

June 13, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN PEREZ DUENAS,

Appellant.

No. 48119-7-II

UNPUBLISHED OPINION

WORSWICK, J. — Jonathan Perez Duenas appeals his convictions and sentence for one count of first degree child rape, two counts of first degree child molestation, and one count of third degree child molestation. Duenas argues that (1) the trial court erred by admitting improper opinion testimony regarding (a) H.A.'s and K.L.'s<sup>1</sup> credibility and (b) Duenas's guilt; (2) the prosecutor committed misconduct by (a) eliciting improper opinion testimony, (b) arguing facts not in evidence, (c) making improper appeals to the jury's passions and prejudices, (d) vouching for H.A.'s and K.L.'s credibility, and (e) disparaging defense counsel; (3) his defense counsel was ineffective for (a) failing to object to impermissible opinion testimony, (b) failing to renew his child hearsay objection, and (c) failing to object to the prosecutor's misconduct; (4) the cumulative effect of the trial court's errors deprived him of a fair trial; (5) Duenas's convictions violated the prohibition against double jeopardy; (6) the trial court erred by imposing a sentence that exceeded the statutory maximum term; and (7) the trial court erred by ordering

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<sup>1</sup> We use initials to identify child witnesses. Gen. Order 2011-1 of Division II, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases* (Wash. Ct. App.), [http://www.courts.wa.gov/appellate\\_trial\\_courts/](http://www.courts.wa.gov/appellate_trial_courts/).

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child rape of H.A. (count I),<sup>3</sup> first degree child molestation of H.A. (count II),<sup>4</sup> first degree child molestation of H.A. (count III),<sup>5</sup> and third degree child molestation of K.L. (count IV).<sup>6</sup>

At a pretrial hearing regarding the admissibility of H.A.'s hearsay statements, the State asked Heather if there had been any major issues between H.A. and Duenas. Heather answered in the negative. The State continued:

[THE STATE]: How did you start the conversation?

[HEATHER]: I—I said, [H.A.], is there anything that you would like to tell me? And she goes, No. And I said, Well, let me make this easy for you. I said your sister has already told me something that I think is really important that you should probably tell me.

[THE STATE]: All right. And how did she respond?

[HEATHER]: And she started crying.

[THE STATE]: And do you recall what was said next?

[HEATHER]: I—she told me—I said, Is there anything you want to tell me? And she started crying. . . . And then she—she told me that he had been touching her.

1 Verbatim Report of Proceedings (VRP) at 35-36. Duenas objected to the admission of H.A.'s hearsay statements, arguing that H.A. had a motive to lie.<sup>7</sup>

The trial court ruled that H.A.'s hearsay statements would be admissible at trial because they met the *Ryan*<sup>8</sup> factors and provided sufficient indicia of reliability. The court stated that it

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<sup>3</sup> RCW 9A.44.073.

<sup>4</sup> RCW 9A.44.083.

<sup>5</sup> RCW 9A.44.083.

<sup>6</sup> RCW 9A.44.089.

<sup>7</sup> Duenas argued that the timing of the disclosure, which occurred shortly after his engagement to Heather, showed that the children were motivated to lie because they did not want Duenas interfering with their father or taking his place.

<sup>8</sup> *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

[THE STATE]: Okay. Now, if they would be not forthcoming with you, would it be about smaller stuff or would it be about a massive issue like this?

[HEATHER]: I think it would be a smaller—I—something like this is not something that's just made up or something that they're going to lie about. It's—I mean, I can tell, especially when my kids are, like, Well we weren't going to tell you, but—you know what I mean? Like, it's not something that's just—yeah. I don't know how to explain it.

2 VRP at 159-60. Duenas did not object. Duenas testified in his defense and denied H.A.'s and K.L.'s allegations.

At the close of trial, the trial court instructed the jury that “[y]ou are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” Clerk’s Papers (CP) at 20. The jury was also instructed that “[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.” CP at 26. Additionally, the trial court instructed the jury that sexual intercourse included penetration by any object, including a body part, and that “sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” CP at 32.

During closing argument, the State argued:

The defendant raped and molested his soon-to-be stepchildren. . . . A lot of us go through our daily routines and our daily lives and we don't deal with child sex abuse or don't face it. And that's a very good thing. It would not be a good society, if we were all dealing with that on a daily basis.

