IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 64952-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
ROBERT MARK DOBYNS,	)	
	)	
Appellant.	)	FILED: June 7, 2010

Grosse, J. — A recorded conversation of a child rape suspect who did not consent to the recording may be judicially authorized when, as here, the police present the alleged rape victim's statements identifying the suspect as the abuser and describing the time, place, and manner of abuse, and the police describe in detail why other investigatory methods would not be effective. Thus, the trial court did not err by admitting evidence of the recorded conversations. Accordingly, we affirm.

FACTS

Robert Dobyns was N.M.'s Tae Kwon Do instructor when she was eight years old. During this time, he became involved in a romantic relationship with her mother and moved in with N.M. and her mother when N.M. was nine. When the relationship between Dobyns and the mother ended, he moved out in December 2002.

In February 2006, N.M. disclosed to her mother that Dobyns sexually abused her when he lived with them. The mother immediately reported N.M.'s disclosure to the police and detectives interviewed N.M. and her mother. N.M. told police that shortly

after Dobyns moved in, he fondled her while viewing pornography on the computer. She said that after this happened, Dobyns called her to his room at night while her mother worked. He would ask her to "snuggle" and would then engage in oral sex with her and digitally penetrate her. According to N.M., this happened nearly every night that her mother was at work. N.M.'s mother confirmed that she was out of the house in the evenings working the night shift as a nurse.

After interviewing N.M., police detectives decided on a plan to have N.M. call Dobyns on the telephone and confront him. A detective applied to the court for authorization to intercept and record the conversation under RCW 9.73.090. The court issued an order authorizing the interception and recording of conversations between Dobyns and N.M. relating to the commission of the crimes of first degree child rape and first degree child molestation.

N.M. then made a few calls to Dobyns and police taped the conversations. In the first conversation, N.M. told Dobyns that she needed to talk to him because there was a discussion at school about sex and she was confused. She told him she had so many questions for him, such as whether she was still a virgin and whether what they did was wrong or right. She also said she was thinking she should tell someone but she did not know whether she should. When he asked her what she was going to tell, she said that he kissed her, touched her, took her clothes off, digitally penetrated her, and engaged in oral sex with her. He initially denied digital penetration, but ultimately admitted to it. He also admitted that they "slept together." She then asked him if she was still a virgin because he digitally penetrated her. He told her that he was not at a

place where he could talk but wanted to talk to her later and that she should call him at work the next day.

N.M. called him at work the next day and asked if they could talk about what they were talking about the day before. She told him again that she was still confused and had questions about whether she was still a virgin and whether "[it was] wrong what we did." He told her that he "would imagine" she was still a virgin and admitted that "what we did was wrong on my part." But he also said he was not comfortable talking about it on the phone because he did not want "things to be misconstrued." He mentioned that he knew of another incident when the police "taped somebody's phone for exactly this thing." When N.M. said she really needed to talk now, he agreed that they needed to talk and said he wanted to help her, but also expressed concern that if she talked to anyone else, there would be "consequences, . . . consequences for me but neither one of our lives will the same after that," and that he would be "going to jail."

The State charged Dobyns with three counts of first degree rape of a child, two counts of first degree child molestation, and five counts of second degree rape of a child and alleged aggravating factors in support of an exceptional sentence. The trial court denied Dobyns' motion to suppress the taped telephone conversations. The jury found Dobyns guilty as charged and found by special verdict that the aggravating factors had been established.

ANALYSIS

I. Evidence of Taped Conversations

Dobyns challenges the admissibility of the taped telephone conversations,

contending that police did not comply with RCW 9.73.130 in obtaining judicial authorization to intercept the conversations, that police violated his rights to counsel and against self incrimination by using N.M. to obtain his statements, and that the trial court erred by allowing the jury to hear the taped conversations when the tape was not admitted into evidence. We disagree.

RCW 9.73.030(1)(a) prohibits the interception and recording of private conversations without the consent of all participants in the conversation. But RCW 9.73.090(2) permits police to intercept or record a conversation with the consent of one party to the conversation:

> PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.

