IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDDIE LEE TRICE, Appellant.	No. 37930-9-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Eddie Lee Trice guilty of three counts of first degree child rape, one count of first degree child molestation, and one count of first degree burglary. RCW 9A.44.073, .083; RCW 9A.52.020(1)(b). The sentencing court found that a 1995 Florida "conviction" was comparable to a Washington crime, and sentenced Trice as a "two strikes" offender under the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, of the Sentencing Reform Act of 1981, ch. 9.94A RCW. Trice appeals, arguing that the evidence was insufficient to support his first degree burglary conviction or, alternatively, that the trial court erred in failing to give an alternative means unanimity jury instruction. Trice further appeals his other convictions, arguing that the prosecutor committed misconduct, his trial counsel's ineffective assistance was constitutionally deficient, and the trial court erred in admitting improper opinion testimony. In addition, Trice appeals his sentence, arguing that the sentencing court erred

in finding the 1995 Florida "conviction" comparable to a Washington strike offense, a 1987 Arkansas conviction was erroneously included in his offender score calculation, and two community custody terms are either unconstitutional or not statutorily authorized. In his statement of additional grounds (SAG),[1] Trice asserts his convictions either should have merged or violate double jeopardy protections, the appellate record is incomplete under RAP 1.2, he was denied his right to confront a videotaped interview of the victim that took place in a room staged to look like a child's room, and exculpatory evidence was withheld at trial.

We hold that sufficient evidence supports Trice's first degree burglary conviction and that the trial court was not required to give the jury a unanimity instruction. Trice's prosecutorial misconduct and ineffective assistance of counsel claims fail because he cannot show prejudice. We also hold that the trial court did not abuse its discretion in admitting the allegedly improper opinion testimony. We accept the State's concessions that the 1995 Florida "conviction" was not comparable to a Washington strike offense and that both challenged community custody terms are improper. Accordingly, we affirm Trice's convictions but vacate his POAA sentence and remand for resentencing. Because we remand for resentencing, we do not reach the merits of Trice's unsupported challenge to the inclusion of the 1987 Arkansas conviction in his offender score.

FACTS

On May 8, 2006, A.L., an 11-year-old fifth grader, went home from school early because she felt sick. Her father, Bill Luedke, and his girlfriend, Sandra Vogt, stayed with A.L. at their apartment for about an hour before leaving to run errands. A.L. lived with Luedke, Vogt, and Vogt's three children. A.L. testified that when she got home, she looked out of a window

[1] RAP 10.10.

overlooking the apartment balcony and saw Trice, who lived and worked in her apartment building. A.L. had met Trice before when her father introduced them. Luedke testified that Trice had been inside the apartment a few times and that "the kids" would let him in to use the phone when Luedke and Vogt were not home. 7 Report of Proceedings (RP) at 203.

About five minutes after Luedke and Vogt left, Trice came to the apartment door and asked if he could use the bathroom. A.L. let him into the apartment to use the bathroom. Trice left but returned sometime later, telling A.L. that he had left his keys in or near the bathroom. A.L. testified that she "let him in so he could get his keys." 7 RP at 158. A.L. testified Trice then offered her money to put on a bathing suit and, when she refused, offered her money to put on two pairs of underwear. Trice walked A.L. to her room and shut the door behind her. A.L. testified that she put on the underwear because she "was scared that if [she] didn't that he would do something." 7 RP at 159. She contemplated jumping out of the window but decided that it was too high to jump.

After A.L. put on the underwear, Trice asked if she was "ready." 7 RP at 159. A.L. said that she was and Trice entered the room. Trice told A.L. to take off the underwear, which she did, and to sit on the bed. A.L. testified Trice began "kissing and licking" her vagina despite her asking him to stop. 7 RP at 161. A.L. testified Trice told her to turn around and bend over, which she did. A.L. testified Trice then touched, rubbed, and inserted a finger into her vagina and anus. A.L. testified that she looked between her legs and saw Trice's ejaculate on the carpeted floor behind her. The incident lasted for about five minutes.

Trice left the apartment but called later to ask her not to tell anyone what had happened because he did not want to go to jail. Luedke, Vogt, and Vogt's three children returned to the

apartment about an hour later. A.L. testified that she did not tell her father what had happened because she was scared he would blame her for letting Trice into the apartment. A.L. testified that she told M.V., Vogt's daughter, what had happened with Trice. The two girls decided that A.L. should tell a school counselor.

A.L. testified that the following day she told the school counselor, Carol Ramm-Gramenz, what had happened. Ramm-Gramenz testified that A.L. came to her office and told her about the incident and that A.L. was worried she would be in trouble because her father had told her not to let anyone into the apartment. Ramm-Gramenz reported the incident to the Tacoma Police Department. A.L. testified that after she spoke with Ramm-Gramenz, a police officer brought her home and she showed the officer where she thought Trice had ejaculated on the floor.

Tacoma Police Department Forensic Specialist Donovan Velez took photographs of the apartment. A.L. pointed to a dark stain on the carpet in her room and indicated to Velez that she believed the stain was from Trice's semen. Velez used an ultraviolet light and found a semen stain six inches from where A.L. had pointed. He cut out the piece of carpet.

Jennifer Knight, a forensic interviewer, also interviewed A.L. on May 9. Although the interview was audio and video recorded, the trial court did not admit the videotape, audio recording, or interview transcript as evidence at trial. Lynn Jorgenson, a nurse practitioner at the Child Abuse Intervention Department of Mary Bridge Children's Hospital, conducted a medical examination of A.L. A.L.'s genital examination was normal; Jorgenson testified that the finding was consistent with A.L.'s version of events because "[t]he vast majority of children that have just had digital penetration would have normal findings." 8 RP at 315.

