IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBIN DOUGLAS HYLTON, Appellant.	No. 38575-9-II PART PUBLISHED OPINION

Armstrong, J. — Robin Douglas Hylton appeals his conviction for third degree child rape, arguing the trial court erred in (1) denying his jury waiver, (2) denying his right to present a defense by excluding certain evidence, (3) retroactively applying the statutory "abuse of trust" aggravating factor as the basis for an exceptional sentence, and (4) imposing an exceptional sentence following his second trial where the State had not alleged the aggravating factor in his first trial and offered no new factual basis, raising a presumption of vindictiveness.[1] Hylton also argues that the jury instruction on "abuse of trust" was unconstitutionally vague, and that the prosecutor committed prosecutorial misconduct by improperly vouching for witnesses. Finding no reversible error, we affirm.

FACTS

The State originally charged Robin Douglas Hylton with three counts of child rape stemming from a series of events that allegedly occurred in 2004. At a bench trial, the trial court convicted Hylton of one count of third degree child rape for an incident on or around Thanksgiving 2004. The court acquitted Hylton of the remaining counts. Before sentencing, the

[1] Hylton also claims the State "erred" in charging the aggravating factor.

trial court vacated the conviction and granted Hylton a new trial based on newly discovered evidence from witnesses who placed Hylton in California at the time of the alleged rape in Lewis County.

On November 5, 2007, the State filed a fourth amended information alleging, in part, that "the defendant used his position of trust or confidence to facilitate the commission of the current offense as provided . . . in RCW 9.94A.535(3)(n)." Clerk's Papers (CP) at 178-79, 187.

Before the new trial, the court, without inquiry or comment, denied Hylton's request to waive a jury trial.[2] The court also denied Hylton's motion to introduce evidence that Lisa Coward, the victim's mother and Hylton's ex-girlfriend, abused and manipulated both her daughters. The court ruled that Hylton had not established a connection between the alleged abuse-manipulation and any trial issue.

At trial, the State presented evidence that Hylton sexually assaulted A.A.A. around Thanksgiving 2004, including medical testimony that her hymen was torn sometime between April 2002 and May 2005. Hylton proposed to testify that A.A.A. told him she had been sexually active with at least one boy after April 2002, which would explain the tear in her hymen. The court rejected the testimony as hearsay and irrelevant.[3] A.A.A. later testified that between her sexual assault exams in 2002 and 2005, only the defendant penetrated her vagina. In closing, the State argued there was no evidence to support that anyone other than Hylton penetrated her vagina between those dates.

---

[2] At an earlier hearing, the court granted defense counsel's request to withdraw and appointed standby counsel to assist Hylton, who proceeded pro se.

[3] The court also noted that Hylton had not given notice to the State under the rape shield statute.

Hylton called witnesses who testified they were with him in California during Thanksgiving 2004. Julie Miller testified she had spent an evening with him in Idyllwild, California during the Thanksgiving holiday in 2004. Hylton attempted to corroborate Miller's statement by introducing an entry from her journal that contained Hylton's name inside a hand drawn heart covering the dates of Thanksgiving and the following Friday. The court sustained the State's objection to Hylton's motion to admit the journal page into evidence on the grounds of hearsay, foundation, and relevance.

Coward testified that she picked up Hylton at the airport the day before Thanksgiving 2004, and that he stayed at her house for the holiday. She further testified that she bore no ill will toward Hylton and that she had no problem with him maintaining contact with her children after their break-up. Before her cross examination, Hylton informed the court that he intended to use a string of e-mails to show that "she was threatening me with something," and that it was "a pattern of behavior." Report of Proceedings (RP) (June 3, 2008) at 356-57. Hylton also claimed the e-mails were contrary to her testimony that she bore him no ill will and that she had no problem with his continued contact with the girls. After attempting to authenticate the first e-mail, Hylton moved to enter it into evidence. The court excluded this e-mail as hearsay and for lack of foundation. Hylton sought to establish the foundation for the remaining e-mails, but never offered them into evidence.

Hylton's defense focused on his California alibi, and each side presented family members and friends who supported or refuted the alibi. In addition, the State presented testimony from an airline employee that a Robin Hylton had flown from Ontario, California to Portland, Oregon on

November 22, just before Thanksgiving, and returned from Portland to Ontario on November 28, just after Thanksgiving. The State also presented evidence of a taped phone conversation between A.A.A. and Hylton in which she accused him of the improper conduct ("a nightmare"), and he responded that blaming him was "a waste of time," that he had said he was sorry, and that he hoped she could forgive him; he never denied the rape during this conversation. RP (June 3, 2008) at 219-234.