And it's hard when you're faced with it. And it's hard when you're faced with it not in the abstract. It's easy to sit there and say, I recognize that this happens. It's easy to say that in the abstract. But when it's right there in front of you and you've gotten to know a child because they've testified in front of you, it's not easy to sit there and fully comprehend that that child has had that happen to them.

And that's actually one of the challenges in prosecuting these cases. . . . We have the obvious hurdle, that we need to prove our case beyond a reasonable doubt.

4 VRP at 398. Duenas did not object.

In concluding his closing argument, the State argued:

And I would argue that to dismiss this case as simply, a they said it happened case, wouldn't do justice to the evidence that's presented. It would mischaracterize it. Because we have more than that. We have the corroboration, we have people being consistent, we have a lack of motivation to lie.

But more importantly, we also have the impact of evidence. . . .

The impact that this has had on everybody involved is very real. What the defendant did to these children is very real and it has been proven to you. I'd ask that you come back guilty.

4 VRP at 411-13. Duenas did not object.

During closing argument, defense counsel attacked H.A.'s and K.L.'s credibility and argued that they fabricated the sexual assault allegations. Defense counsel also stated, "Now, how do we prove it didn't happen? Well, there's no physical evidence. We rely upon the testimony and we look at that testimony." 4 VRP at 416-17.

During rebuttal argument, the State noted that defense counsel was

accusing [H.A. and K.L.], knowing full well that their mother got to leave the stresses of her job, got to come home and spend time with them, that she was in love with the defendant, that they were happy and set to be married. And what he is accusing them of doing, is fabricating sexual assault allegations and carrying it through.

4 VRP at 423. The State also noted that "what [defense counsel] is accusing them of doing is absolutely egregious. . . . [N]obody here—and we don't have evidence so—what was actually going on?" 4 VRP at 424. Duenas did not object to the State's argument.

The State continued,

Now, defense counsel, you know, brings up these points that we don't have physical evidence and that's kind of dovetailing, because there was some people during jury selection that said I want physical evidence. . . .

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credibility and (b) Duenas's guilt. The State argues that Duenas failed to preserve this issue for appeal. We agree with the State.

A defendant may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Generally, we will not consider a claim of error for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). To demonstrate manifest error, the defendant must show actual prejudice by identifying a constitutional error and showing that the alleged error actually affected his rights at trial. *Kirkman*, 159 Wn.2d at 926-27. To determine if the defendant claims a manifest constitutional error, we preview the merits of the defendant's claim to see if it would succeed. *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

The trial court has wide discretion in determining the admissibility of evidence, and we review its decision of whether to admit evidence for abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion when its decision to admit evidence is manifestly unreasonable or based on untenable grounds or reasons. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

Generally, no witness may offer testimony in the form of an opinion regarding a witness's credibility or the defendant's guilt. *Demery*, 144 Wn.2d at 759; *Kirkman*, 159 Wn.2d at 927. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *Demery*, 144 Wn.2d at 759.

"[W]hen a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error." *State v. Warren*, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006), *aff'd on other grounds*, 165 Wn.2d 17, 195 P.3d 940 (2008), *cert.*

committed a manifest constitutional error by admitting Heather's testimony, and we do not review his claim of error.

B. *Testimony Regarding Duenas's Guilt*

Duenas argues that Heather's testimony that H.A. and K.L. would not lie about an issue like sexual assault was improper opinion testimony regarding Duenas's guilt. Because Duenas did not preserve this claim of error for appeal, we do not review it.

Heather's testimony was not an explicit or near explicit opinion on Duenas's guilt. Consequently, the admission of her testimony was not a manifest error of constitutional magnitude. Thus, Duenas has not preserved this claim for appeal, and we do not review it.

II. PROSECUTORIAL MISCONDUCT

Duenas argues that the prosecutor committed flagrant and ill-intentioned misconduct by (a) eliciting improper opinion testimony from Heather regarding H.A.'s and K.L.'s credibility and Duenas's guilt, (b) arguing facts not in evidence, (c) making improper appeals to the jury's passions and prejudices, (d) vouching for H.A.'s and K.L.'s credibility, and (e) disparaging defense counsel. We hold that most of the claimed misconduct was not improper and that Duenas waived the remaining issues.