Among other things, RCW 9.73.130 requires that the following be included in the application for judicial authorization to record the conversation:

> (3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:
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> (a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;
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> (b) The details as to the particular offense that has been, is being, or is about to be committed;
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> (c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;
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> (d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;

> (e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
>
> (f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]

A judge who issues an order to intercept private conversations has "considerable discretion" to determine whether the order satisfies the relevant statutes.[1] Thus, we do not review the application's sufficiency de novo, but decide if the facts in the application were "minimally adequate" to support the issuing judge's determination.[2]

Dobyns contends that the application here did not satisfy subsection (3)(c) of RCW 9.73.130 because it lacked a "factual background that would establish probable cause to believe there will be an incriminating disclosure on the tape," and contends that there was no corroboration that a crime was committed. But as the trial court found, the affidavit was quite specific and detailed in its description of the facts establishing probable cause to believe a sexual assault was committed. It described N.M.'s interview, which included detailed facts about the time, place, and manner of sexual contact Dobyns engaged in with her. The affidavit also provided corroborating facts from the mother, who confirmed that she was out of the house in the evenings working as a night shift nurse, which is when N.M. stated that the abuse occurred.

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[1] State v. Porter, 98 Wn. App. 631, 634, 990 P.2d 460 (1999), rev. denied, 140 Wn.2d 1024 (2000).
[2] Porter, 98 Wn. App. at 634.

Dobyns asserts that "it is clear from a close reading of the statute itself, as well as the case law, that it was intended to be used in situations involving an informant and an ongoing criminal enterprise or activity; not simply to obtain confessions . . . ." But nowhere does the statute limit authorized recordings to such conversations. Rather, as Dobyns acknowledges, the statute's plain language refers to conversations involving a nonconsenting party who "has committed, is engaged in, or is about to commit a felony."[3] It is undisputed here that the nonconsenting party was believed to have committed a felony.

Dobyns further contends that the application did not meet the requirements of subsection (f) because it did not contain facts showing that other normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried.[4] In fact, the case law does not require that police must actually pursue alternative methods, only that police must "seriously consider" other techniques and inform the court of the reasons the alternatives have been or "likely will be inadequate."[5] Here, as the trial court found, the affidavit sufficiently identifies other investigative methods and provides the reasons they would be inadequate, stating:

> Because of the nature of the assault on [N.M.] with only minimal penetration, and the fact that the assaults took place before and after [N.M.] started her period, it is reasonable to believe that no physical evidence would be present inside [N.M.]'s body that would corroborate her statements. [N.M.] made mention in her statement about a white negligee that Robert Dobyns kept in his bedroom and would have her wear during these sexual assaults. I considered applying for a search warrant for Robert Dobyns residence to search for that particular negligee but being that the time between the last known sexual assault and

[3] RCW 9.73.090(2).
[4] He also asserts that police did not "try other methods and ignored a number of other methods that have been used in hundreds of other cases in the past," but fails to identify any such methods.
[5] State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992).

> [N.M.]'s disclosure is greater than three years, the likelihood of being granted that warrant and finding that negligee is remote.
>
> Normal investigative techniques might include detectives interviewing Robert Dobyns, but here that would likely fail. Robert Dobyns has demonstrated through his covert sexual assaults against [N.M.] when he was living at their house and in a position of leadership over her as her Tae Kwon Do instructor that he is well aware that his sexual activity with [N.M.] is criminal. Robert Dobyns is not likely to discuss his sexual activity with [N.M.] with anyone other than [N.M.] He is far more likely to discuss the incidents with [N.M.] if he is not first alerted to the scope of the investigation by being interviewed by Detectives. I considered using a "phone tip" or "phone tilt" but I feel that the exact words of the conversation should be recorded on tape so that the conversation between [N.M.] and Robert is not left to paraphrasing thereby eliminating the chance of words being misconstrued. A verbatim recording of the conversations between [N.M.] and Robert is necessary to obtain a record of what is said because the statements of Robert may corroborate the allegations. . . . Only a recorded conversation between Robert Dobyns and [N.M.] will provide definitive evidence showing whether Robert Dobyns had sexual intercourse and sexually molested [N.M.] on numerous occasions over the period of time that Robert Dobyns lived with [N.M.] Finally, if the evidence ultimately merits such a conclusion, only a recorded conversation between these two individuals will clear Robert Dobyns of this crime. Detectives are not aware of other normal investigative methods to obtain evidence pertaining to the above-described crimes.