Tacoma Police Department Detective Jeffrey Turner testified that Trice did not return to

the apartment complex after May 9. A bench warrant was issued for Trice's arrest. After investigation, Turner discovered Trice was in Los Angeles, California. Turner contacted the Los Angeles Police Department and faxed a copy of the warrant. The Los Angeles Police arrested Trice on May 12.

Detective Turner and his partner, Tacoma Police Department Detective Keith Holden, flew to Los Angeles and interviewed Trice at the Los Angeles Police Department 77th Street Station, where they advised Trice of his *Miranda*[2] rights. Turner testified that Trice said initially he knew the police were in Los Angeles to investigate Luedke because Trice knew that Luedke was "into drugs." 7 RP at 275. Trice also said that Luedke was often home alone with A.L. and that he thought Luedke was "doing some inappropriate things with her." 7 RP at 275. Trice told the detectives that he had been inside A.L.'s apartment only once to collect a key to another apartment from Luedke.

Detective Turner testified that when he asked Trice why he had moved to California, Trice said he had received a phone call from the apartment building owner who told him "that there was a warrant out for his arrest for raping a little girl at the apartment complex." 7 RP at 280. Trice then said, "If I put my stuff in that little girl, you would know it. I would have hurt it." 7 RP at 280. Turner told Trice that the police had information about what had happened to A.L., and relayed A.L.'s version of events to Trice. Trice's demeanor changed from "engaging" to "looking out, looking off, and tears began to well up in his eyes." 7 RP at 289. Turner told Trice that he thought Trice had been "compassionate" because he used his finger rather than penis but that it was only a matter of time before a deoxyribonucleic acid (DNA) analysis revealed that the semen

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

on the carpet of A.L.'s room matched Trice. Trice next made a spontaneous statement: "I did it. I am sick. I did it. I did what you said I did, and you're right. I didn't want to hurt that little girl." 7 RP at 291.

Washington State Patrol Crime Laboratory Forensic Scientist Jeremy Sanderson tested a court-ordered blood sample taken from Trice and compared his DNA profile to the semen on the carpet. It matched Trice. Sanderson admitted he did not test the rape kit or clothing also submitted for DNA testing after he matched the semen on the carpet with Trice.

Procedural History

On May 12, 2006, the State charged Trice with three counts of first degree child rape, one count of first degree child molestation, and one count of first degree burglary. RCW 9A.44.073, .083; RCW 9A.52.020(1)(b). The trial court held a CrR 3.5 hearing on June 4, 2007. Detectives Turner and Holden testified about their Los Angeles interview with Trice. The trial court ruled that Trice's statements to the detectives were admissible at trial.

At the conclusion of a jury trial held in April 2008, the parties presented an agreed upon set of jury instructions that the trial court read to the jury without objection. The jury found Trice guilty as charged on April 17, 2008. Trice stipulated to his criminal history but objected to the State's expected use of three out-of-state convictions as "strike" offenses under the POAA.

With respect to the POAA sentence, the State argued that a 1995 Florida sexual battery "conviction" was comparable to the Washington crimes of either second degree rape or indecent liberties by forcible compulsion. RCW 9A.44.050(1)(a), .100(1)(a). The State also argued that a 1987 Arkansas aggravated robbery conviction was comparable to the Washington crime of second degree robbery or to a most serious offense because Trice had been armed with a firearm.

The sentencing court found the 1995 Florida "conviction," but not the 1987 Arkansas conviction, comparable to a Washington crime for POAA purposes. Former RCW 9.94A.030(33)(b) (2005).

With respect to his offender score calculation, Trice argued that the first degree child molestation conviction merged with the first degree child rape convictions. The sentencing court found same criminal conduct but not merger. The court sentenced Trice to life in total confinement without the possibility of early release on each of the three first degree child rape convictions and the first degree child molestation conviction. The court sentenced Trice to 89 months confinement on the first degree burglary conviction, to be served concurrently. The sentencing court imposed community custody, subject to several conditions, for the remainder of Trice's life on the first degree child rape and first degree child molestation convictions, and 18 to 36 months on the first degree burglary conviction. Trice timely appeals.

DISCUSSION

Trice asserts that (1) the evidence was insufficient to support his first degree burglary conviction, (2) he has the right to a unanimous jury verdict on the first degree burglary charge, (3) the prosecutor committed misconduct, (4) he received ineffective assistance of counsel, and (5) the trial court erred by admitting the detectives' and school counselor's opinion testimonies. Trice also challenges his sentence, asserting that the 1987 Arkansas conviction was improperly included in his offender score, that he should not have been sentenced under the POAA because the 1995 Florida "conviction" was not comparable to any Washington crime, and two community custody terms are either unconstitutional or not statutorily authorized. The State concedes that the 1995 Florida "conviction" was not comparable to any Washington crime and that the two challenged community custody terms are improper. We accept the State's concessions and

remand for resentencing in accord with this opinion. We affirm on all other issues.

Sufficiency of the Evidence

Trice asserts that the evidence was not sufficient to support his conviction for first degree burglary. RCW 9A.52.020(1)(b). Although he concedes "there was evidence to support the prosecution's version of events," Trice argues that the State did not prove beyond a reasonable doubt that he either entered or remained in the apartment unlawfully. Br. of Appellant at 44. We hold that the evidence was sufficient to support finding that Trice both entered and remained unlawfully and affirm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Here, the information charging first degree burglary alleged that Trice entered or remained unlawfully in A.L.'s apartment building and, while in the building, "did intentionally assault A.L." Clerk's Papers (CP) at 3; RCW 9A.52.020(1)(b). The trial court instructed the jury that

> [a] person commits the crime of Burglary in the First Degree when he or she enters or remains unlawfully in a building with intent to commit a crime against

> a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime assaults any person.