During closing arguments, the prosecutor admonished the jury that they were the sole judges of credibility and they alone assessed the weight of the witnesses' testimony. In discussing A.A.A.'s testimony, the prosecutor stated, "You can tell, body language, what she [A.A.A.] was saying, the whole package, she was telling the truth." RP (June 4, 2008) at 563-64. He closed his final argument by stating that "she's telling us a true story."[4] RP (June 4, 2008) at 570. The prosecutor described Detective Brown, who investigated the alleged sexual assault, as a "straight shooter, very credible, very believable," claiming that she would not do anything to "affect her job." RP (June 4, 2008) at 564. The prosecutor implied that the State's witness, Sandra Eschbach, recognized there could be criminal consequences if she lied. He also commented that while the jury would never know if the defendant lied, "if evidence came up that a State's witness lied in trial, you can imagine what the State might then do with that information. Leave that to you." RP (June 4, 2008) at 564-65.

The jury received a special verdict form, which asked, "Did the defendant, Robin Douglas Hylton, use his position of trust or confidence to facilitate the commission of the crime of Rape of

[4] In his brief, Hylton states that this comment referred to Sandra Eschbach. The record, however, supports only that the comment referred to A.A.A.

a Child in the Third Degree as charged?" CP at 118. The jury instructions on the special verdict form did not define "position of trust or confidence," or describe any required nexus between the position of trust and the crime. CP at 135.

The jury convicted Hylton of third degree child rape, finding that he abused a position of trust to facilitate the commission of the crime. The judge imposed an exceptional sentence of 50 months' confinement and community custody for up to 48 months.

ANALYSIS

I. Aggravating Sentencing Factors

A. Retroactive Application of the Abuse of Trust Factor

Hylton argues that the aggravating factor for abuse of trust, statutorily enacted in 2005, cannot be retroactively applied to his crime under (1) RCW10.01.040, also known as the savings clause and (2) the ex post facto clauses of the state and federal constitutions. We disagree.

i. Background

Before 2005, the Sentencing Reform Act's (SRA) aggravating factor for abuse of trust was limited to economic cases. Former RCW 9.94A.390(2)(d)(iv) (2000), *recodified as* RCW 9.94A.535 (Laws of 2001 ch. 10, § 6). Washington courts, however, justified exceptional sentences where the defendant utilized a position of trust to facilitate noneconomic crimes. *State v. Harp*, 43 Wn. App. 340, 343, 717 P.2d 282 (1986) (imposing exceptional sentence for second degree statutory rape and indecent liberties by forcible compulsion consistent with RCW 9.94A390(2)); *State. v. Fisher*, 108 Wn.2d 419, 425-26, 739 P.2d 683 (1987) (a sentencing judge may rely on this factor in cases involving noneconomic as well as economic offenses); *State v.*

Jennings, 106 Wn. App. 532, 550, 24 P.3d 430 (2001) (recognizing RCW 9.94A.390(2)(d)(iv) as the basis for applying an aggravating factor for abuse of trust in noneconomic crimes); *see also State v. Armstrong*, 106 Wn.2d 547, 550, 723 P.2d 1111 (1986) (the nonexclusive and illustrative nature of SRA's list of aggravating factors justifies the use of such factors for noneconomic crimes). Thus, a sentencing court could find abuse of trust as an aggravating factor in noneconomic crimes at common law.

The legislature added abuse of trust to the SRA as an aggravating factor for all criminal offenses on April 15, 2005.[5] Laws of 2005, ch. 68, § 3, *codified as* RCW 9.94A.535. The amendment's language is identical to RCW 9.94A.390(2)(d)(iv). *See* RCW 9.94A.535(n) ("[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense"). The legislature specifically stated its intention to "create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances." Laws of 2005, ch. 68, § 1. The codified abuse of trust factor is, however, slightly narrower in scope than its common law predecessor. *See State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992) (reckless abuse of trust may operate as an aggravating factor by analogy, rather than strictly under the statute, which by its literal language applies only to purposeful misconduct). Under the statutory language of the 2005 amendment, the factor applies only to purposeful misconduct. RCW 9.94A.535(n).

[5] Laws of 2005, chapter 68, referred to as "S.B. 5477" in the appellant's brief, was enacted to conform the SRA to the ruling in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In that case, the court held that a criminal defendant has a constitutional right to have a jury determine beyond a reasonable doubt any aggravating fact that is used to impose a greater punishment than the standard range or conditions.

ii. Statutory Retroactivity Analysis

Hylton argues the addition of the aggravating factor for abuse of trust was a substantive change to the SRA. He concedes the procedures for imposing an aggravating factor in the 2005 amendments apply to conduct that occurred before the date of the amendments. *State v. Pillatos*, 159 Wn.2d 459, 477, 105 P.3d 1130 (2007). But Hylton contends that because aggravating factors are now considered the functional equivalent of elements of the crime under *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), the addition of abuse of trust to the SRA's list of aggravating factors constitutes a substantive change to the law. Thus, according to Hylton, it cannot be applied retroactively under RCW 10.01.040.