Dobyns next contends that by using N.M. to obtain his statement, the police illegally obtained his confession in violation of his constitutional rights to counsel and against self incrimination. He contends N.M. was acting as an agent of the police and that by using her to obtain his statements the police circumvented his Fifth Amendment right against self incrimination and Sixth Amendment right to counsel during police questioning. We disagree.

Dobyns cites State v. Heritage[6] to support his assertion that N.M. was acting as an agent of the police and that he was therefore entitled Miranda[7] protections during her questioning of him. But in Heritage, the "agents" of the state were government

[6] 152 Wn.2d 210, 95 P.3d 345 (2004).
[7] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

employees acting in an official capacity: they were park security officers who were city employees, wore uniforms identifying them as security officers, carried law enforcement equipment, and whose functions included patrolling for unlawful activities. While the court acknowledged that "Miranda [applies] to a broader class of government employees rather than merely law enforcement officers," it did not hold, as Dobyns suggests, that the scope of state agents reaches beyond government employees.[8] Here, it is undisputed that N.M. was not a government employee. Dobyns' Fifth Amendment claim is therefore without basis.

His Sixth Amendment right to counsel claim is likewise without merit. As the cases he cites make clear, the Sixth Amendment right to counsel attaches only after a person has been charged.[9] Here, it is undisputed that Dobyns was not charged with a crime at the time the conversations were recorded. Thus, he had no Sixth Amendment right to counsel that could have been violated at this time.

Dobyns further argues that the trial court erred by allowing the prosecutor to play the tape of the recorded conversation when the tape itself was not admitted into evidence. But because Dobyns did not object to the playing of the tape at trial he has waived any objection to admission of this evidence.[10]

II. Right to a Public Trial

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[8] 152 Wn.2d at 216.

[9] See Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985) (reiterating that "'the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer *at or after the time that judicial proceedings have been initiated against him*'") (quoting Brewer v. Williams, 430 U.S. 387, 398, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)) (emphasis added).

[10] State v. Gray, 134 Wn. App. 547, 558-59, 557, 138 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007) (to challenge a trial court's admission of evidence on appeal, a party must raise a timely and specific objection at trial).

Dobyns next contends that the trial court violated his right to a public trial by questioning a juror individually in the courtroom. He contends that in doing so, the court closed the courtroom to the public before questioning the juror without first determining whether a courtroom closure was justified and engaging in the inquiry required by State v. Bone-Club.[11] The State contends that there was no courtroom closure triggering the need for such an inquiry. We agree.

Failure to conduct the Bone-Club inquiry before closing a courtroom violates the right to a public trial and results in reversal for a new trial.[12] While the right to a public trial applies during jury voir dire,[13] questioning of individual jurors apart from other jurors does not violate that right because once the jurors are sworn in, they are no longer members of the public, but officers of the court.[14] Thus, there is no courtroom

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[11] 128 Wn.2d 254, 906 P.2d 325 (1995). In Bone-Club, the court set forth the following factors that a trial court must consider on the record before ordering a courtroom closure:

> "(1) The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
> "(2) Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> "(3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> "(4) The court must weigh the competing interests of the proponent of closure and the public.
> "(5) The order must be no broader in its application or duration than necessary to serve its purpose."

128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

[12] State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

[13] Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); Federal Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

[14] State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008), rev. denied, 165 Wn.2d 1024 (2009).

closure when the trial court conducts individual voir dire of one juror in the courtroom apart from the other jurors when the trial court has not otherwise ordered the courtroom closed to the public.[15] To determine whether the court ordered a courtroom closure, we consider the plain language of the closure request.[16]

Here, one of the jurors, Juror 16, asked to be questioned privately about his past experience as a victim. During general voir dire, this juror stated that he was a victim, but defense counsel interrupted and asked if he wanted to discuss this later. The court then advised the juror that it was up to him whether he talked about it now or later and he agreed to do it later. After more general voir questioning, the court stated:

> I'm going to excuse the jury panel at this time to go back to the jury assembly room to wait for a few moments. I don't believe we'll take too long and then I'll have you come back and then we'll do the rest of the jury selection. Number 16 can stay here. . . All right. The jury panel has now been excused with the exception of Number 16 who is here. Number 16, the panel has been excused. There are still a few other people in the courtroom. I can ask them to leave too. Do you –.