CP at 96; *see* RCW 9A.52.020(1)(b). "A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." CP at 98; RCW 9A.52.010(3). The trial court also instructed the jury that

> [t]o convict the defendant of the crime of Burglary in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 8th day of May, 2006, the defendant entered or remained unlawfully in a building, 4028 S. Lawrence Street, Apt. D, Tacoma, WA;
>
> (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
>
> (3) That in so entering or while in the building or in immediate flight from the building the defendant assaulted a person, A.L.; and
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 101; RCW 9A.52.020(1)(b). Last, the trial court instructed the jurors that they "ha[d] a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP at 102.

As to whether Trice unlawfully entered A.L.'s apartment, the State relies on *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988), to argue that the jury could have inferred that Trice fraudently induced A.L. to invite him into the apartment, rendering any invitation to enter invalid. Specifically, the State argues that because (1) Trice had previously told A.L. she could be his wife when she was older, (2) A.L. saw Trice out of her window meaning Trice could have seen her at home, and (3) Trice had no reason to use A.L.'s bathroom because his own apartment

was in the same building, the jury could have inferred Trice's fraudulent intent. RCW 9A.52.040 ("In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein."). Although we agree the jury could have inferred Trice's fraudulent or deceptive intent to enter, the State's reliance on *Collins* is incomplete.

In *Collins*, two women invited Collins, a stranger, into their home to use the telephone. 110 Wn.2d at 254-55. After Collins used the telephone, he assaulted the two women. *Collins*, 110 Wn.2d at 255. Our Supreme Court held that Collins had remained unlawfully on the premises because he exceeded the limited scope of his invitation, namely, to use the telephone. *Collins*, 110 Wn.2d at 255. Our Supreme Court specifically noted that the issue in the case was not whether Collins had entered the premises unlawfully because "[t]here was no evidence offered to prove Collins' intent prior to" assaulting the two women. *Collins*, 110 Wn.2d at 256 n.1 (no evidence supported the State's argument that Collins, a stranger, had gained entry by fraud).

Here, A.L. knew Trice. He had been inside her apartment before. Trice knocked on the apartment door just five minutes after A.L.'s parents left. Sufficient evidence in the record supports a jury's inference that Trice saw A.L.'s parents leave the apartment complex and gained entrance into the apartment by using the bathroom as a ruse to determine whether A.L. was in fact alone. Learning that she was, Trice left before A.L. could become alerted to her danger. The jury could also infer that Trice intentionally left his keys in the apartment so that he would have an excuse to reenter. Trice specified to A.L. that his keys were in or near the bathroom. A.L. allowed Trice into the apartment for the limited purpose of finding his keys.

Viewing the facts in the light most favorable to the jury's verdict, we hold that the

evidence is sufficient to support the first degree burglary conviction by unlawful entry because any rational trier of fact could have found that Trice gained entry by fraudulent or deceitful means. *Salinas*, 119 Wn.2d at 201; *Camarillo*, 115 Wn.2d at 71 (giving deference to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence). Any rational jury could have inferred that Trice unlawfully entered the apartment with the intent to assault and rape A.L. RCW 9A.52.040. Such nefarious intent vitiates the limited permission Trice induced from A.L. to enter the apartment.[3] *Collins*, 110 Wn.2d at 256 n.1.

We likewise hold that the evidence was sufficient to support a finding that Trice unlawfully remained in the apartment. A.L.'s invitation for Trice to enter was limited to a specific area, here, the bathroom, and for a specific purpose, here, either to use the bathroom or to find his keys in or near the bathroom. *Collins*, 110 Wn.2d at 261-62 (a limitation on or revocation of the privilege to be on the premises may be inferred from the circumstances of a case). "No reasonable person could construe [A.L.'s invitation] as a general invitation to all areas of the house for any purpose." *Collins*, 110 Wn.2d at 261. On these facts, any trier of fact could have found that once Trice unlawfully entered the apartment and remained inside, he unlawfully remained. *Salinas*, 119 Wn.2d at 201.

Even if we held that the jury could not have inferred that Trice induced A.L. to invite him inside by fraud, which we do not, here, Trice opened the door of A.L.'s room, observed her in her

[3] *See State v. Komok*, 54 Wn. App. 110, 114-15 n.10, 772 P.2d 539 (1989) (constructive trespass may be found where trespasser procured consent fraudulently), *aff'd*, 113 Wn.2d 810, 783 P.2d 1061 (1989); *see also State v. Mermis*, 105 Wn. App. 738, 749, 20 P.3d 1044 (2001) ("Washington has long adhered to the principle that fraud will vitiate any contract."); *cf. State v. Wilson*, 136 Wn. App. 596, 609, 150 P.3d 144 (2007) (it is the consent of the residence possessor "that drives the burglary statute's definition of a person who 'is not then licensed, invited, or otherwise privileged to so enter or remain' in a building." (quoting RCW 9A.52.010(3))).

underwear, and entered her bedroom. Trice exceeded the limited scope of his invitation the moment he ceased looking for his keys in or near the bathroom, his invitation or license to be in the apartment terminated, and Trice thereafter remained unlawfully. *Collins*, 110 Wn.2d at 261; *see State v. Allen*, 127 Wn. App. 125, 133, 110 P.3d 849 (2005) ("the unlawful remaining concept is intended primarily for situations in which the initial entry to a building is lawful, but the defendant either exceeds the scope of the license or privilege to enter, or the license is impliedly or expressly terminated"). Accordingly, we hold that the evidence was sufficient to support Trice's first degree burglary conviction and affirm.

Unanimous Jury Verdict

Alternatively, Trice argues that his Sixth Amendment and art. I, § 21 right to a unanimous jury verdict was violated when the trial court did not give the jury a separate instruction to elect by which means it found him guilty of first degree burglary, i.e., whether the jury found that Trice had entered unlawfully or that he had remained unlawfully. Because first degree burglary is not an alternative means crime, we hold that the trial court did not err in giving the actively agreed upon jury instructions.

