State of California*, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed.166 (1941). "The aim of the requirement of due process is . . . to prevent fundamental unfairness in the use of evidence[.]" *Id.*

Evidentiary rules must yield to constitutional rights and cannot "infring[e] upon a weighty interest of the accused" or be "arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *United States v.*

Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)).

In *Holmes*, the United States Supreme Court invalidated a common law rule that excluded the defendant's evidence of third-party guilt if the prosecution's evidence was strong. 547 U.S. at 323-24, 329. The rule's purported justification was "to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 330. But evaluating the strength of the State's case is specifically reserved for the factfinder. *Id.* Therefore, the rule did not serve any legitimate interest and violated a defendant's constitutional right to a fair trial. *Id.* at 330-31.

The Court's reasoning in *Holmes* applies here because "hue and cry" also infringes on a defendant's right to a fair trial. Like the unconstitutional rule in *Holmes*, the "hue and cry" rule favors the prosecution, and it is unfair. *Id.* at 330. "A relaxation of the hearsay rules would surely aid the prosecution's ability to obtain a conviction in any case in which credibility was key and

physical evidence was lacking." *Martinez*, 196 Wn.2d at 625 (Gordon McCloud, J., dissenting). A rule that favors the prosecution "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady v. Maryland*, 373 U.S. 83, 88, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see Lisenba*, 314 U.S. at 236.

"Hue and cry" allows the State to admit hearsay to preemptively bolster the complainant's testimony in its case-in-chief. But the rule does not apply the other way: a defendant cannot present evidence in their own case-in-chief that they repeatedly told others they did *not* assault the complainant. *See* ER 801(d)(2); *Holmes*, 547 U.S. at 330 ("The rule applied in this case is no more logical than its converse would be.").

In no other circumstance can a party preemptively bolster witness credibility. This amounts to court-approved vouching in trials for sex offenses. But courts cannot apply different rules for different charges "merely because litigants might prefer different rules in a particular class of cases." *United States v.*

Salerno, 505 U.S. 317, 322, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992).

"Hue and cry" is also arbitrary and disproportionate to any legitimate purpose. In fact, the rule is precisely *contrary* to a legitimate purpose: the State has "a legitimate interest in ensuring that *reliable evidence* is presented to the trier of fact in a criminal trial." *Scheffer*, 523 U.S. at 309 (emphasis added). "Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules." *Id.*

Similar to the unconstitutional rule in *Holmes*, which had no examination to ensure the evidence's reliability, "hue and cry" is a "blanket rule" allowing out-of-court statements "without any of the indicia of reliability that the enacted ERs demand of all other exceptions to the rule against hearsay." *Holmes*, 547 U.S. at 329; *Martinez*, 196 Wn.2d at 617 (Gordon McCloud, J., dissenting). This violates principles of fairness, which is why hearsay is generally excluded. *Chambers*, 410 U.S. at 298, 302.

The purported justification for admitting hearsay under the "hue and cry" doctrine is to preemptively bolster a complainant's testimony based on the assumption that jurors are biased against sexual assault victims and will not find them credible. *Martinez*, 196 Wn.2d at 613. Under this reasoning, there would be evidentiary rules to preemptively counteract all bias. *See id.* at 627 (Gordon McCloud, J., dissenting) ("Creating a rule that allows admission of potentially unreliable evidence in order to counteract juror prejudice also sets a dangerous precedent for dealing with other juror prejudices."). Racial bias is clearly evident in our criminal legal system. *State v. Gregory*, 192 Wn.2d 1, 22, 427 P.3d 621 (2018); Letter from Wash. Sup. Ct. to Members of Judiciary & Legal Cmty. (June 4, 2020). But of course, there is no rule to preemptively bolster the testimony of defendants who are people of color simply because this bias exists. Regardless, jurors are specifically instructed in every case to "avoid bias, conscious or unconscious," when assessing witness credibility and reaching a decision. *See* 11 Wash.