RCW 10.01.040 generally requires that crimes be prosecuted under the law in effect at the time they were committed. *Pillatos*, 159 Wn.2d at 472. RCW 10.01.040 in relevant part (the savings clause) provides:

> Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act.

But the savings clause applies only to substantive changes, not procedural ones. *Pillatos*, 159 Wn.2d at 472; *State v. Hodgson*, 108 Wn.2d 662, 669-70, 740 P.2d 848 (1987) (by its own terms, RCW 10.01.040 saves only substantive rights and liabilities). Thus, the relevant question is whether RCW 9.94A.535 alters Hylton's substantive rights.

As preliminary matter, Hylton's reliance on *Apprendi* is misplaced. There, the U.S. Supreme Court recognized that elements of an offense and sentencing enhancements must be

treated as functional equivalents in order to comport with the Sixth Amendment's jury-trial guarantee. *Apprendi*, 530 U.S. at 494 n.19; *see also Washington v. Recuenco*, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). *Apprendi* does not support the contention that aggravating factors are functionally equivalent to elements of the crime in all instances; the court held only that any fact that would increase the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *see also State v. Clarke*, 156 Wn.2d 880, 890-91, 134 P.3d 188 (2006) (the Sixth Amendment does not bar judicial fact finding relating to a sentence that does not exceed the relevant statutory maximum). Washington State courts have not read *Apprendi* as requiring courts to treat aggravating factors as elements of the crime for all purposes. *See e.g.*, *State v. Benn*, 161 Wn.2d 256, 262-64, 165 P.3d 1232 (2007) (although aggravating factors are elevated to equivalent status of elements under the Sixth Amendment, double jeopardy principles do not apply to individual aggravating factors). Indeed, our Supreme Court has admonished that extending *Apprendi* might lead to unintended results. *State v. Mills*, 154 Wn.2d 1, 9-10, 109 P.3d 415 (2005) (reasoning that to "slavishly" apply the *Ring* and *Apprendi* functional equivalent language would disturb carefully crafted legislative procedure).

Two recent Washington cases have discussed what "functional equivalent" means. In *State v. Powell*, No. 804966, 2009 WL 4844354 (Wash.), the Supreme Court considered whether the *Apprendi* "functional equivalent" language requires the State to allege an aggravating factor before trial in the charging document. Six justices apparently believe that it does; four believe that notice after trial but before a jury hearing on the aggravating factors satisfies the Sixth

Amendment. *Powell* does not apply here because Hylton has not raised a notice issue. And *Powell* does not change the reasoning in *Benn* that aggravating factors are not the same as elements of a crime for sentencing purposes. *See also State v. Eggleston*, 164 Wn.2d 61, 70-71, 187 P.3d 233 (2008). Six of the *Powell* justices agreed that whatever affect Powell's argument had on the notice issue, it did not extend to due process or double jeopardy concerns. *Powell*, 2009 WL 4844354 at *7-8 (lead opinion) and *9 (Stephens, J., concurring in result).

Division One of this court also recently considered the scope of aggravating factors as the "functional equivalent" of elements of a crime. *State v. Gordon & Bukovsky*, No. 63815-7, 2009 WL 4756146 (Wn. App. Div. 1). The court held that "aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing." *Gordon & Bukovsky*, 2009 WL 4756146 at *8. But the court qualified this statement by explaining that nothing in its holding suggests that aggravating factors are elements of the substantive crime, only that aggravating factors must be treated as elements of an aggravated form of the crime for the purposes of jury instructions and the Sixth Amendment. *Gordon & Bukovsky*, 2009 WL 4756146 at *8 n.10 (citing *State v. Roswell*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008)). Because aggravating factors are not the same as elements of crime under all circumstances, we reject Hylton's argument that the addition of the abuse of trust factor is a per se substantive change to the SRA.

Although adding abuse of trust to the SRA constitutes some form of change, it does not affect Hylton's substantive rights. In *Pillatos*, the court reasoned that because both the past and present law allow for exceptional sentences, the procedural changes in the SRA did not violate the savings clause. *Pillatos*, 159 Wn.2d at 473; *see* RCW 9.94A.345. Just like the defendants in

Pillatos, Hylton was eligible for an exceptional sentence under the law as it existed at the time he committed the crime. *See Pillatos*, 159 Wn.2d at 473, 475; *see also State v. McNeal*, 142 Wn. App. 777, 793, 175 P.3d 1139 (2008) (defendant had no "vested right" to a standard range sentence without consideration of exceptional sentencing factors). Applying RCW 9.94A.535 did not alter his penalty, increase the status of his crime, or change the facts the State had to prove to support an aggravating factor. *See Hodgson*, 108 Wn.2d at 669. Moreover, because the amended statute did not alter the consequences of the crime, Hylton was not prejudiced from lack of notice. *See Pillatos*, 159 Wn.2d at 470.