Initially, we note that Trice did not object to the jury instructions at trial. CrR 6.15(c). We consider error raised for the first time on appeal when the giving or failure to give a jury instruction invades a fundamental constitutional right of the accused. *State v. Green*, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (citing Wash. Const. art. I, § 21; *State v. McHenry*, 88 Wn.2d 211, 213, 558 P.2d 188 (1977)). Trice's right to a unanimous jury verdict is such a constitutional fundamental right. *See, e.g.*, *Green*, 94 Wn.2d at 231. We review alleged errors in jury instructions de novo. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*,

518 U.S. 1026 (1996).

Alternative means statutes identify a single crime and provide more than one means of committing that crime. *State v. Williams*, 136 Wn. App. 486, 497, 150 P.3d 111 (2007). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *Williams*, 136 Wn. App. at 496 (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Generally, "[w]here a single offense may be committed by alternative means . . ., unanimity is required as to guilt for the single crime charged but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means." *Williams*, 136 Wn. App. at 497-98 (citing *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988)).

In *Allen*, Division One of this court held that "enters unlawfully" and "remains unlawfully" describe separate acts, and concluded they are alternative means of committing burglary. 127 Wn. App. at 131 (quoting *State v. Klimes*, 117 Wn. App. 758, 767-68, 73 P.3d 416 (2003)). But the *Allen* holding must be viewed in light of the particular facts before the *Allen* court: where a defendant lawfully enters the public lobby of three buildings and later unlawfully intrudes into the building's private areas to take items belonging to building employees or tenants. 127 Wn. App. at 127-30. In that context, because any person regardless of his intent may lawfully enter the public space, it is reasonable to determine, as the *Allen* court did, whether the State proved that Allen unlawfully remained in the private portions of the buildings. 127 Wn. App. at 137 n.27 (citing *State v. Miller*, 90 Wn. App. 720, 725, 954 P.2d 925 (1998) ("Washington law does not provide that entry or remaining in a business open to the public is rendered unlawful by the defendant's intent to commit a crime.")).

It does not appear that the *Allen* court intended its limited holding to apply to the facts before us. Here, any rational trier of fact could have inferred that Trice entered and remained inside the apartment with the intent to rape A.L. Thus, unlike in *Allen*, Trice's deceptive entry into the victim's private home was unlawful from the beginning. Thereafter, Trice's coercive entry into A.L.'s bedroom was wholly nonconsensual. If a defendant enters a building with the intent to commit a crime inside and commits the crime inside, he necessarily remained in the building with the intent to commit the offense. *See Allen*, 127 Wn. App. at 133 (whether a defendant possessed intent to commit a crime at the time of the lawful or unlawful entry into a building is irrelevant if the defendant unlawfully remained with intent to commit a crime). Even if burglary were an alternative means crime, which we do not believe it is, here the evidence was sufficient to establish that Trice both unlawfully entered and remained inside the private home of the victim. Accordingly, we hold that no alternative means unanimity instruction was required and Trice's constitutional right to a unanimous jury verdict was not violated. *Williams*, 136 Wn. App. at 497-98 (citing *Kitchen*, 110 Wn.2d at 410).

Prosecutorial Misconduct

Trice next asserts that we should reverse his convictions because the prosecutor committed five instances of misconduct during closing argument. Specifically, Trice challenges the following remarks: (1) comparing the jury's verdict to the "truth" (Br. of Appellant at 39); (2) comparing the reasonable doubt standard to a jigsaw puzzle; (3) comparing the State's burden to the reasonable certainty needed to cross a street; (4) stating that there was "no explanation" for the events offered at trial, possibly as a comment on Trice exercising his right not to testify (Br. of Appellant at 35); and (5) opining that the defense's argument that A.L.'s father set up Trice to get

money from the apartment owner was "disgusting" (Br. of Appellant at 32). Trice argues that the prosecutor's misconduct cannot be held harmless because of several witnesses' questionable credibility and because his alleged confession was not recorded.

A defendant claiming prosecutorial misconduct bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Prejudice is established only where "'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *Pirtle*, 127 Wn.2d at 672). Absent a proper objection and a request for curative instruction, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill intentioned that an instruction could not have cured the prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

If the prosecuting attorney's statements were improper and the defendant made a proper objection to the statements, then we consider whether there was a substantial likelihood that the statements affected the jury. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). We review a prosecutor's allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *Dhaliwal*, 150 Wn.2d at 578; *Brown*, 132 Wn.2d at 561. Even if improper, a prosecuting attorney's remarks do not require reversal unless the remarks are "so prejudicial that a curative instruction would be ineffective." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). We presume a jury follows the trial court's instruction. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v.*

Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

We do not reach the issue of whether the prosecutor's remarks here were misconduct for two reasons. *See State v. Coleman*, 152 Wn. App. 552, 570-71, 216 P.3d 479 (2009). First, Trice did not object at trial to the challenged comments and fails to show on appeal that the comments were so "'flagrant and ill intentioned'" that a curative instruction could not have cured any allegedly resulting prejudice.[4] *Coleman*, 152 Wn. App. at 570 (quoting *State v. Classen*, 143 Wn. App. 45, 64-65, 176 P.3d 582, *review denied*, 164 Wn.2d 1016 (2008)). Second, Trice cannot show prejudice "'in the context of the entire record and the circumstances at trial,'" which overwhelmingly show his guilt. *Coleman*, 152 Wn. App. at 571 (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Here, the DNA test results established that Trice's semen was on the carpet in A.L's room. Detectives Turner and Holden testified that Trice confessed while interviewed in Los Angeles. In light of such overwhelming evidence before the jury, the prosecutor's remarks, even if improper, did not prejudice the jury's verdict. *Reed*, 102 Wn.2d at 147-48; *Coleman*, 152 Wn. App. at 571; *cf. State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010) (where a jury was presented with conflicting evidence, the court cannot conclude the prosecutor's comments did not affect the jury's verdict), *review denied*, 171 Wn.2d 1013 (2011).