To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Where, as here, a defendant fails to object to alleged prosecutorial misconduct, he is deemed to have waived any error unless he shows the misconduct "was so flagrant and ill intentioned that an instruction [from the trial court] could not have cured the resulting prejudice."

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B. *Arguing Facts Not in Evidence*

Duenas also argues that the prosecutor committed misconduct by arguing facts not in evidence by stating that Duenas “raped and molested his soon-to-be stepchildren.” Br. of Appellant at 27. We hold that the prosecutor’s conduct was not improper.

We review a prosecutor’s statements during closing argument in the context of the total argument, the issues in the case, the evidence addressed in closing argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). It is improper for a prosecutor to assert during closing argument facts not admitted as evidence during trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). We accord a prosecutor some latitude to argue reasonable inferences from facts in evidence. *Dhaliwal*, 150 Wn.2d at 577.

During closing argument, the prosecutor stated, “The defendant raped and molested his soon-to-be stepchildren.” 4 VRP at 386. Later, the prosecutor noted that one count of first degree child rape and two counts of first degree child molestation pertained to H.A.; the remaining third degree child molestation count related to K.L.

Duenas argues that the prosecutor asserted facts not in evidence during closing argument because there was no evidence presented at trial that Duenas raped both H.A. and K.L. However, viewing the statement in the context of the total argument and the issues in the case, it is clear that the prosecutor was not arguing that Duenas was also guilty of child rape of K.L. The prosecutor did not argue that Duenas was also guilty of child rape of K.L. when addressing the evidence and charges, and he did not suggest that Duenas committed uncharged acts. Accordingly, the prosecutor’s statement was proper.

Generally, appeals for the jury to act as a conscience of the community are permissible unless they are specifically designed to inflame the jury. *State v. Davis*, 141 Wn.2d 798, 873, 10 P.3d 977 (2000). During closing argument, the prosecutor stated:

A lot of us go through our daily routines and our daily lives and we don't deal with child sex abuse or don't face it. And that's a very good thing. It would not be a good society, if we were all dealing with that on a daily basis.

4 VRP at 386.

In arguing that it would not be a good society if jurors dealt with sexual assault on a daily basis, the prosecutor did not ask the jury to convict Duenas to protect their society. Rather, the prosecutor made a generalization about society. Further, the argument cannot be said to have been specifically designed to inflame the passions and prejudices of the jury because it was not inflammatory, and the prosecutor did not make the statement in an effort to seek a conviction on the basis of fear and anger. Duenas fails to show that the prosecutor's argument was improper.

## 2. Duenas's Thought Process

Duenas also argues that the prosecutor made improper appeals to the jury's passions and prejudices by providing a first person narrative of his thought process. We hold that this conduct was not improper.

In discussing the third degree child molestation of K.L. charge, the prosecutor said:

Well, we can't get inside the defendant's head, but from the evidence, I would argue that what's going on is a couple of possibilities. One, he's testing the waters. He's rubbing her calf and seeing, okay, A. Is she awake? And B. Am I going to get some reaction?

4 VRP at 397-98.

Duenas relies on *State v. Pierce*, 169 Wn. App. 533, 280 P.3d 1158 (2012), to support his contention that the prosecutor's account of his thought process amounted to misconduct. In

During closing argument, the prosecutor addressed the third degree child molestation of K.L. charge. The prosecutor noted that K.L. described the offense in a unique and detailed way, and he argued that the amount of detail “should send some shivers down some of you.” 4 VRP at 398. Duenas did not object.

We assume that the prosecutor’s comment that K.L.’s account “should send some shivers down some of you” was improper. Nonetheless, we note that it was a brief and isolated statement. Duenas fails to show that the statement was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. Accordingly, Duenas has waived this issue.

#### 4. Impact on Heather’s Family

Duenas also argues that the prosecutor made improper appeals to the jury’s passions and prejudices by inviting the jury to consider the emotional impact of the crimes on Heather’s family. We hold that Duenas waived this issue.

In concluding his closing argument, the prosecutor stated:

We have the corroboration, we have people being consistent, we have a lack of motivation to lie.

But more importantly, we also have the impact of evidence. . . .

....

The impact that this has had on everybody involved is very real. What the defendant did to these children is very real and it has been proven to you. I’d ask that you come back guilty.