Practice, Pattern Jury Instr.: Crim. WPIC 1.02 (5th ed. 2024). Jurors are presumed to follow these instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

The "hue and cry" rule serves no legitimate purpose and infringes on the accused's right to due process and a fair trial. This Court should abandon the rule.

c. This Court's holding in Crossguns *requires it to abandon the "hue and cry" rule.*

Even though this Court upheld this offensive and unnecessary doctrine in *Martinez*, this Court's more recent holding in *State v. Crossguns*[1] undermines the legal underpinnings of *Martinez*.

In *Martinez*, this Court unanimously acknowledged "the [hue and cry] doctrine's problematic roots" in perpetuating rape myths. 196 Wn.2d at 620-21 (Gordon McCloud, J., dissenting) ("All nine justices agree" "the hue and cry rule stems from false assumptions about how 'real' rape victims behave."). This

[1] 199 Wn.2d 282, 505 P.3d 529 (2022).

Court also acknowledged the doctrine's racially disparate application. *Id.* at 610 n.2. This Court further acknowledged the doctrine is inconsistent with the rules of evidence. *Id.* at 613.

Despite all of this, this Court upheld the "hue and cry" rule. *Id.* Therefore, the rule continues to apply in the same manner as it has for over a century. *Id.* at 611.

Then in *Crossguns*, this Court eliminated a different but equally outdated evidentiary rule: the "lustful disposition" doctrine. 199 Wn.2d at 290. "Lustful disposition" allowed the prosecution to introduce evidence of the accused's prior, uncharged acts "that paints a picture that the offender has an overpowering sexual desire for or attraction to their victim." *Id.* at 292. Because it perpetuated outdated rape myths and was improper propensity evidence, this Court abandoned the "lustful disposition" doctrine, requiring such evidence to comport with the rules of evidence. *Id.* at 294-95.

Likewise, the "hue and cry" doctrine also perpetuates rape myths, is unnecessary to prove the offense, and is

incongruous with the rules of evidence. Like the evidence formerly admissible under the "lustful disposition" doctrine, the rules of evidence should govern the admissibility of "hue and cry" statements. *See Crossguns*, 199 Wn.2d at 294-95; *Martinez*, 196 Wn.2d at 621 (Gordon McCloud, J., dissenting) ("hue and cry" should be subject "to the same rigorous reliability tests that our evidence rules apply to all other out-of-court statements").

This Court's holding in *Crossguns* erodes the legal underpinnings of *Martinez*. *E.g. W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (citing cases). This Court should hold the unnecessary and harmful "hue and cry" doctrine has no place in trials for sex offenses. This Court should accept review to address this important constitutional issue. RAP 13.4(b)(3), (4).

2. Even if the doctrine is permitted, "hue and cry" statements must be timely. The Court of Appeals decision demonstrates this Court's guidance is necessary to clarify the doctrine's proper application.

Even if the "hue and cry" rule remains valid, such evidence is admissible only if the statement was "timely." *Martinez*, 196 Wn.2d at 614 (citing *State v. Ferguson*, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983)). Because the statements in this case were made approximately four months after the alleged incidents, they were not timely. The Court of Appeals decision affirming the trial court's erroneous ruling conflicts with published decisions and undermines Mr. Combs's constitutional rights, requiring this Court's guidance on this important issue. RAP 13.4(b)(1), (2), (3).

a. A statement is timely and admissible as "hue and cry" only if it was made immediately.

The "hue and cry" doctrine only allows a timely complaint. *State v. Chenoweth*, 188 Wn.App. 521, 532, 354 P.3d 13 (2015). It is timely if the person made it "immediately or soon after the alleged injury was committed" or "when there

is an 'opportunity to complain.'" *State v. Hunter*, 18 Wash. 670, 672, 52 P. 247 (1898); *Martinez*, 196 Wn.2d at 614 (quoting *State v. Griffin*, 43 Wash. 591, 597, 86 P. 951 (1906)).