Ineffective Assistance of Counsel

Next, Trice asserts that he received ineffective assistance of counsel because his trial

[4] We note, however, that the focus of a prosecutor's closing argument should be on the elements of the crime charged and the evidence proving those elements, not on process.

counsel did not object to the alleged instances of prosecutorial misconduct. But to establish ineffective assistance of counsel, Trice must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice would occur here if, but for his counsel's deficient performance, there is a reasonable probability that the outcome would have differed. *McFarland*, 127 Wn.2d at 335 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Thomas*, 109 Wn.2d at 226 (emphasis omitted) (quoting *Strickland*, 466 U.S. at 694).

Here, Trice's claim fails because, even if his counsel's performance was deficient, Trice's "failure to establish prejudice automatically defeats his ineffective assistance of counsel argument because prejudice is one part of a two-prong test that he must meet." *Coleman*, 152 Wn. App. at 571 (citing *Magers*, 164 Wn.2d at 191); *see also Strickland*, 466 U.S. at 687; *McFarland*, 127 Wn.2d at 334-35. As discussed above with respect to Trice's prosecutorial misconduct claims, the overwhelming evidence showing his guilt precludes a finding that the outcome would have differed had his counsel objected. Trice's claim fails.

Opinion Testimony

Next, Trice asserts his Sixth Amendment and art. I, § 21 right to trial by an impartial jury was violated when the trial court admitted allegedly improper opinion testimony by the two police detectives and the school counselor. Although Trice challenges seven instances of allegedly

improper opinion testimony, we review two of the comments only[5] and hold that the trial court did not abuse its discretion in admitting either of them.

The trial court has discretion when admitting or excluding evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Lay witness opinion testimony is typically limited because it invades the jury's exclusive province to determine witness credibility. *Demery*, 144 Wn.2d at 759. "To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" *State v. King*, 167 Wn.2d 324, 332-33, 219 P.3d 642 (2009) (internal quotation marks omitted) (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)). We review the trial court's admission or rejection of testimony for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

"'Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it

[5] We do not review Trice's challenge to Detective Holden's testimony that he thought Detective Turner was "a very good detective" or Ramm-Gramenz's testimony that she thought A.L.'s story to the police "was very credible" because the trial court sustained defense counsel's objection to these testimonies. RAP 3.1; RP (Apr. 9, 2008) at 24; 6 RP at 116. We also do not review Trice's challenges to (1) Ramm-Gramenz's testimony that A.L. told her story "quite well, and correctly, and credibly" (6 RP at 116); (2) Turner's testimony that he thought Trice had details about the crime he could not have learned from Wright; or (3) Turner's testimony that he thought he knew the "facts" at the time he interviewed Trice. Defense counsel did not object to these three comments at trial. RAP 2.5(a). As discussed above with respect to Trice's prosecutorial misconduct and ineffective assistance of counsel claims, because Trice cannot show prejudice, he cannot show these three instances of allegedly improper opinion testimony prejudiced him. *State v. Curtiss*, 161 Wn. App. 673, 697-98, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011); *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008) (a manifest error affecting a constitutional right raised for the first time on appeal will be reversed only if actual prejudice or a practical and identifiable consequence is shown).

invad[es] the exclusive province of the [jury].'" *King*, 167 Wn.2d at 331 (internal quotation marks omitted) (alterations in original) (quoting *Demery*, 144 Wn.2d at 759); *see* ER 403. "A law enforcement officer's opinion testimony may be especially prejudicial because the 'officer's testimony often carries a special aura of reliability.'" *King*, 167 Wn.2d at 331 (quoting *Kirkman*, 159 Wn.2d at 928). Lay witnesses may "give opinions or inferences based upon rational perceptions that help the jury understand the witness's testimony and that are not based upon scientific or specialized knowledge." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing ER 701). They may not, however, give opinion testimony that are "expressions of personal belief[] as to . . . the intent of the accused, or the veracity of witnesses." *Montgomery*, 163 Wn.2d at 591 (citing *Demery*, 144 Wn.2d at 759); *see* ER 403, 701.

We review two of Trice's challenges to Detective Holden's testimony. First, Holden testified as follows:

> [Q] What happened when you were done, when you were finished with that handwritten statement?
>
> A I remember [Trice] asking us if this handwritten statement was going to help him or hurt him. And I said -- told him that I knew that this handwritten statement wasn't the truth and we could prove that it wasn't the truth and --
>
> [DEFENSE COUNSEL]: Objection, Your Honor.
> THE COURT: The objection is. . .?
> [DEFENSE COUNSEL]: It's a comment on credibility.
> [STATE]: I'll move on, Your Honor.
> THE COURT: All right. Your next question. Okay.

RP (Apr. 9, 2008) at 43. The colloquy shows Holden recounting the events of the Los Angeles interview. As such, the trial court did not abuse its discretion in admitting the testimony as an explanation of an interrogation tactic, which is not improper. *State v. Curtiss*, 161 Wn. App. 673, 697, 250 P.3d 496 (recounting police statements made during the interrogation process are

explanations of interrogation tactics and not expressions of personal beliefs (citing *Demery*, 144 Wn.2d at 763-65)), *review denied*, 172 Wn.2d 1012 (2011).