Hylton argues, however, that the fact that abuse of trust may have been a permissible *nonstatutory* aggravator prior to 2005 is irrelevant to whether the 2005 amendment is retroactive. Hylton cites no authority for this proposition, but simply notes that "everything else under the sun" was also a possible aggravator because the statutory list was nonexclusive. Br. of Appellant at 42. We acknowledge that the statutory list was nonexclusive, but that does not mean the common law abuse of trust aggravator was invalid. *See generally Pillatos*, 159 Wn.2d at 472-73. We disagree with Hylton that the pre-2005 common law abuse of trust is somehow irrelevant to the question of whether the 2005 amendments created a substantive change to the SRA.

iii. Ex Post Facto Analysis

Hylton also argues that applying a new, disadvantageous sentencing guideline to conduct occurring before its enactment violates the ex post facto clauses of the state and federal constitutions.

The ex post facto clauses of the federal and state constitutions forbid the State from

enacting laws that punish an act that was not punishable when committed or that increase the punishment for the crime committed. *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 184, 814 P.2d 635 (1991); *see* U.S. Const. art. I, §§ 9, 10; Wash. Const. art. I, § 23. A statute or amendment violates the ex post facto clause if it (1) is substantive, as opposed to merely procedural; (2) is retrospective; and (3) disadvantages the defendant affected by its enactment. *Powell*, 117 Wn.2d at 185; *see also Miller v. Florida*, 482 U.S. 423, 430, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987). A statute or amendment does not apply retrospectively just because it may apply to conduct predating its enactment statutes. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). A new law is retrospective only if it "'changes the legal consequences of acts completed before its effective date.'" *Miller*, 482 U.S. at 430 (quoting *Weaver v. Graham*, 450 U.S. 24, 31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)); *see also Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 740-41, 264 P.2d 241 (1953). In the context of an act already criminally punishable, disadvantage means the statute alters the standard of punishment that existed under the prior law. *Pillatos*, 159 Wn.2d at 476.

The 2005 amendments were neither retrospective, nor did they disadvantage Hylton.[6] First, the 2005 amendments did not change the legal consequences of any underlying conduct. The legislature specifically noted its intention to create a *new* criminal procedure, and to codify *existing* common law aggravating factors, without expanding or restricting the aggravating circumstances. Laws of 2005, ch. 68, § 1. RCW 9.94A.535 therefore did not create a new crime,

[6] Where a statute is merely procedural and applied retroactively, a court need not address a defendant's ex post facto argument. *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977). Because it is not clear whether all the 2005 amendments were procedural, we address the other factors of an ex post facto violation.

increase the punishment for Hylton's crime, or deprive him of a defense. *See Collins v. Youngblood*, 497 U.S. 37, 42, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). Hylton's argument that the "new" statutory factor creates liability for factors previously unlisted is disingenuous and obscures the intended effect of the 2005 amendments. *State v. Schmidt*, 100 Wn. App. 297, 299, 996 P.2d 1119 (2000) (the purposes of the ex facto clause are to ensure that legislative acts give fair warning of their effect and prevent arbitrary and potentially vindictive legislation). Since the changes to the SRA do not affect the consequences for any underlying crime or aggravating factor, Hylton was effectively on notice of the punishment at the time the crime was committed. *Pillatos*, 159 Wn.2d at 470-71.

Moreover, the validity of exceptional sentences before the 2005 amendments is not an issue in analyzing whether a later statute violates ex post facto principles; notice that certain conduct was illegal and carried certain consequences is all that is required to defeat an ex post facto claim. *Pillatos*, 159 Wn.2d at 475 ("[T]he key is whether the defendant had notice of the punishment at the time of the crime, not whether in some metaphysical sense, a constitutional statute existed at the time of the crime.") (emphasis omitted) (citations omitted).

Hylton has not shown that he faced a presumptively higher sentencing range, or was otherwise aggrieved by the trial court's application of the statutory abuse of trust aggravator. And because his conduct was purposeful, both the common law aggravating factor and the new statutory aggravating factor result in the same sentencing enhancement. The State also fully complied with the procedural changes mandated by *Blakely*: the State alleged in the information that it was seeking an abuse of trust aggravator; the issue was submitted to the jury; and the jury

had to find the aggravating factor beyond a reasonable doubt. RCW 9.94A.535. Hylton has failed to demonstrate an ex post facto violation.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I. Waiver of Jury Trial

Hylton argues the trial court abused its discretion in rejecting his jury trial waiver without setting forth its reasons on the record. Hylton relies on the proposition that a court's failure to exercise discretion constitutes an abuse of discretion.