This Court and the Court of Appeals strictly construe the timeliness requirement. For example, a statement may be timely if it was made during a period of ongoing abuse. *Martinez*, 196 Wn.2d at 614. It may also be timely if made immediately after the alleged incident. *Hunter*, 18 Wash. at 672 (within an hour); *State v. Ragan*, 22 Wn.App. 591, 596, 593 P.2d 815 (1979) (an hour later). But one year later is too long. *Chenoweth*, 188 Wn.App. at 531. And six months is too long, especially where the complainant was under "no threat, no restraint, [and had] no lack of opportunity" to tell someone sooner. *Griffin*, 43 Wash. at 598-99.

The timeliness requirement brings the "hue and cry" rule into closer alignment with the rules of evidence. Timeliness is a critical indicator of reliability for admitting out-of-court statements. Indeed, the basis for many hearsay exceptions is

rooted in immediacy. *See* ER 803(a)(1) (present sense impression exception), (a)(2) (excited utterance exception), (a)(3) (state of mind exception). Timeliness is often "*the* factor that assures trustworthiness." *United States v. Green*, 556 F.3d 151, 155 (3d Cir. 2009) (emphasis in original).

If the complaint was not made immediately after or at first opportunity, it is not admissible as "hue and cry." Then, like any other out-of-court statement, it is subject to the rules of evidence.

b. Ms. McCafferty's statements were not timely.

Ms. McCafferty told her mother, grandmother, and classmate she was raped approximately four months after the last incident. Four months later is too long, and these statements were not timely.

In addition, Ms. McCafferty had ample opportunity to disclose. Her mother had broken up with Mr. Combs's uncle. Immediately after the last alleged assault, Ms. McCafferty moved to a different city, far from Mr. Combs. She no longer

saw or had any connection to Mr. Combs. Nothing prevented Ms. McCafferty from telling someone. Still, many months passed before she did so. *See Griffin*, 43 Wash. at 598-99 (statements made after "months of inexcusable delay" are not admissible as "hue and cry").

This case also demonstrates the danger of relaxing the timeliness requirement because the "hue and cry" rule has no other check on reliability. All of the testimony about Ms. McCafferty's disclosure was inconsistent and unreliable. None of the witnesses could testify with any certainty as to when Ms. McCafferty told them she was raped. Her grandmother could not remember when the conversation took place. RP 1105. Her mother only had a vague recollection of when Ms. McCafferty told her. RP 1185. Ms. Woods could not remember when Ms. McCafferty told her and only "vaguely" recalled the conversation. RP 912-13, 928, 937.

Ms. McCafferty also could not remember when she told any of them, and she admitted her account of who she told and

and when changed at every step of the case. RP 1349, 1365, 1369-70. Her testimony of each disclosure significantly contradicted the other person's testimony. *Compare* RP 1346, 1373, 1378-80 (Ms. McCafferty), *with* RP 1084-90 (grandmother), RP 1176-78 (mother), RP 912-37 (Ms. Woods). Beyond being untimely, the statements were unreliable.

Despite their unreliable recollection, each witness testified Ms. McCafferty told them she was raped. But "repetition is not a valid test for veracity." *Osborn*, 59 Wn.App. at 4. Permitting three witnesses to repeat Ms. McCafferty's out-of-court statements allowed the State to preemptively bolster and "artificially enhance" her testimony with unreliable evidence, giving it "an undeserved aura of trustworthiness." DuBois, *supra*, at 1109.

The Court of Appeals affirmed the trial court's erroneous application of the "hue and cry" doctrine, concluding other circumstances demonstrated the statement months later was still timely. App. 5. But evidence that Ms. McCafferty was

"uncomfortable" disclosing earlier does not make her statement timely. *See* App. 5. Timeliness under "hue and cry" does not turn on a person's reasons for disclosing. An untimely statement cannot be admitted as "hue and cry" simply because a person decided for personal reasons to disclose long after, even though they were under no threat and had no lack of opportunity. *Griffin*, 43 Wash. at 598-99. The doctrine is "limited": it only allows the fact that the person told someone, and it must be timely. *Martinez*, 196 Wn.2d at 611. "[A]nything beyond that is hearsay of the most dangerous character." *Hunter*, 18 Wash. at 672. The Court of Appeals decision is contrary to the longstanding limitations on "hue and cry."

c. The trial court's misapplication of the "hue and cry" rule was not harmless.