Juror 16 responded, "I don't care, don't matter." The court then continued questioning of Juror 16 in the courtroom.

Following the verdict, Dobyns moved for a new trial, asserting that his right to a public trial had been violated by the court's closure of the courtroom during the questioning of Juror 16. For support, Dobyns submitted affidavits of individuals who were spectators in the courtroom, some of whom were members of Dobyns' family. In those affidavits, the individuals stated that they believed that they were required to leave the courtroom during the questioning of the juror. The trial court denied the

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[15] See State v. Price, 154 Wn. App. 480, __ P.3d __ (2009).
[16] Bone-Club, 128 Wn.2d at 261.

motion, explaining:

> I think [defense counsel] mischaracterize[s] a little bit of what was stated because I never asked the question of whether any of the jurors wanted to be questioned in private. I asked if they wanted to be questioned outside the presence of the other jurors. And that's [sic] we did. The courtroom was never closed. No one else was ever asked to leave the courtroom. The jurors, the other jurors, were excused and that is the only thing that happened here.

We agree with the trial court that Dobyns mischaracterizes the record. The trial court did not order anyone to leave, but simply stated that the court "could ask" the spectators to leave if the juror wanted. In fact, the juror replied that he did not care and the court did not ask anyone to leave. That some of the spectators left the courtroom was based on their subjective belief that the court ordered them to leave; the record is clear that the court did not issue such an order.[17] Thus, there was no courtroom closure implicating Dobyns' right to a public trial.[18]

III. Juror Challenge

Dobyns next contends that the trial court erred by denying his challenges to two jurors for bias. A trial judge must excuse any juror who "has manifested unfitness as a juror by reason of bias [or] prejudice."[19] The party challenging the juror has the burden of proving bias.[20] Even equivocal answers do not require removal of a juror; rather, "the question is whether a juror with preconceived ideas can set them aside."[21]

Because the trial court is in the best position to determine a juror's impartiality,

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[17] The affidavits do not indicate whether there were other spectators in the courtroom and whether they also left courtroom.
[18] See also Price, 154 Wn. App. at 489 (no courtroom closure "implied or otherwise" where court did not ask spectators to leave, but spectator left at prosecutor's request).
[19] RCW 2.36.110.
[20] State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).
[21] Noltie, 116 Wn.2d at 839.

we will not reverse a trial court's denial of a challenge to a juror for actual bias unless it is a manifest abuse of discretion.[22] We review a trial court's decision on actual bias as a factual determination and must defer to the trial court's decision.[23] "This is done by taking the evidence in the light most favorable to the prevailing party below, which in turn means that the appellate court must accept the trial judge's decision regarding the credibility of the prospective juror and any other persons involved, as well as the trial judge's choice of reasonable inferences."[24]

Here, Juror 43 stated:

> I could listen to the evidence and I could follow the court's instructions. But I have -- you know, like I say, I may have a hard time with this so I don't know if I could be totally impartial.
> . . . .
> I would like to presume everyone innocent until proven guilty but my daughter is the same age as the victim and I think I would probably have prejudices.

When asked by the prosecutor if he could "go along with the notion in our system that people are presumed innocent until proven guilty," he responded, "Yes." The prosecutor also asked if he could try to wait until he heard all the evidence to make any decisions and he responded, "Yes." Defense counsel then asked if he could assure them he will, not whether he "would try to," and he responded, "I don't know that."

Juror 35 initially said that he felt like he could not be fair because of the nature of the crime, stating: "For sex crimes, that's top of my list. You know, I just don't like that at all, you know, whole works . . . ." When the prosecutor asked if he could "hold

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[22] Noltie, 116 Wn.2d at 838.
[23] Ottis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 755, 812 P.2d 133 (1991).
[24] Ottis, 61 Wn. App. at 756 (footnotes omitted).

back making decisions about what may or may not have happened" until he heard "the whole story," he responded, "It's going to be hard." The prosecutor then asked if he could do his best to put that aside and just listen to the evidence and he replied, "I could try, yes." But when defense counsel asked if he could "assure" them, he responded, "No, I don't think so."