Hylton had no constitutional right to a nonjury trial. *Singer v. United States*, 380 U.S. 24, 36, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965). A defendant may waive his right to be tried by a jury only with the court's consent, a decision we review for an abuse of discretion. CrR 6.1(a); RCW 10.01.060; *State v. Batten*, 17 Wn. App. 428, 439-40, 563 P.2d 1287 (1977).[7] A trial court abuses its discretion only when it exercises its discretion in a clearly untenable or manifestly unreasonable way, or where the defendant can show prejudice as a result of having his cause heard by a jury. *State v. Rupe*, 108 Wn.2d 734, 753, 743 P.2d 210 (1987).

A trial court also abuses its discretion where it fails to consider factors necessary to support its conclusion. *Bowcutt v. Delta N. Star Corp.*, 95 Wn. App. 311, 320-21, 976 P.2d 643 (1999) (trial court abused its discretion in granting a preliminary injunction when it failed to examine public interest considerations); *see also Kucera v. State Dep't of Transp.*, 140 Wn.2d 200, 224, 995 P.2d 63 (2000). And we will find a trial court's decision untenable if it is based on an erroneous view of the law or an incorrect legal analysis. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

To successfully challenge the denial of a jury waiver, a defendant must show the trial court exercised its discretion in a manifestly unreasonable or untenable manner. *State v. Maloney*, 78

[7] Even a pro se defendant has the right to waive a jury trial. *State v. Adams*, 3 Wn. App. 849, 852, 479 P.2d 148 (1970).

Wn.2d 922, 927, 481 P.2d 1 (1971). In *Maloney*, the Supreme Court noted that a criminal defendant has no constitutional right to a nonjury trial. *Maloney*, 78 Wn.2d at 927. The Court also reasoned that because it had no record of the jury voir dire, it could not evaluate any "claim of prejudice accruing to appellant." *Maloney*, 78 Wn.2d at 926-27. The court concluded the defendant had not shown either that the trial court had abused its discretion[8] or that he was prejudiced by "having his cause heard before a jury." *Maloney*, 78 Wn.2d at 928.

Hylton's only claim is that the trial court abused its discretion by failing to set forth its reasons on the record for denying the waiver. He does not assert that any of the jurors were biased or otherwise unfit to hear his case. As in *Maloney*, we have no record of the voir dire and cannot evaluate any possible prejudice to Hylton from having a jury hear his case. We reject Hylton's claim that the trial court erred in denying his request to waive a jury.

II. Exclusion of Evidence

Hylton argues that the trial court violated his right to present a complete defense by excluding certain evidence.

The constitutional right to compulsory process is synonymous with a defendant's right to present a defense. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But the right to present testimony of witnesses is not absolute, and a defendant has no right to offer testimony inadmissible under applicable evidence rules. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct 646, 98 L. Ed. 2d 798 (1988); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A trial court has broad discretion in ruling on evidentiary

[8] The court's opinion reports only that the trial court denied the defendant's request to waive a jury; it does not state the trial court's reasoning or whether it even explained its reasoning on the record.

matters; we will overturn its decision only for a manifest abuse of that discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). An aggrieved party must clearly establish manifestly unreasonable or untenable grounds for the trial court's decision before we will find an abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

If we find error, we will reverse only if the defendant can show within reasonable probabilities that the trial court's ruling materially affected the trial outcome and, thus, was prejudicial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). We presume that an error in excluding evidence that infringes on a defendant's constitutional right is prejudicial. *Id. State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Accordingly, such error is subject to a harmless error analysis and we must reverse unless we are satisfied beyond a reasonable doubt the jury would have convicted the defendant absent the error.

A. Evidence of Abuse

The trial court excluded Hylton's proposed testimony that Coward had abused and manipulated her daughters because he failed to establish a nexus between the prior misconduct and the issues in the case. Hylton contends the evidence was admissible to show bias.[9]

A defendant's right to impeach a prosecution witness with evidence of bias is a constitutionally protected right of cross examination. *Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). This includes the right to establish a crucial prosecution witness's bias by an independent witness. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Extrinsic evidence of bias is therefore admissible where it is relevant to a witness's

[9] Hylton also argues that this evidence was not a statement and therefore not hearsay. The proffered testimony, however, was not excluded on the basis that it constituted hearsay.

credibility. *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). But the trial court may refuse evidence where the circumstances only remotely tend to show bias or prejudice, or where the evidence is vague, merely argumentative, or speculative. *State v. Guizzotti*, 60 Wn. App. 289, 293, 803 P.2d 808 (1991).