The trial court's erroneous admission of untimely statements as "hue and cry" was not harmless. Reversal is required when, "within reasonable probabilities, had the error not occurred, the outcome of the trial would probably have been

materially affected." *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (citations omitted).

In *Commonwealth v. Arana*, the trial court erroneously admitted testimony from three witnesses "as to their tearful conversations" with the complainant, which served no purpose other than to bolster her testimony. 453 Mass. 214, 228, 901 N.E.2d 99 (2009). The Massachusetts Supreme Court reversed, concluding that, had the jury not heard the erroneously admitted evidence, there was "more than a slight possibility that the jury might have disbelieved some of portion of [the complainant's] testimony." *Id.*

Similarly, the jury in this case heard three witnesses testify about their emotional conversations where Ms. McCafferty told them she was raped. RP 1087, 1179. This evidence served no purpose other than to bolster her testimony. Had it been properly excluded, there is more than a slight possibility the jury would have reached a different conclusion.

In addition, the court did not instruct the jury on how to consider the evidence. *See Griffin*, 43 Wash. at 598 (the jury must be "properly instructed" as to the purpose of hue and cry evidence). The court allowed the jury to consider the statements for their truth, which compounded the prejudice.

The Court of Appeals concluded any error was harmless, stating, "[e]ach witness merely answered a single 'yes' to whether H.M. disclosed to them that she was raped." App. 5 n.3. This ignores the actual substance of their testimony, the impact of *three* witnesses' emotional bolstering, as well as the trial court's failure to instruct the jury.

In affirming, the Court of Appeals broadened the "hue and cry" rule and undermined established precedent. This Court should accept review to provide guidance to lower courts on the proper application of the "hue and cry" rule. RAP 13.4(b)(1), (2), (3).

3. The prosecutor committed reversible misconduct when he told the jury its "job" was to decide whether Ms. McCafferty was telling the truth. The Court of Appeals decision erodes longstanding constitutional principles, and this Court should accept review.

In closing argument, the prosecutor repeatedly told the jury it must convict if it thought Ms. McCafferty was telling the truth. This was reversible misconduct.

The State bears the burden to prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury weighs the evidence to determine whether the State has met this high burden. *Emery*, 174 Wn.2d at 760.

A prosecutor has "wide latitude" during closing argument, but they must not misstate or shift the burden of proof. *In re Glasmann*, 175 Wn.2d 696, 704, 713, 286 P.3d 673 (2012). A prosecutor improperly shifts the burden of proof when they tell the jury to decide the case based on whether it thinks someone was lying or telling the truth. *Id.* at 713; *State v. Barrow*, 60 Wn.App. 869, 874-76, 809 P.2d 209 (1991).

This Court and the Court of Appeals has repeatedly held this is misconduct. *Crossguns*, 199 Wn.2d at 298; *Glasmann*, 175 Wn.2d at 713; *State v. Miles*, 139 Wn.App. 879, 889-90, 162 P.3d 1169 (2007); *State v. Fleming*, 83 Wn.App. 209, 213, 216 921 P.2d 1076 (1996). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. "This task is independent of whether the jurors think any witnesses are lying or telling the truth." *Crossguns*, 199 Wn.2d at 297.

Even absent an objection, prosecutorial misconduct requires a new trial when it is so flagrant and ill-intentioned that an instruction could not have cured the prejudice. *State v. Loughbom*, 196 Wn.2d 64, 74-75, 470 P.3d 499 (2020). This analysis focuses on the impact of the misconduct and "whether the defendant received a fair trial in light of the prejudice." *Id.*; *Glasmann*, 175 Wn.2d at 681.

In this case, the prosecutor repeatedly urged the jurors to convict if they believed Ms. McCafferty was telling the truth.