In a similar case, State v. Noltie,[25] the court held that the trial court did not abuse its discretion by denying a challenge to a juror for actual bias when the juror expressed discomfort about listening to an alleged child victim of sexual abuse and stated that it would be difficult for her to be impartial. There, the juror stated that she thought she might have difficulty being fair because she had two little granddaughters and thought it might be traumatic when the child witness testified.[26] When asked if she would want a person like her on the jury, she responded, "No, I don't think so. . . . I don't know. I don't know. It is just, I guess children, I don't know."[27] When defense counsel asked whether it was a possibility or a probability that she would lean in favor of the State, she replied that it was a "possibility."[28]

The court concluded that the juror's testimony did not show a probability of actual bias, but at most demonstrated a possibility of prejudice.[29] The court also gave considerable deference to the trial court's judgment, recognizing that the trial court was in the best position to judge whether the juror's answers merely reflected honest

[25] 116 Wn.2d 831, 838, 809 P.2d 190 (1991).
[26] Noltie, 116 Wn.2d at 836.
[27] Noltie, 116 Wn.2d at 836 (internal quotation marks omitted).
[28] Noltie, 116 Wn.2d at 837 (internal quotation marks omitted).
[29] Noltie, 116 Wn.2d at 838-39.

caution or whether they manifested a likelihood of actual bias.[30] The court recognized that "'the trial court has, and must have, a large measure of discretion'" and concluded, "'[f]or the very reason that reasonable minds can well differ on this issue, we defer to the judgment of the trial court in this case.'"[31]

Likewise here, the trial court did not abuse its discretion by determining that either challenged juror demonstrated actual bias. While their responses to questions about their ability to be impartial were equivocal, they demonstrated a possibility of impartiality, not a probability. While neither could assure the court with absolute certainty that they could put aside their prejudices, both convinced the trial court that they were willing to try and we defer to the trial court's credibility determinations. Thus, the jurors demonstrated at most a "possibility" of bias, which does not establish actual bias.

IV. Court's Treatment of Defense Counsel

Dobyns next contends that "[t]he court's repeated comments, short retorts and attitude was a comment on the defense, his case and the veracity of the State's witnesses." But he does not refer to any specific comments or incidents of mistreatment of counsel nor does he provide any citations to the record for these contentions. Rather, he simply notes that "[s]uch comments by the judge did not go unnoticed" and refers only to the following comments by defense counsel to the court:

> Okay. I've only been doing this for a couple of days myself, and I've never had this problem. And my concern is -- and I want to make a record here -- that this jury is seeing you jump me here in public continuously and I'm afraid they're going to get prejudiced and I don't want that to occur.

[30] Noltie, 116 Wn.2d at 839-40.
[31] Noltie, 116 Wn.2d at 839-40 (quoting 14 Lewis H. Orland & Karl B. Tegland, Washington Practice: Trial Practices § 202, at 331 (4th ed. 1986)).

Put in context, this exchange occurred after the trial court sustained foundation objections during Dobyns' testimony when defense counsel sought to refresh his recollection about the taped phone conversation. The exchange continued as follows:

> THE COURT: I don't want it to occur either --
> [DEFENSE COUNSEL]: I'm doing the best I can do to maintain. Counsel objects every time I open my mouth. And that's fine. But it's getting to be where I can't even get a word out where people are starting to laugh now. And this is getting not -- this is not a fair trial if that continues.
> THE COURT: [Defense counsel], if the questions are asked properly for refreshing the recollection, that can happen. I'll let you do that.
> [DEFENSE COUNSEL]: How about if I just play the tape?
> THE COURT: I'm not going to tell you how to try your case, Mr. McConnell.
> [DEFENSE COUNSEL]: Okay. That's fine. I'm just trying not to go through two hours at this rate.
> [PROSECUTOR]: Your Honor, my objections are just based under ER 612. The proper question and foundations aren't being asked, which is would it help to refresh your memory, yes, take a look at that, let me know when your [sic] done, has that refreshed your memory, he can answer, instead of just having him read off the transcript.
> [DEFENSE COUNSEL]: Your Honor, I've done that three times. I went through that process three times.
> THE COURT: Well, but you have not, [defense counsel]. You have not asked those questions. That's why I've --
> [DEFENSE COUNSEL]: Okay.
> THE COURT: -- sustained the objection. If those questions are asked, then we don't have any problem. All right. And it's basically referring back to the question that you're trying to seek the answer from, not would it refresh or do you remember what it says on line 5, but do you remember -- would it refresh your recollection to review this as to what your answer was when she asked the question.