Hylton offered to testify that Coward abused, controlled, and manipulated her daughters. The trial court rejected the offer because Hylton had not shown a connection between such alleged abuse and manipulation and any issue in the case.

The record supports the trial court's decision. Hylton failed to show that Coward's abuse and manipulation of her daughters suggested they were biased against Hylton. He did not offer to prove that Coward's influence over her daughters caused A.A.A. to fabricate the charges or that it affected her testimony. Thus, the trial court did not abuse its discretion in rejecting Hylton's offer to prove Coward's abuse of or manipulation of her daughters.

B. E-mails from Coward to Hylton

The court excluded the first of these e-mails, dated February 14, as hearsay and for lack of foundation. Hylton argues the trial court should have admitted the e-mails because they were not offered to prove the truth of the matter asserted; rather, they contain nonhearsay statements, relevant simply because they were made. Thus, according to Hylton, they were admissible to show bias.

Hylton's argument fails for several reasons. First, although all the e-mails were marked as exhibits, Hylton offered only one. As to the remaining e-mails, Hylton never gave the trial court the opportunity to rule on their admissibility. He cannot now complain that the trial court should

have admitted these e-mails. *Herring v. Dep't of Soc. and Health Servs.*, 81 Wn. App. 1, 20-21, 914 P.2d 67 (1996) (no error in excluding evidence never offered despite an opportunity lay a proper foundation).

As to the one e-mail Hylton did offer, even if we accept his arguments as to its admissibility, he cannot show prejudice because the trial court allowed him to question Coward about the e-mail and its contents. *See State v. Valdobinos*, 122 Wn.2d 270, 279, 858 P.2d 199 (1993) (defendant was not denied opportunity to show witness's bias when his counsel repeatedly inquired into possible bias at trial). The jury learned of the e-mail's contents; the error, if any, is harmless.

C. Explanation of Torn Hymen

The court excluded Hylton's proposed testimony as irrelevant hearsay. Hylton maintains that evidence A.A.A. was sexually active with another male would have rebutted the State's argument that there was no other explanation for A.A.A.'s torn hymen. We agree.

Hylton's problem, however, is that his offer of proof did not include evidence that A.A.A. had been sexually active with another male. Hylton offered his own testimony that A.A.A. told him she had "snuck out of a dance. And I went out with this boy and we messed around and I got in trouble and blah, blah, blah." RP (June 2, 2008) at 122. This falls considerably short of establishing that A.A.A. had sex with the boy. The trial court did not err in rejecting the evidence. The evidence was either irrelevant or of such minimal relevance that the court's ruling did not harm Hylton.

D. Miller's Journal Entry[10]

[10] Hylton mentions that the trial court also excluded the defense investigator's testimony

The trial court excluded the journal page as irrelevant hearsay; the court also ruled that Hylton had not laid a proper foundation for admitting the evidence. Hylton argues that Miller's journal entry was not hearsay because the journal's heart diagram was essentially a nonverbal act, not a statement offered for the truth of the matter asserted. Hylton further maintains that even if the diagram is hearsay, it was admissible as a prior consistent statement under ER 801(d)(1)(ii), corroborating the date that Miller met Hylton.

"Hearsay" is an out-of-court "statement" used to prove the truth of the matter asserted. ER 801(c). "Hearsay" is not admissible unless an exception applies. ER 802. Nonverbal conduct is a statement for the purposes of ER 801 if it is intended by the person as an assertion. ER 801(a). Thus, a nonverbal act that is not intentionally used as a substitute for words to express a fact is not hearsay. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). The admissibility of nonassertive conduct as circumstantial evidence is governed by principles of relevance rather than hearsay. *Penelope B.*, 104 Wn.2d at 652-53. Where the issue is whether the evidence is a written or nonverbal assertion, the burden is on the party, here the State, claiming that an assertion is intended; doubtful cases are to be resolved in favor of admissibility. *Penelope B.*, 104 Wn.2d at 654.

Here, the State failed to prove that Miller entered the heart drawing in her calendar to communicate that she was with Hylton on the critical dates, which would render the entry inadmissible hearsay. She could well have made the drawing simply to record her affection for Hylton. Nonetheless, we are satisfied the error was harmless.

---

completely, purportedly relevant because he helped Miller find her journal in storage, but assigns no specific error to this action.

Hylton had a group of friends and relatives who supported his alibi. A.A.A. also had a group of friends and relatives who supported her story by disproving Hylton's alibi. Because of the relationships, the jury had reason to be skeptical of each side. But the State had two pieces of strong independent evidence that supported the charge. First, the State proved that a Robin Hylton flew from southern California to Portland just before Thanksgiving 2004, and a Robin Hylton flew back to southern California just after Thanksgiving. Although it is possible this was a different Robin Hylton, the jury could easily have concluded the chances of such a coincidental trip at the exact time of the alleged rape were remote. Second, in Hylton's taped phone conversation with A.A.A., she accused him of improper touching and he responded that blaming him was a "waste of time"; she accused him of not being able to say he was sorry and he responded that he "did say I'm sorry"; and finally, when she still attacked him, he said he hoped "you can find a way to forgive me." These statements are difficult to reconcile with his claim of innocence. We are satisfied the jury would have convicted Hylton even if the court had admitted the heart notation.