He told them: "if you listen to [Ms. McCafferty's] testimony, and you believe her, you're done. You've already found Mr. Combs guilty because you found that I met my burden on all five of those elements." RP 1532. He said the jury's "job" was to decide "who to believe." RP 1532. He said the jury was tasked with answering "one question: Whether or not, having heard all the evidence . . . do you believe [Ms. McCafferty]?" RP 1540. He also told the jury that, under Washington law, believing the complainant was enough to convict: "Because in Washington state if you look at all the evidence and you find the victim to be credible, if you believe them in light of that evidence, that's enough." RP 1540. The prosecutor hammered this home in rebuttal, again telling the jury whether Ms. McCafferty was telling the truth was "really the biggest issue. Lying. . . . So, is she lying?" RP 1587. "If she's not lying [it's] because it happened." RP 1588. This was prosecutorial misconduct. *See Crossguns*, 199 Wn.2d at 298.

This misconduct was flagrant and ill-intentioned. Ignoring the longstanding prohibition against this exact type of misconduct is reversible error. *Glasmann*, 175 Wn.2d at 713. And no instruction could have cured the prejudice. Telling the jury to decide whether Ms. McCafferty was telling the truth was a primary theme of the prosecutor's closing argument. And because the entire case hinged on credibility, the prosecutor's comments had an inflammatory effect in an emotional case involving young people and sexual assault.

The prosecutor's other statements in closing compounded the prejudice. He implied the jurors should decide the case based on their beliefs about what is right and wrong, telling them "the law is, is a representation of our shared moral values." RP 1519. He stressed this was an "emotionally charged" case that should make them "uncomfortable"; if they're "uncomfortable" "[i]t's because you believe that it happened. You would not be uncomfortable if you didn't think it happened." RP 1587. The prosecutor also called Ms.

McCafferty the "victim," even though the court prohibited this term. RP 1540; *see* RP 95; CP 18. These statements made the prosecutor's misconduct more egregious by telling the jurors to decide the case based on their emotional and moral judgment.

The Court of Appeals overlooked these statements to focus on the prosecutor's brief comments about the burden of proof. App. 7-8. But this does not negate the prosecutor's repeated statements and emotional pleas to the jury to decide the case based on whether it believed Ms. McCafferty. The Court of Appeals decision conflicts with numerous published decisions prohibiting this exact conduct and undermines Mr. Combs's constitutional rights. This Court should accept review. RAP 13.4(b)(1), (2), (3).

F. CONCLUSION

Based on the preceding, Mr. Combs requests this Court accept review pursuant to RAP 13.4(b).

This brief is in 14-point Times New Roman, contains 4,940 words, and complies with RAP 18.17.

Respectfully submitted this 25th day of February 2025.

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APPENDIX

Table of Contents

FILED
1/27/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRANDON DENNIS COMBS, Appellant.	No. 85277-9-I DIVISION ONE UNPUBLISHED OPINION

MANN, J. — A jury convicted Brandon Combs of three counts of rape in the second degree and one count of child molestation in the second degree. On appeal, Combs argues (1) the trial court abused its discretion in admitting statements under the "hue and cry" or "fact of complaint" doctrine, (2) the prosecutor committed misconduct, and (3) the victim penalty assessment (VPA) and DNA collection fee should be stricken.

We remand to strike the VPA and DNA collection fee. We otherwise affirm.

I

In 2018, H.M.'s mother was dating Kevin Combs, the uncle of Brandon Combs. H.M. lived with Kevin,[1] and Combs lived with his dad around the corner from H.M.

[1] First names are used to avoid confusion with the appellant. No disrespect is intended.

During summer 2018, Combs, H.M., and other children in the neighborhood would play in an open field near their homes. At the time, Combs was 19 years old and H.M. was 13 years old. Combs began making inappropriate comments about H.M.'s body to her when no other people were around.

H.M. described multiple incidents where Combs touched her inappropriately including: touching her breasts, putting his penis in her mouth, and inserting his penis into her vagina. H.M. stated that Combs knew she was only 13 years old. After each incident, Combs told H.M. not to tell anyone.