4 VRP at 411-13. Duenas did not object.

The prosecutor’s discussion of the allegations’ impact on Heather and her family was irrelevant to the charged offenses and constituted an appeal to the jury’s passions and prejudices. However, the prosecutor only briefly referred to the allegations’ impact and did not elaborate on

and K.L. were telling the truth. Moreover, the prosecutor did not express his personal opinion regarding H.A.'s and K.L.'s credibility. Accordingly, Duenas does not show that the prosecutor's statement was improper.

Duenas also argues that the prosecutor expressed his personal belief regarding K.L.'s credibility in stating that the details she gave in describing the assault only come out if someone is being truthful. Defense counsel attacked K.L.'s credibility throughout trial. The prosecutor responded to defense counsel's argument by arguing that evidence could support the jury's conclusion that K.L. was credible. As a result, the prosecutor did not express his personal opinion that K.L. was credible or that her testimony was truthful. Accordingly, the prosecutor's statement was not improper.

E. *Disparaging Defense Counsel*

Duenas also argues that the prosecutor committed misconduct by disparaging defense counsel in implying that defense counsel was being misleading. We hold that Duenas waived this issue.

It is improper for a prosecutor to disparagingly comment on defense counsel's role or challenge defense counsel's integrity. *Thorgerson*, 172 Wn.2d at 465. Disparaging defense counsel, however, is significantly different from disparaging defense counsel's argument. See *Thorgerson*, 172 Wn.2d at 451.

In closing argument, defense counsel attacked H.A.'s and K.L.'s credibility and argued that they fabricated the sexual assault allegations. During his rebuttal argument, the prosecutor stated that it was "absolutely egregious" for defense counsel to suggest that H.A. and K.L. were lying. 4 VRP at 424. Duenas did not object.

The defendant must show that defense counsel's representation was deficient and that defense counsel's deficient representation prejudiced him. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness and was not based on a tactical decision. *State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005). Prejudice occurs when, but for defense counsel's deficient performance, there is a reasonable probability that the outcome at trial would have been different. 126 Wn. App. at 686.

A. *Failure To Object to Impermissible Opinion Testimony*

Duenas argues that defense counsel was ineffective by failing to object to Heather's impermissible opinion testimony regarding H.A.'s and K.L.'s credibility and Duenas's guilt. We disagree because Duenas cannot show that defense counsel's performance prejudiced him.

To prove that defense counsel was ineffective for failing to challenge the admission of evidence, a defendant must show that (1) the failure to object fell below prevailing professional norms, (2) the proposed objection would likely have succeeded, and (3) the result of the trial would have been substantially different had the objection succeeded. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Counsel's failure to object to testimony cannot prejudice a defendant unless the trial court would have ruled that the testimony was inadmissible. *See McFarland*, 127 Wn.2d at 337.

During cross-examination, Duenas asked Heather whether H.A. and K.L. lied. Heather responded in the affirmative. On redirect, the State asked if H.A. and K.L. "would be not forthcoming . . . about smaller stuff or . . . about a massive issue like [sexual assault]?" 2 VRP at

reluctant to tell her about the sexual assault and that she asked H.A. open-ended questions to learn what had occurred.

The trial court ruled that H.A.'s hearsay statements would be admissible. The court determined that H.A. did not have a motive to lie because she reluctantly told Heather about the abuse and that H.A.'s statements provided sufficient indicia of reliability because H.A. was fairly consistent in her accounts of the abuse. The trial court also took note that Heather avoided making suggestive answers in asking H.A. about the abuse.

At trial, Heather testified that she asked H.A. a series of leading questions when she first confronted H.A. about the sexual assault allegations. Duenas did not object. Heather also testified that H.A. had a bad attitude in the months leading up to the allegations and that H.A. mostly directed her attitude toward Duenas. Duenas did not object.

The trial court determined that H.A.'s hearsay statements provided sufficient indicia of reliability because H.A. did not have a strong motive to lie and because her allegations were fairly consistent. Although Heather testified about asking H.A. leading questions and testified that H.A. had a bad attitude toward Duenas, her testimony still showed that H.A. reluctantly told her about the abuse and that H.A.'s accounts of the abuse were fairly consistent. Accordingly, Duenas cannot show that had defense counsel renewed his objection to H.A.'s hearsay statements, the objection would have been successful. Therefore, Duenas cannot show that defense counsel's failure to renew the objection prejudiced him, and his claim fails.