III. Improper Vouching

Hylton claims the State committed prosecutorial misconduct during argument by vouching for the credibility of A.A.A. and her supporters. Specifically, Hylton argues that the prosecutor personally assured the veracity of these witnesses when he (1) stated that A.A.A. was "telling the truth" and "telling a true story"; (2) implied that Detective Brown risked losing her job if she did not tell the truth and stated that she was a "straight shooter, very credible, very believable"; and (3) stated that Sandra Eschbach acknowledged the criminal consequences of falsifying her

testimony. Br. of Appellant at 36-37.

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). We review a prosecutor's comments in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). While it is improper for a prosecutor to assert a personal opinion about a witness's veracity, he may argue an inference of credibility based on the evidence. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). To prove the conduct was prejudicial, the defendant must establish a substantial likelihood the misconduct affected the jury's verdict. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). If defense counsel fails to object to an improper remark, we will reverse only if the remark is so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009).

Hylton did not object to any of the prosecutor's comments during the closing argument and must accordingly show that the comments, if improper, were so prejudicial that a curative jury instruction could not have alleviated the error. He has not made such a showing.

In closing argument, the prosecutor spoke at length about A.A.A.'s story, emphasizing its consistency and corroboration by other evidence. Just before mentioning A.A.A.'s credibility, the prosecutor counseled the jury to take into account a witness's memory, personal interest, and manner in which they testified when assessing a witness's credibility. Thus, when the prosecutor stated that "[y]ou can tell, body language, what she was saying, the whole package, she was

telling the truth," he was in fact encouraging the jury to infer credibility based on the manner in which she testified. RP (June 4, 2008) at 563-64; *see Brett*, 126 Wn.2d at 175 (no prejudicial error unless it is "clear and unmistakable" that counsel is expressing a personal opinion). In light of his argument as a whole, the prosecutor's comments do not constitute improper vouching with regards to A.A.A.'s credibility. *See Jackson*, 150 Wn. App. at 884-85 (taking into account the entire argument, the fact that the prosecutor reminded the jury that it was the sole judge of credibility, and the fact that the prosecutor outlined which evidence—and reasonable inferences from the evidence—could support the jury's conclusion that the witnesses were credible).

The prosecutor's statements regarding Eschbach—that she knew lying could make her criminally responsible—were likewise proper given the issues raised during her testimony. Hylton cross examined Eschbach as to whether she felt indebted to Coward, insinuating that she might be lying on behalf of Coward. On redirect, the prosecutor sought to rehabilitate the witness by asking whether Eschbach knew the repercussions of lying on the stand and if she would be willing to commit a crime by lying under oath. The prosecutor raised the issue of perjury only in response to the defendant's challenge to Eschbach's truthfulness. *See State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (prosecutor's argument was not improper when it responded to defense counsel's attack on the victim's credibility). In this context, the prosecutor's comments about Eschbach during closing arguments do not constitute improper vouching as they referenced matters discussed on the record and reasonable inferences that could be drawn therefrom. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006) (A prosecutor enjoys reasonable latitude in arguing inferences from the record, including inferences as to witness

credibility).

Finally, although the propriety of the prosecutor's comments regarding Detective Brown —that she would not testify untruthfully so as not to affect her job—is questionable, it is clear that the harm, if any, was not so substantial as to affect the jury's verdict. Detective Brown testified at trial to the police investigation of Hylton, detailing the wire tapping protocol that led to the recording of the phone conversation between Hylton and A.A.A. But the phone conversation had already been admitted into evidence and played to the jury in full. Her testimony did not address any disputed, substantive evidence, nor was she a crucial witness whose credible testimony was key to the prosecution's case. Hylton has not shown that the prosecutor's comments could not have been cured by an instruction. Thus, the comments do not rise to the level of "flagrant and ill-intentioned" required for reversal. Hylton's claim that the prosecutor engaged in misconduct by improperly vouching for witnesses fails.

IV. Presumption of Vindictiveness

Hylton argues the trial court's harsher sentence after his second trial raises a presumption the court acted vindictively, citing *North Carolina v. Pearce*, 395 U.S. 711, 725, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled in part by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). According to Hylton, the trial court could not impose an exceptional sentence unless it was based on new facts not present at the first trial. Hylton also assigns "error" to the State's charging abuse of trust as an aggravating factor.