H.M.'s mother and Kevin broke up toward the end of summer 2018. H.M. and her mother moved in with H.M.'s grandmother in Issaquah. After school started, H.M. disclosed to her friend K.W. that she had been raped. Around Christmas 2018, H.M. disclosed to her grandmother and mother that she had been raped.

On January 16, 2019, police arrived at H.M.'s house for an unrelated incident. H.M. approached the officer and asked if she could report a sexual assault.

The State charged Combs with three counts of rape in the second degree and one count of child molestation in the second degree.

Before trial, Combs sought to exclude statements H.M. made to K.W., her mother, and grandmother that she was sexually assaulted. Combs argued the statements were untimely and thus inadmissible under the fact of complaint doctrine. Combs argued the statements were untimely because H.M. did not make the statements until four months after she last was around Combs. The trial court ruled:

> I think based on everything I have before me the Court reluctantly acknowledges that this antiquated rule, which Justice Gordon McCloud bemoans in her dissent on [State v. Martinez, 196 Wn.2d 605, 476 P.3d 189 (2020)], the Court is going to rule the actual—the fact that it was

> admitted with zero details the Court will again reluctantly agree that the law would support its admission given the timing.
>
> I understand and appreciate the defense's concerns under [State v. Chenoweth, 188 Wn. App. 521, 354 P.3d 13 (2015)]. I do think there is enough in Martinez to allow for that to come in. So the only things that will come in are the disclosure of the fact that she believes she had suffered a sexual assault, period. There is no name, there is no detail, there is nothing to describe the actual events themselves. That would be it.

At trial, K.W. testified that H.M. disclosed to her that H.M. was raped. H.M.'s grandmother testified that H.M. told her that she was raped. H.M.'s mother also testified that H.M. disclosed to her that she had been raped. In accordance with the court's ruling, the witnesses testified only that H.M. disclosed she had been raped but did not testify to any name or detail about the assaults.

The jury found Combs guilty on all counts. The court sentenced Combs to an indeterminate sentence with a minimum of 144 months.

Combs appeals.

II

Combs argues the trial court abused its discretion in admitting H.M.'s statements to K.W., her mom, and her grandmother under the fact of complaint doctrine because they were untimely. We disagree.[2]

The fact of complaint doctrine, also known as hue and cry doctrine, is a case law exception to the prohibition on hearsay that permits the introduction of evidence that the alleged victim made a complaint to someone after the assault. State v. DeBolt, 61 Wn.

[2] Combs urges this court to abandon the fact of complaint doctrine. But our Supreme Court recently rejected an attempt to abandon to the doctrine in Martinez, 196 Wn.2d at 614 ("Because the fact of complaint doctrine protects victims and provides an important supplement to the current rules of evidence, we decline to abandon the doctrine."). For that reason, we do not address Combs's argument that the doctrine should be abandoned.

App. 58, 63, 808 P.2d 794 (1991). The doctrine is limited and only allows evidence to demonstrate that the victim reported to someone in a timely matter, but the witness cannot disclose details about the assault. Martinez, 196 Wn.2d at 611. The purpose of doctrine is to eliminate any bias that jurors may have that "real" victims report promptly. Martinez, 196 Wn.2d at 611.

"A complaint is timely if it is made when there is an 'opportunity to complain.'" Martinez, 196 Wn.2d at 614 (internal quotation marks omitted) (quoting State v. Griffin, 43 Wash. 591, 597, 86 P. 951 (1906)). We "leave it in the able hands of the trial court to determine what constitutes a timely complaint based on surrounding circumstances." Martinez, 196 Wn.2d at 615.

We review the trial court's admission of evidence under the fact of complaint doctrine under an abuse of discretion standard. Martinez, 196 Wn.2d at 614. "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

Combs argues that H.M.'s statements were not timely because she did not make them until four months after the assault.