C. *Failure To Object to Prosecutorial Misconduct*

Duenas also argues that defense counsel was ineffective by failing to object to the prosecutor's purported misconduct during closing argument and by failing to request a curative

errors and the errors, if any, have little to no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Here, the only errors we consider involve prosecutorial misconduct. As discussed above, it was error for the prosecutor to encourage an emotional reaction to K.L.'s testimony, discuss the emotional impact of the crimes on Heather's family, and disparage defense counsel during closing argument. However, the combined effect of these errors do not require reversal. The prosecutor's statements resulted in little prejudice as they were brief and isolated statements that occurred during the prosecutor's lengthy closing argument. Moreover, H.A.'s and K.L.'s testimony provided the jury with an abundance of evidence of Duenas's guilt, and the jury was properly instructed on how to weigh that evidence. The prosecutor's statements did not undermine Duenas's convictions or his right to a fair trial.

As a result, Duenas fails to establish that he was prejudiced by the alleged errors, and he does not show how these combined alleged errors affected the outcome of his trial. Because the alleged errors had little to no effect on the outcome of his trial, we hold that Duenas's cumulative error claim fails and does not warrant reversal.

#### V. DOUBLE JEOPARDY

Duenas also argues that his convictions for one count of first degree child rape of H.A. and one count of first degree child molestation of H.A. violated the prohibition against double jeopardy. The State concedes error. We reject the State's concession and affirm Duenas's

Under *Blockburger*, we presume that the legislature did not intend to punish criminal conduct twice when the evidence required to support a conviction for one of the charged crimes would have been sufficient to support a conviction for the other charged crime. 152 Wn.2d at 820. Accordingly, when a defendant receives multiple convictions for offenses that are identical both in fact and in law, he cannot be punished separately absent clear legislative intent to the contrary. *Peña Fuentes*, 179 Wn.2d at 824; *State v. Freeman*, 153 Wn.2d 765, 776, 108 P.3d 753 (2005). “A ‘defendant’s double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.’” *Peña Fuentes*, 179 Wn.2d at 824 (quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995)). If each offense includes elements not included in the other offense, the offenses are different and multiple convictions do not violate double jeopardy. 179 Wn.2d at 824. Additionally, if each count arises from a separate and distinct act, the defendant is not exposed to multiple convictions for the same criminal act. 179 Wn.2d at 824.

First degree child rape requires proof of “sexual intercourse” with a child under the age of 12. RCW 9A.44.073(1). Sexual intercourse can be proven by evidence of any form of penetration. RCW 9A.44.010(1)(a). First degree child molestation requires proof of “sexual contact” with a child under the age of 12. RCW 9A.44.083(1). “Sexual contact” refers to “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2).

The State charged Duenas with one count of first degree child rape of H.A. (count I) and two counts of first degree child molestation of H.A. (counts II and III). At trial, H.A. testified

Duenas's convictions violate double jeopardy. The State appears to base its concession on the rule announced by the Washington Supreme Court in *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). Under *Mutch*, there is a double jeopardy violation if, considering the evidence, arguments, and instructions, it is not clear that it was “‘manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act.” 171 Wn.2d at 664 (alterations in original).

At trial, H.A. testified that Duenas touched her genitals and digitally raped her. The court instructed the jury that it must decide each count separately, and the court defined the elements of both first degree child rape and first degree child molestation. In closing argument, the prosecutor stated that one count of first degree child rape and one count of first degree child molestation dealt with the same incident. While the prosecutor referred to the incident as the time when H.A. was digitally raped, he did not argue that evidence of penetration satisfied both counts. Instead, he emphasized that two different crimes were charged for this incident and that the jury must consider the charges separately. Considering the entire record in this case, no double jeopardy violations occurred under the rule in *Mutch*. Despite the prosecutor's conflated closing argument, the evidence and jury instructions made it manifestly apparent to the jury that each count involved distinct acts of sexual assault, even if the acts were part of the same incident.