Second, Detective Holden testified that he reviewed Detective Turner's initial report and believed "it was an accurate and well-written report. [Turner] did a great job." RP (Apr. 9, 2008) at 53. Defense counsel objected to the testimony as unresponsive and as a comment on Turner's credibility. The State argued that it was "simply a comment on this witness's belief as to whether or not that report is accurate." RP (Apr. 9, 2008) at 53. The trial court overruled the objection. We note that the comment that Turner did a "great job" on his initial report was unresponsive to any question. *See Lundberg v. Baumgartner*, 5 Wn.2d 619, 625, 106 P.2d 566 (1940) (if the answer of the witness is unresponsive, counsel should object as soon as he can "reasonably be expected to comprehend the purport of the unresponsive answer and formulate and state his objections thereto"). Defense counsel properly objected and the trial court should have struck the nonresponsive comment. *Lundberg*, 5 Wn.2d at 625. However, in light of the overwhelming evidence before the jury, including the detectives' other testimony regarding Trice's confession, we hold the anecdotal comment on the quality of Turner's initial police report was harmless.[6] *King*, 167 Wn.2d at 332-33.

[6] Moreover, we note that counsel's tactical decision not to move to strike the testimony or for a limiting instruction is not unusual under these circumstances. "Counsel may conclude that more damage may be done by calling the jury's attention to the evidence." *State v. Barber*, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984), *review denied*, 103 Wn.2d 1013 (1985).

Sentencing

Trice appeals his first degree child molestation and first degree child rape POAA sentences,[7] asserting that the State did not prove that a 1995 Florida second degree sexual battery "conviction" was legally or factually comparable to Washington's second degree rape or indecent liberties statutes. Trice argues that the crimes were not legally comparable, i.e., that while the Washington statutes required "forcible compulsion," the Florida statute did not. Br. of Appellant at 60. Trice also argues that the sentencing court could not have found the crimes factually comparable because there was nothing in the record for the court to review. The State concedes it did not prove the Florida statute was legally or factually comparable to the Washington statutes and remand for resentencing is appropriate. We accept the State's concession and remand for resentencing.

A person who has been convicted of first degree child rape is a "persistent offender" if that person has, before the commission of the current offense, been previously convicted of an out-of-state offense that is comparable to second degree rape. Former RCW 9.94A.030(33)(b). A sentencing court must sentence a "persistent offender" to life in prison without possibility of parole. RCW 9.94A.570. The State has the burden at sentencing to prove that an out-of-state conviction is "comparable" to a Washington crime. RCW 9.94A.525(3). We review de novo a sentencing court's decision to consider a prior conviction as a strike. *State v. Thiefault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007) (citing *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004), *review granted in part and remanded*, 154 Wn.2d 1031 (2005)).

[7] The sentencing court found Trice to be a "two-strikes" offender: the first strike as the 1995 Florida second degree battery "conviction," and the second strike as one of the current first degree child rape convictions. Former RCW 9.94A.030(33)(b).

The sentencing court employs one of two tests to determine the comparability of a foreign offense. *Thiefault*, 160 Wn.2d at 415. First, the court must determine whether the foreign offense is legally comparable—"that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Thiefault*, 160 Wn.2d at 415. Second, if the foreign offense elements are broader than Washington's elements, precluding legal comparability, the sentencing court must determine "whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Thiefault*, 160 Wn.2d at 415 (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Thiefault*, 160 Wn.2d at 415 (citing *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 258, 111 P.3d 837 (2005); *State v. Farnsworth*, 133 Wn. App. 1, 22, 130 P.3d 389 (2006), *review granted and remanded*, 159 Wn.2d 1004 (2007)). Only foreign convictions that are either legally or factually comparable may count as a strike under the POAA. *Thiefault*, 160 Wn.2d at 415 (citing *Lavery*, 154 Wn.2d at 258); *see* ch. 9.94A RCW.

Here, the State established that, in 1996, Trice had pleaded nolo contendere as a habitual felony offender in Florida to a second degree sexual battery charge. Former Florida Statutes section 794.011(5) (1995) provided that "[a] person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree." "Sexual battery" means "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however,

sexual battery does not include an act done for a bona fide medical purpose." Former Fla. Stat. § 794.011(1)(h) (1995). "Serious personal injury" means "great bodily harm or pain, permanent disability, or permanent disfigurement." Former Fla. Stat. § 794.011(1)(g) (1995).

Former RCW 9A.44.050 (1993) provided, in relevant part, that "(1) [a] person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person: (a) By forcible compulsion." RCW 9A.44.100 provides, in relevant part, "(1) [a] person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another: (a) By forcible compulsion." "Sexual contact" means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "Forcible compulsion" means "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6).

First, former Florida Statute section 794.011(5) is not legally comparable to either former RCW 9A.44.050(1)(a) or .100(1)(a). Unlike the Florida statute, both Washington statutes require the State to prove an element of "forcible compulsion." On its face, the Florida statute does not require any proof of physical force or violence. Thus, the Florida statute is broader than the Washington statutes and is not legally comparable. *Thiefault*, 160 Wn.2d at 415.

Second, the sentencing court had insufficient evidence before it to compare the criminal conduct required under the Florida and Washington statutes. In support of its sentencing memorandum, the State submitted the Florida felony charging information, Trice's plea of nolo

contendere, and police reports detailing the investigation. But the sentencing court could rely only on facts in the foreign record that were admitted, stipulated to, or proved beyond a reasonable doubt. *Thiefault*, 160 Wn.2d at 415. Here, nothing before the sentencing court indicated that Trice admitted or stipulated to the details in the police report. *Walker v. Florida*, 880 So. 2d 1262, 1265 (2004) ("'A plea of nolo contendere does not admit the allegations of the charge in a technical sense but only says that the defendant does not choose to defend.'" (quoting *Vinson v. Florida*, 345 So. 2d 711, 715 (Fla., 1977))), *rev'd on other grounds*, 932 So. 2d 1085 (2006). And because Trice pleaded nolo contendere, no facts were proven beyond a reasonable doubt. *Walker*, 880 So. 2d at 1265. Thus, the sentencing court could not rely on the State's documentation and, in the absence of other reviewable information, the sentencing court could not have compared Trice's alleged conduct as charged under the Florida statute to either Washington statute. *Thiefault*, 160 Wn.2d at 415. Accordingly, we accept the State's concession that the Florida statute was neither legally nor factually comparable to the Washington statutes and remand for resentencing.