Contrary to Combs's argument, timeliness under the fact of complaint doctrine is not strictly construed. Rather, the Supreme Court has stated that the trial court is in the best position to determine whether a complaint was timely made, and "[t]rial judges have discretion to admit evidence explaining why a victim waited to report facts of sexual violence, and other circumstances, in deciding whether or not to admit fact of the

complaint testimony." Martinez, 196 Wn.2d at 615. There is thus no bright line rule for deciding whether a statement is timely under the doctrine.

Here, H.M. made the statements around four months after the assaults occurred. H.M. testified that she was uncomfortable talking about what happened. H.M. also began self-harming after the assaults. At the same time, her mother and Kevin broke up and H.M. moved to a new city. H.M. eventually started at a new school and got a fresh start. Once she got comfortable in her new living situation and processed what happened to her, she eventually disclosed to family and friends.

As the court outlined in Martinez, the inquiry of timeliness does not turn on a predetermined amount of time. 196 Wn.2d at 614. Rather, it is an examination of the facts and surrounding circumstances and when the victim had an opportunity to complain. Martinez, 196 Wn.2d at 614. The trial court carefully considered these circumstances and determined the statements were timely for the purpose of the fact of complaint doctrine.

Because of the significant discretion given to the trial court in considering the circumstances and admitting evidence under the fact of complaint doctrine, we hold that H.M.'s statements were timely and the trial court did not abuse its discretion in admitting this evidence.[3]

[3] Even if the admission of the statements was error, any error was harmless under the nonconstitutional harmless error standard. State v. Rocha, 21 Wn. App. 2d 26, 34, 504 P.3d 233 (2022) (erroneous admission of evidence in violation of an evidentiary rule is reviewed under nonconstitutional harmless error analysis). Each witness merely answered a single "yes" to whether H.M. disclosed to them that she was raped. The State's case did not focus on these disclosures but rather focused on H.M.'s behavior changes after the assaults. Combs cannot demonstrate there is a reasonable probability that the outcome of the trial would have been different without these statements.

III

Combs argues that the prosecutor committed misconduct in closing arguments when he told the jury it must convict if it thought H.M. was telling the truth. We disagree.

To prevail on a claim of prosecutorial misconduct, the defendant 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) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

When there is a failure to object to improper statements, it constitutes a waiver unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wn.2d at 561. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Here, Combs failed to object to the prosecutor's closing argument, so his argument is waived unless he can show that the statements were so flagrant and ill

intentioned that no instruction could have cured the prejudice. Brown, 132 Wn.2d at 561. Combs argues the following portions of the State's closing argument were improper:

> And if you listen to that evidence, if you listen to her testimony, and you believe her, you're done. You've already found Mr. Combs guilty because you found that I met my burden on all five of those elements.
>
> . . . Because the instructions tell you that it's your job to look at the evidence, the testimony, and it's your job to decide what makes sense about it, who to believe and why.
>
> . . . .
>
> Whether or not, having heard all of the evidence, you can look at that and in light of all the evidence, do you believe [H.M.]? Because in Washington state if you look at all the evidence and you find the victim to be credible, if you believe them in light of that evidence, that's enough.
>
> . . . .
>
> And if you look at those and you find that you're uncomfortable it's not because of the nature of this case. It's because you believe that it happened. You would not be uncomfortable if you didn't think it happened. So keep in mind that when you deliberate.
>
> . . . .
>
> So is she lying? Let's talk about that.
>
> Why would she lie? They don't have a duty to prove motive, but I encourage you to look for one because there are two alternatives here. Either this was worth it for her to get this attention to cut herself multiple times, to drink bleach, to have nothing happen. Is that the attention she wanted to have, the friends that she told come to her at 13 and tell her it's her fault, to have to come in and tell a bunch of strangers about what happened knowing that I would have to stand here and argue that it's the truth what happened to her? Is that a motive to lie? Is that worth it for her? Because what's the alternative? If she's not lying because it happened.

Combs argues these statements impermissibly shifted the burden of proof. We disagree.