First degree child rape requires proof of sexual intercourse, but first degree child molestation does not. *State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006). Conversely, first degree child molestation requires proof of sexual contact, but first degree child rape does not. 157 Wn.2d at 611. As first degree child rape and first degree child molestation each include

Duenas was sentenced to 54 months of incarceration and 36 months of community custody for third degree child molestation, a class C felony. RCW 9A.44.089(2). The maximum sentence authorized by statute for a class C felony is 60 months. RCW 9A.20.021(1)(c). As a result, the trial court was required to reduce Duenas's 36-month community custody term so that his standard range term of confinement and term of community custody did not exceed 60 months. The trial court failed to do so. The State concedes Duenas's sentence exceeded the statutory maximum for third degree child molestation. We accept the State's concession and remand for amendment of the community custody term.

#### VII. COMMUNITY CUSTODY CONDITIONS

Duenas also argues that the trial court abused its discretion in ordering that Duenas undergo plethysmograph testing and imposed an unconstitutionally vague condition by prohibiting him from entering into a relationship with another with minor aged children. The State concedes that the trial court abused its discretion in ordering that Duenas submit to plethysmograph testing. We accept the State's concession regarding the plethysmograph testing condition. However, we affirm the condition prohibiting Duenas from entering into a relationship with another with minor aged children.

##### A. *Plethysmograph Testing*

Duenas argues that the trial court abused its discretion in ordering plethysmograph testing as a community custody condition. The State concedes error. We accept the State's concession.

A trial court is permitted to impose "crime-related prohibitions" and affirmative conditions as part of a felony sentence. Former RCW 9.94A.505(8) 2002. We review the imposition of a community custody condition for abuse of discretion and will reverse only if the

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We review vagueness challenges to community custody conditions under an abuse of discretion standard. *Sanchez Valencia*, 169 Wn.2d at 793. We will reverse a sentencing condition if it is manifestly unreasonable. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). The imposition of an unconstitutional condition is manifestly unreasonable. 164 Wn.2d at 753.

The vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires that citizens have fair warning of prohibited conduct. 164 Wn.2d at 752. Community custody provisions that fail to provide ascertainable standards of guilt to protect against arbitrary enforcement are unconstitutionally vague. 164 Wn.2d at 752. However, “a community custody provision is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.” *Sanchez Valencia*, 169 Wn.2d at 793 (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 148 Wn. App. 302, 321, 198 P.3d 1065 (2009)).

Community custody provisions may require defendants to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” RCW 9.94A.703(3)(d). A defendant may also be ordered to refrain from direct or indirect contact with a specific class of individuals. RCW 9.94A.703(3)(b). The trial court ordered that Duenas “not enter into a relationship with anyone who has minor aged children residing in or visiting their home without the approval of the therapist and the [community corrections officer].” CP at 57.

custody condition is unconstitutionally vague and therefore manifestly unreasonable. Thus, the trial court did not abuse its discretion in imposing the community custody condition.

#### VIII. APPELLATE COSTS

Duenas asks that we refrain from awarding appellate costs against him because he is indigent. A commissioner of this court can consider whether to award appellate costs in due course under the newly revised RAP 14.2 if the State files a cost bill and if Duenas objects to that cost bill.

#### STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Duenas claims the prosecutor committed misconduct by (1) vouching for H.A.'s credibility, (2) making improper appeals to the jury's passions and prejudices, (3) impugning and disparaging the role and integrity of defense counsel, (4) minimizing the burden of proof, and (5) misrepresenting the role of the jury. Duenas already raised claims on appeal regarding the prosecutor's misconduct in vouching H.A.'s credibility, making improper appeals to the jury's passions and prejudices, and impugning and disparaging the role and integrity of defense counsel. We need not reconsider issues already raised and argued by defense counsel on appeal. *State v. Meneses*, 149 Wn. App. 707, 715-16, 205 P.3d 916 (2009), *aff'd in part*, 169 Wn.2d 586, 238 P.3d 495 (2010). We address Duenas's remaining claims below, and we conclude that they lack merit.

#### I. PROSECUTORIAL MISCONDUCT

Duenas claims that the prosecutor committed misconduct by (a) minimizing the burden of proof during closing argument and (b) misrepresenting the role of the jury. His claims lack merit.