Trice also alleges that the 1987 Arkansas conviction was incorrectly included in his offender score calculation. Specifically, Trice argues that because the sentencing court found that the Arkansas conviction was not comparable to a Washington crime for POAA purposes, the conviction should not have been included in his offender score at all. But Trice does not cite any authority supporting the proposition that an out-of-state conviction determined by a sentencing court not to be a "strike" offense under the POAA may not be comparable to a nonstrike offense and thus included in calculating a defendant's total offender score. We do not consider arguments unsupported by legal authority. RAP 10.3(a)(6). Moreover, on remand, the sentencing court is

required to determine Trice's offender score and sentence anew in accord with RCW 9.94A.525 and .530(2).[8]

Conditions of Community Custody

For the first time on appeal, Trice asserts that the trial court erred in imposing certain community custody terms. Specifically, Trice argues that a condition restricting his access to pornographic materials violates his First Amendment and due process rights as unconstitutionally vague and that another condition restricting his access to the internet was not statutorily authorized. The State concedes remand is appropriate as to both conditions. We accept the State's concession and remand for resentencing.

"'[I]llegal or erroneous sentences may be challenged for the first time on appeal.'" *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Washington courts routinely consider preenforcement challenges to sentencing conditions. *Bahl*, 164 Wn.2d at 745-46. We review whether a term of community custody is sufficiently specific or statutorily authorized de novo. *State v. Mitchell*, 114 Wn. App. 713, 716, 59 P.3d 717 (2002) (citing *State v. Jones*, 93 Wn. App. 14, 17-18, 968 P.2d 2 (1998)); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

When a sentencing court sentences a defendant such as Trice under former RCW 9.94A.715 (2003), it must also sentence the defendant to a term of community placement under former RCW 9.94A.850 (2002). The sentencing court must include conditions provided in former RCW 9.94A.700(4), and may also include conditions provided in former RCW

[8] RCW 9.94A.530(2) provides, in relevant part,

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

9.94A.700(5). A "crime-related prohibition" is a court order prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted and is being sentenced. Former RCW 9.94A.030(13). The sentencing court may further require the defendant to participate in rehabilitative programs. Former RCW 9.94A.715(2)(b).

"[C]onditions may be imposed that restrict free speech rights if reasonably necessary, but they must be sensitively imposed." *Bahl*, 164 Wn.2d at 757. Here, the challenged community custody conditions are as follows:

> Defendant shall comply with the following other conditions during the term of community placement / custody:
> . . . .
> 14. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.
> . . . .
> 25. You shall not have access to the internet unless the computer has child blocks in place and active.

CP at 233-34.

First, our Supreme Court has already held that the challenged community custody condition restricting access to or possession of pornographic materials is unconstitutionally vague. *Bahl*, 164 Wn.2d at 758. "The fact that the condition provides that [a] community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement." *Bahl*, 164 Wn.2d at 758. Thus, we accept the State's concession that condition 14 is unconstitutionally vague and remand for imposition of conditions containing proper specificity. *See State v. Sansone*, 127 Wn. App. 630, 643, 111 P.3d 1251 (2005). Applicable sex offender treatments should establish appropriate limits on a defendant's possession

of pornography, not a community corrections officer via prohibition in the judgment and sentence.

Second, we accept the State's concession that evidence does not support a finding that restricting Trice's access to the internet relates to the circumstances of the crimes for which Trice was convicted and sentenced. Former RCW 9.94A.030(13). Trice was convicted of three counts of first degree child rape, one count of first degree child molestation, and one count of first degree burglary. The record shows that all events occurred either in person or over the telephone. Because there is no evidence that internet use contributed in any way to the crime, we hold condition 25 was not statutorily authorized. *State v. O'Cain*, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008).

Statement of Additional Grounds (SAG)

In his SAG, Trice asserts that (1) his convictions either should have merged or violate double jeopardy protections, (2) the appellate record is incomplete under RAP 1.2, (3) he was denied his right to confront a videotaped interview of the victim that took place in a room staged to look like a child's room, and (4) exculpatory evidence was withheld at trial. Trice's claims lack merit.

First, neither the merger doctrine nor the United States Constitution and Washington Constitution art. I, § 9 double jeopardy clauses apply to Trice's convictions. The merger doctrine only applies when the legislature has clearly indicated that to prove a particular degree of a crime, "'the State must prove not only that a defendant committed that crime . . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.'" *State v. Baldwin*, 111 Wn. App. 631, 642, 45 P.3d 1093 (2002) (quoting *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983)), *aff'd*, 150 Wn.2d 448, 78 P.3d 1005 (2003). The doctrine "is

relevant only when a crime is 'elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code.'" *Baldwin*, 111 Wn. App. at 642 (quoting *State v. Parmelee*, 108 Wn. App. 702, 710, 32 P.3d 1029 (2001), *review denied*, 146 Wn.2d 1009 (2002)). The double jeopardy clause protects defendants "against multiple punishments for the same offense." *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

Here, the State charged Trice with three separate instances of child rape. Count I alleged that Trice "initially contacted A.L.'s vagina with his tongue and/or mouth." CP at 92. Count II alleged that Trice "then penetrated A.L.'s vagina with his finger." CP at 92. And count III alleged that Trice "then penetrated A.L.'s anus with his finger." CP at 92. Trice was convicted of each of the three first degree child rape charges as well as first degree child molestation and first degree burglary. The sentencing court found that the convictions did not merge but that they constituted the same criminal conduct for offender score purposes. The sentencing court also relied on RCW 9A.52.050, the burglary anti-merger statute, to impose a sentence for the first degree burglary conviction.