First, throughout closing arguments, the prosecutor repeated that the State had the burden to prove all the elements, and again in rebuttal, the prosecutor began with "I think Mr. Will and I really agree wholeheartedly on one thing in this case, and that's that

I absolutely bear the burden. Mr. Combs has no burden. He doesn't have anything to do in this case." After repeatedly emphasizing that the State bore the burden of proof, the prosecutor argued that if the jury believed H.M., the elements of the crime would be met. This is not an impermissible burden shift because the prosecutor did not suggest that Combs had any burden.

Second, a prosecutor has "wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility." State v. Thompson, 169 Wn. App. 436, 496, 290 P.3d 996 (2012). The prosecutor was permitted to argue that H.M. had no motive to lie, particularly when the case hinged on credibility.

Lastly, Combs fails to show that the prosecutor's comments affected the verdict. Similarly, Combs fails to show any improper comment could not have been cured by an instruction. The instruction informed the jury that it was the jury's role to determine credibility, that the State had the burden of proof, and that the attorneys' statements were not evidence. Because Combs cannot demonstrate the prosecutor's comments were so flagrant and ill intentioned that they could not be cured by an instruction, his argument is waived.

For these reasons, we decline to reverse Combs's conviction on this basis.

IV

Combs argues this court should remand to strike the VPA and DNA collection fee. The State does not oppose.

In 2023, the legislature amended RCW 7.68.035 to prohibit courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). LAWS OF 2023, ch.

449, § 1. Our courts have held that recent amendments to statutes governing legal financial obligations apply to matters pending on direct appeal. State v. Ellis, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

We remand to strike the VPA and DNA collection fee.

V

Combs asserts three more grounds for appeal in his statement of additional grounds. RAP 10.10. We address each in turn.

Combs first argues that it was improper for jury selection to be conducted over Zoom where potential jurors could hear other jurors' answers.

A trial court's ruling on the scope and content of jury selection will not be disturbed on appeal unless there was an abuse of discretion and the rights of the defendant have been substantially prejudiced. State v. Wade, 28 Wn. App. 2d 100, 534 P.3d 1221 (2023), review denied, 2 Wn.3d 1018, 542 P.3d 570 (2024).

Here, the trial court adopted reasonable voir dire procedures in light of the ongoing COVID-19 pandemic. See Wade, 28 Wn. App. 2d at 113 (holding the trial court did not abuse discretion in conducting voir dire over Zoom during the COVID-19 pandemic). And Combs offers no examples of any prejudice. Without more, we conclude the trial court did not abuse its discretion in conducting voir dire remotely.

Combs next argues there was insufficient evidence during trial to support a conviction. We disagree.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To determine whether sufficient evidence supports a conviction, we must "view the

evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). The State's evidence is admitted as true, and circumstantial evidence is considered equally reliable as direct evidence. State v. Scanlan, 193 Wn.2d 753, 770, 445 P.3d 960 (2019). And we defer to the fact finder's resolution of conflicting testimony and their evaluation of the evidence's persuasiveness. Homan, 181 Wn.2d at 106.

Here, viewing the evidence most favorable to the State, the evidence was sufficient for the jury to convict. H.M. detailed multiple incidents throughout summer 2018 where she was sexually assaulted by Combs. Additionally, three people testified that H.M. disclosed to them that she was raped and that her demeanor changed after that summer. A rational jury could have found the elements were met beyond a reasonable doubt.

Combs lastly argues he had ineffective assistance of counsel because his attorney failed to move for dismissal based on the lack of evidence.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant in a criminal proceeding is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must demonstrate both (1) that counsel's representation fell below an objective standard of reasonableness and (2) resulting prejudice—a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d

322, 334-35, 899 P.2d 1251 (1995). If a defendant fails to establish either element, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335. To demonstrate deficient performance, a "defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." McFarland, 127 Wn.2d at 336.

Combs fails to establish deficient performance or resulting prejudice.

For the reasons above, we remand to strike the VPA and DNA collection fee. We otherwise affirm.

Mann, J.

WE CONCUR:

Cheung, J.

Birk, J.

WASHINGTON APPELLATE PROJECT

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