In *State v. Osman*, 192 Wn. App. 355, 375, 366 P.3d 956 (2016), the court addressed whether defense counsel's definition of the term "abiding belief" misstated the State's burden of proof. The *Osman* court took note of the Supreme Court of the United States' determination that "[t]he word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." 192 Wn. App. at 374 (internal quotation marks omitted) (quoting *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)). As a result, the term "abiding belief" encouraged jurors "to reach a subjective state of near certitude of the guilt of the accused." 192 Wn. App. at 375 (quoting *Victor*, 511 U.S. at 14-15). Accordingly, the *Osman* court held that defense counsel did not improperly quantify the State's burden of proof by arguing that an abiding belief of guilt meant that the jurors would not look back on their decision after leaving the courthouse and wonder if they made a mistake. 192 Wn. App. at 375.

Here, the prosecutor argued in closing that "[b]eyond a reasonable doubt is described . . . . It's when you have an abiding belief in the charges, that's it." 4 VRP at 430. The prosecutor continued: "So when you are analyzing arguments the defense made, you got to ask yourself, does it affect my abiding belief that this happened?" 4 VRP at 430.

Duenas claims that the prosecutor's statement minimized the State's burden of proof because it suggested that "beyond a reasonable doubt" was a trivial standard. Looking at the argument as a whole, the prosecutor did not argue that an abiding belief was a fleeting or short-lived belief. Instead, the prosecutor argued that the jury must have an abiding belief in the charges to convict Duenas. Accordingly, the prosecutor did not minimize the State's burden of proof, and his statement was proper. Duenas's claim lacks merit.

No. 48119-7-II

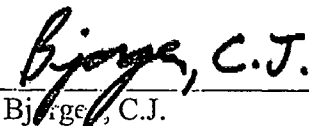
asked the jury to decide if they had an abiding belief in H.A.'s account of sexual abuse. Merely asking questions of the jury does not rise to the level of misrepresenting the role of the jury. *State v. Lewis*, 156 Wn. App. 230, 241, 233 P.3d 891 (2010). Accordingly, the prosecutor did not misrepresent the role of the jury, and his statement was proper. Thus, Duenas's claim lacks merit.

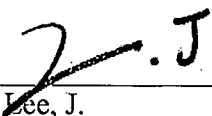
### CONCLUSION

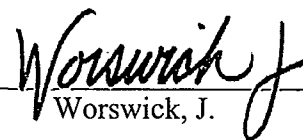
We hold that the trial court imposed a sentence exceeding the statutory maximum and abused its discretion in ordering Duenas to submit to plethysmograph testing. But we reject Duenas's remaining arguments. Accordingly, we affirm Duenas's convictions, but we remand for the trial court to amend the community custody term and to strike the plethysmograph testing community custody condition.

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.

We concur:

  
Bjorge, C.J.

  
Lee, J.

  
Worswick, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

August 8, 2017

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN PEREZ DUENAS,

Appellant.

No. 48119-7-II

ORDER DENYING  
MOTION FOR RECONSIDERATION  
AND AMENDING OPINION

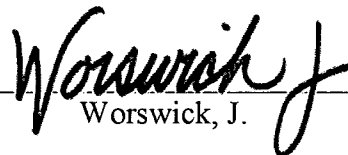
APPELLANT Jonathan Duenas moved this court to reconsider its June 13, 2017 opinion and reverse his convictions. After consideration, we deny the motion but amend the opinion in part as follows.

It is hereby ORDERED that on page 22, paragraph 1, the following text shall be deleted:

However, as discussed above, Heather did not expressly state that she believed H.A. and K.L. were telling the truth or that Duenas was guilty.

The following language shall be inserted in its place:

As discussed above, Heather did not directly state that she believed H.A. and K.L. were telling the truth. Moreover, Heather's testimony did not infer Duenas's guilt and was not an opinion on the accuracy of H.A.'s and K.L.'s disclosures.

  
Worswick, J.

We concur:

  
Birge, C.J.

  
Lee, J.

APPENDIX 3

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
1/3/2018  
BY SUSAN L. CARLSON  
CLERK

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN PEREZ DUENAS,

Petitioner.

No. 94963-8

## ORDER

Court of Appeals

No. 48119-7-II

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens (Justice Madsen sat for Justice Owens), Wiggins and Gordon McCloud, considered at its January 2, 2018, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 3rd day of January, 2018.

For the Court

Fairhurst, C.J.  
CHIEF JUSTICE

APPENDIX 4

**Additional material  
from this filing is  
available in the  
Clerk's Office.**