Thus, it is clear that the court was simply sustaining objections that were appropriate and signaling to defense counsel that he was not asking the correct foundation questions. The record does not support Dobyns' contention that the court treated counsel unfairly to the detriment of his case.

V. Prosecutorial Misconduct

Dobyns contends that the prosecutor improperly vouched for the witnesses' credibility by making the following comments in closing argument:

> "If they were making this thing up -- well, they were straight shooters, both of them, when they were on the stand."
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> "People who are making things up like that don't have problems talking about it. . . . This is a normal response for a parent who's just learned this kind of information."
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> "[S]he shot me looks like please don't make me talk about this. . . . People fabricating stories can't come up with those kinds of details."
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> "[Y]ou can't make that stuff up, the detail, unless you're telling the truth."
>
> "If she was making it up, she would have said, yeah, I saw him ejaculate every time. Instead she said well, no, but she remembered that she saw his penis wet. Why . . . She's telling us the truth."
>
> "It's confusing for kids, conflicting feelings, so they don't really know what they should do. And she was, by the way, nine when this started. Nine-year-olds are nine-year-old. They don't -- how are they supposed to understand this kind of thing? You can't hold a nine-year-old to the same standard as an adult. It's ridiculous to do so."

To establish that a prosecutor's misconduct amounts to prejudicial error, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[32] A prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.[33] A prosecutor has wide latitude in closing argument to draw and express reasonable inferences from the evidence.[34] This includes comments on a witness's credibility

[32] State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).
[33] State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).
[34] State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

based on the evidence.[35]

Here, the challenged remarks were arguments about inferences from the evidence.[36] The prosecutor did not argue that the witnesses should be believed because the prosecutor believed them; rather, the prosecutor argued reasons why their stories were credible based on the evidence presented, e.g., the lack of inconsistencies in the testimony, the level of detail in the testimony, N.M.'s age at the time of the crimes, and the witnesses' general demeanor. Additionally, some of the comments were in response to the defense arguments, which is also proper argument.[37] Thus, Dobyns' prosecutorial misconduct claim is without merit.

VI. Jury Instruction

Finally, Dobyns challenges Instruction 27, contending that it "created confusion within the jury as to the issue of aggravating factors." Curiously, Dobyns does not reproduce the challenged jury instruction nor has it been designated for the appellate record. He simply quotes the last sentence of that instruction, asserting:

> Instruction 27's last sentence indicates that "[i]f you unanimously have a reasonable doubt as to this question, you must answer no." While the proper sentence indicates "no" is the appropriate answer if any one person has a reasonable doubt, the final sentence contradicts that and, thereby, may be confusing to the jurors.

Without an instruction in the record for us to review, we are unable to consider this claim.

VII. Statement of Additional Grounds

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[35] State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).
[36] The court sustained Dobyns' objection to the comment that the witnesses were "straight shooters," and Dobyns fails to show that any prejudice from this comment was not cured by the court's ruling or otherwise warrants reversal.
[37] See State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

In a pro se statement, Dobyns identifies two additional grounds for appeal, asserting that a juror was sleeping at times during the trial and that the jury foreman's wife worked for the prosecutor's office, sat in the back of the courtroom during the trial, was overheard discussing the trial with the foreman during lunch, and was told not to return to the courtroom. Because Dobyns fails to substantiate these claims or demonstrate why they require reversal, we find no merit in them.

We affirm the judgment and sentence.

Grosse, J

WE CONCUR:

Dwyer, C.J.

Ellington, J