As to the claim of State error, Hylton has provided neither supporting authority nor argument. Without argument or supporting authority, Hylton has waived the assigned error.

State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(6).

Where a defendant has successfully attacked his first conviction, due process principles require that vindictiveness play no part in the sentence he receives after a new trial. *Pearce*, 395 U.S. at 725. Thus, a court's reasons for imposing a more severe sentence after the second trial must appear on the record, based on identifiable conduct occurring after the original sentence. *Pearce*, 395 U.S. at 726. Otherwise, a presumption arises that the sentencing court imposed the greater sentence for a vindictive purpose—a presumption that must be rebutted by objective information justifying the increased sentence. *Alabama*, 490 U.S. at 798-99. But where no reasonable likelihood exists that actual vindictiveness motivated the court in increasing the sentencing, the defendant must prove actual vindictiveness. *Alabama*, 490 U.S. at 799.

The presumption of vindictiveness is not without limitations. *See e.g.*, *Chaffin v. Stynchcombe*, 412 U.S. 17, 26, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973) (possibility for sentencing abuse is minimal in a properly controlled retrial by jury). Several factors distinguish a jury's role in the sentencing process and diminish the likelihood of vindictiveness: a jury is not informed of prior sentences at de novo trials, nor does it have a personal stake in the prior conviction. *Stynchcombe*, 412 U.S. at 27. Although Hylton argues the court had discretion to reject the aggravating factor, the fact that the jury found the aggravating factor diminishes the possibility the judge acted vindictively in imposing the exceptional sentence. Accordingly, the burden shifts to Hylton to show actual vindictiveness. And this he has not done. Moreover, we will not infer that the sentencing court acted vindictively merely because the prosecutor sought an exceptional sentence. *Stynchcombe*, 412 U.S. at 27 n.13 ("it would be erroneous to infer a

vindictive motive merely from the severity of the sentence recommended by the prosecutor"). Because Hylton has not proved actual vindictiveness, this argument fails.

V. Jury Instruction on "Abuse of Trust" Factor

Hylton argues that the special verdict form was unconstitutionally vague because it did not define "position of trust or confidence," and did not describe the nexus between the position of trust and the crime charged. Br. of Appellant at 48. Again, Hylton argues that since aggravating factors are like elements of the crime, they are subject to due process protections against vagueness. Hylton asserts that neither the term "position of trust or confidence," nor the concept of a nexus between the position of trust and the crime are self-defining and, thus, the trial court should have instructed the jury as to their meanings. Br. of Appellant at 50-52.

We may refuse to review any claim of error which the appellant did not raise in the trial court unless the error is manifest and affects a constitutional right. RAP 2.5(a)(3). The exception under RAP 2.5(a)(3) is a narrow one: a defendant must show that the asserted constitutional error was (1) "manifest" and (2) not harmless beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Due process principles are usually satisfied if the trial court instructs the jury (1) on each element of the charge and (2) that the State must prove each element beyond a reasonable doubt. *Scott*, 110 Wn.2d at 690. The trial court is not required to specifically define particular terms. *Scott*, 110 Wn.2d at 691. Accordingly, jury instructions that fail to define particular terms are not "manifest" constitutional errors that can be raised for the first time on appeal. *Scott*, 110 Wn.2d at 691 (a defendant who fails to propose a defining instruction, waives the issue on appeal); *see also State v. O'Hara*, 167 Wn.2d 91, 107, 217 P.3d

756 (2009) (failure to provide the full statutory definition of malice when the jury was otherwise instructed on all elements of the crime did not constitute manifest error).

Hylton did not object to or take exception to any jury instruction. Because the trial court instructed the jury as to each element of the crime charged, including the aggravating factors, its failure to further define "position of trust or confidence" and describe the nexus between the position of trust and the crime does not amount to a manifest constitutional error. Hylton cannot

raise the issue for the first time on review.[11]

We affirm.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.

[11] In *State v. Gordon and Bukovsky*, No. 63815-7, 2009 WL 4756146 (Wn. App. Div. 1), the court held that where an appellate court had further defined a legal standard of a statutory aggravating factor, failure to include this standard is manifest constitutional error. *Gordon*, at *8. We question Gordon's manifest error analysis. We are also satisfied that the phrase "position of trust or confidence" is sufficiently self-defining that reasonable jurors would not need an additional definition. *State v. Marcum*, 61 Wn. App. 611, 614, 811 P.2d 963 (defining "trust" from Webster's Third New International Dictionary). Although there is some case law describing the application of abuse of trust to various factual scenarios, there is no case law defining it as a technical legal standard as exists for the terms "deliberate cruelty" and "particular vulnerability" implicated in *Gordon*. *See Gordon*, 2009 WL 4756146 at *7.