RCW 9A.44.073(1) provides that "[a] person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." "Sexual intercourse"

> (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) [a]lso means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
>
> (c) [a]lso means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1). Because the State was not required to prove some other criminal act defined elsewhere in the statutes when it proved each of the three separate alleged instances of child rape, the merger doctrine does not apply to the convictions. Similarly, because each of the three acts constitutes a different offense, there are no double jeopardy violations here.

Second, nothing in the record supports Trice's contention that the record before us is incomplete. As an initial matter, we note that RAP 1.2 concerns our interpretation or waiver of the rules on appeal, and not the sufficiency of the appellate record. Even assuming Trice intended to cite to RAP 9.2, which provides that the appellant has the duty to submit relevant reports of proceedings to us for review, Trice does not indicate which reports of proceeding are allegedly missing. RAP 10.10(c). Our review of the record indicates that all ordered reports of proceedings were submitted and filed for our review.

Third, Trice's assertion that his right to confront witnesses was violated lacks merit. The Sixth Amendment confrontation clause prohibits admission of testimonial statements in criminal prosecutions unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. Trice contends that he was unable to confront the video recording of A.L.'s interview, presumably A.L's recorded interview with Knight. But the record shows that neither the video nor the interview transcript was admitted as evidence at trial. Trice did not have a right to confront witness testimony that the trial court did not admit. And because the interview was not before the jury, the staged child's room in which the interview took place was also not presented to the jury.

Fourth, it appears Trice asserts that exculpatory evidence was withheld at trial. Our

review of the record shows that Forensic Scientist Sanderson admitted he did not test a rape kit or clothing also submitted for DNA testing after he matched the DNA profile from the semen on the carpet to Trice. Because the jury heard Sanderson admit that he did not test all the evidence, Trice was not prejudiced. Moreover, without test results—which Trice could have requested—there is no basis to believe that evidence of those results would have been exculpatory. *See Stenson*, 132 Wn.2d at 709, 714 (evidence is not rendered prejudicial merely because it is inconclusive; an evidentiary error which is not of a constitutional magnitude requires reversal only if the error, within reasonable probability, reasonably affected the outcome (citing *Commonwealth v. Yesilciman*, 406 Mass. 736, 745, 550 N.E.2d 378 (1990))).

Accordingly, we affirm Trice's convictions but remand for resentencing in accord with this opinion.

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.

QUINN-BRINTNALL, J.

I concur:

HUNT, J.

Armstrong, J. (dissenting) — Because there is insufficient evidence to support a finding that Trice entered unlawfully with the intent to commit a crime, I dissent.

I. Unlawful Entry

A.L. invited Trice into the apartment once for the limited purpose of using the bathroom and a second time to find his keys near the bathroom. "A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur." *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005). "It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who 'is not then licensed, invited, or otherwise privileged to so enter or remain' in a building." *State v. Wilson*, 136 Wn. App. 596, 609, 150 P.3d 144 (2007) (quoting RCW 9A.52.010(3)).

The majority reasons that Trice unlawfully entered the apartment by fraudulently obtaining A.L.'s consent to get his keys when he really intended to commit a crime; therefore, Trice unlawfully entered. Majority at 11. The majority discusses *State v. Collins*, 110 Wn.2d 253, 751 P.2d 837 (1988), to support its conclusion that Trice entered unlawfully. The *Collins* court held that the defendant unlawfully remained in the victims' home when he exceeded the scope of his invitation—to use the telephone. After attempting to use the telephone, apparently unsuccessfully, the defendant grabbed both victims, dragged them into a bedroom, and sexually assaulted one victim. *Collins*, 110 Wn.2d at 255. The court found this sufficient to support the "unlawfully remaining" prong of the burglary statute.[9] *Collins*, 110 Wn.2d at 261. The *Collins*

[9] The court also found support in a second theory: when the defendant grabbed the victims, his privilege to be in the residence was revoked. *Collins*, 110 Wn.2d at 261.

court did not reason as the majority does here that the defendant's entry into the residence was unlawful because he committed a crime once in the residence. In fact, the *Collins* court was careful to avoid the problem of finding that the defendant unlawfully remained based solely on the defendant's intent to commit a crime because that essentially would "convert all indoor crimes into burglaries." *Collins*, 110 Wn.2d at 261-62. Yet that is exactly what the majority does here.

The majority finds that Trice's fraudulent entry satisfies the "unlawful entry" element of burglary. But because the fraud is based, according to the majority, on Trice's unannounced intent to assault the victim, the majority's analysis improperly collapses the unlawful entry element of burglary with the intent to commit a crime. But the intent to commit a crime is a separate element from unlawfully entering. *See Allen*, 127 Wn. App. at 137.

We have previously held that burglary is an alternative means crime. *State v. Johnson*, 132 Wn. App. 400, 409-10, 132 P.3d 737 (2006) (citing *Allen*, 127 Wn. App. at 132-36). A jury's general verdict finding the defendant guilty of burglary requires "sufficient evidence as to each means" or substantial evidence such that "a reviewing court can tell that the verdict was based on only one means." *Johnson*, 132 Wn. App. at 410. Because the trial court committed prejudicial error by failing to instruct the jury it had to unanimously agree on which means of burglary Trice committed, I would reverse.

_____

Armstrong, J.