IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AARON EDWARD OLSON, Appellant.	No. 41239-0-II UNPUBLISHED OPINION

Johanson, A.C.J. — A jury convicted Aaron Edward Olson of two counts of second degree rape of K.B. The trial court, under ER 404(b), admitted evidence of Olson's rape of G.C. to demonstrate a common scheme or plan. Olson argues on appeal that (1) the trial court erred in admitting the evidence of the rape of G.C., (2) the State committed numerous acts of prosecutorial misconduct, (3) cumulative error deprived him of a fair trial, and (4) the trial court erred when it required him to pay certain legal costs and when it prohibited him from consuming alcohol as a condition of his community placement. We affirm because the trial court did not abuse its discretion in admitting evidence of G.C.'s rape as evidence of common scheme or plan, and none of Olson's additional claims warrants reversal.

FACTS

I. Rape of K.B.

In May 2005, 15-year-old K.B. walked to her neighborhood store, Saars Market Place in Tacoma. After leaving the store, a white truck approached with two young men inside. Olson drove the truck, and his friend, Tony Emery, sat in the passenger seat.

Olson offered to give K.B. a ride back to her house, just a short distance away. At first, K.B. declined; but, Olson persisted, and eventually K.B. accepted his offer. The men introduced themselves as Aaron and Tony, and Olson let K.B. into the middle of the bench seat.

Olson then pulled the truck into an alley behind the store. K.B. testified that Olson began "groping" her and requested oral sex. 5 Verbatim Report of Proceedings (VRP) at 95. K.B. refused and attempted to push his hands away. She reiterated her desire that Olson drive her home, and Olson drove the truck within a block of K.B.'s house and parked. Olson again asked K.B. to provide him oral sex; and, he offered to let her out of the truck if she complied. Then, Olson and Emery collaborated to unbutton and remove K.B's pants. This whole time, an upset K.B. asked that they stop and let her out of the truck.

Then, Olson forced K.B. onto her stomach on the bench seat in the truck and began raping her; simultaneously, Emery pulled down his own pants and forced K.B. to give him oral sex. When the men finished, they released K.B., who ran into her house and told her brother, who in turn notified police.

K.B. told police that she did not know Aaron or Tony; but, she provided a description. K.B. went to the hospital, where a rape kit was conducted, collecting the deoxyribonucleic acid

(DNA) from her body and clothes. Even with the DNA samples taken from K.B., by July 2005, authorities had no suspects or leads in their investigation.

II. Rape of G.C.

According to G.C., at 11:00 pm on February 27, 2006, she completed her shift at a Tacoma Walgreens. In the Walgreens parking lot individuals, later identified as Olson and Emery, confronted her with a handgun. They ordered G.C. to drive them to the Saars Market Place. When they arrived at the store, Olson and Emery asked G.C. to give them her money. When she indicated she did not have money, they ordered her to get in the back seat so they could rape her. G.C. told them that she was pregnant, and after Olson and Emery conferred with one another, they determined that G.C. should instead provide them oral sex.

G.C. testified that she begged Olson and Emery not to hurt her; and, they told her that if she did not provide them oral sex, they would kill her. G.C. complied. Afterward, they had G.C. drive to a Safeway, where they exited her vehicle.

Soon thereafter, G.C. described her assailants to the police, who took her to the hospital and collected her clothing. G.C. helped police draft a composite sketch of Olson and Emery. But, by April 2006, without leads or suspects, G.C.'s case had also gone cold.

III. Investigation and Procedure

In November 2006, Tacoma police received a tip that Olson was responsible for several rapes and robberies occurring in February and March 2006 and that Olson resembled the individual pictured in G.C.'s composite sketch. Police also learned that Olson and Emery were known associates.

Tacoma Police Detective Jeff Turner discerned that Olson resided within six blocks of both the K.B. and G.C. rapes. He compared Olson and Emery to G.C.'s description of her attackers. Detective Turner obtained photos of Olson and Emery and created a photomontage that he showed to G.C. She identified Emery but not Olson—who was later linked to her case through DNA testing.

The State initially included in the same charging document Olson's and Emery's offenses against both G.C. and K.B. But, the trial court severed the counts for the crimes against G.C. and K.B., so the State first tried Olson and Emery for their alleged offenses against G.C. A jury convicted Olson and Emery on all counts relating to G.C. Olson[1] then went to trial on his offenses relating to K.B, two charges[2] of second degree rape.[3]

Before trial on the K.B. charges, Olson moved, pursuant to ER 404(b), to preclude the State from presenting any evidence of his prior charges and conviction relating to G.C. The trial court heard arguments on the matter and ultimately issued a written ruling allowing evidence of Olson's conviction on the G.C. charges.

At trial, many witnesses testified, including K.B. and G.C.—who both testified to their rapes at the hands of Olson and Emery—as well as Olson himself. Olson offered conflicting testimony. For instance, he testified that he never used forcible compulsion in raping K.B., and that in fact, K.B. was complicit in helping him undress her and moving her body into a position to

[1] Before trial, Emery pleaded guilty on the K.B. offenses.

[2] The State charged Olson for his rape of K.B., as well as an accomplice for Emery's rape of K.B.

[3] RCW 9A.44.050(1)(a).

facilitate the rape. Olson stated, "She helped do everything." 8 VRP at 493. But at the same time, Olson responded affirmatively when the State asked him, "She didn't want to have sex with you. That's your testimony?" 8 VRP at 492. And, Olson testified later, "I have read, technically, what rape is, and she didn't consent. She didn't say, yes, let's do. That is, technically, rape." 8 VRP at 493. But, Olson denied forcible compulsion, "I was gentle with her." 8 VRP at 493.

K.B.'s testimony, however, reflected a different perspective. She testified that she tried to remove Olson's hands when he groped her, and she also testified that Olson grabbed her face and forced her to kiss him before she was able to pull away. K.B was "asking him to stop" and was "freak[ing] out" and "struggling" when Olson tried to touch her. 5 VRP at 101, 102. Contrary to Olson's claims, K.B. also testified that she attempted to hold her pants up, but Olson and Emery "grabbed ahold of my hands with one of theirs and took their other hands and pulled my pants off." 5 VRP at 103. K.B. stated that she tried to protect herself, but she could not overcome their combined strength. K.B. finally discussed how Emery had to pry her mouth open to receive oral sex.

A forensic nurse, Judith Henning, corroborated K.B.'s story that Olson used forcible compulsion in the rape. Henning examined K.B. the night of the rape, and she testified that K.B. was "hurting pretty badly at the time of the assault." 6 VRP at 281. Henning examined K.B. for injuries, and she discovered a bruise above K.B.'s left knee, on her left shin, and on her right lower leg—all consistent with K.B.'s story that she was kicking when Olson was raping her from behind. Henning also noticed a laceration on the "posterior fourchette" of K.B.'s vagina, as well as redness along K.B.'s perianal area. 6 VRP at 295.

During closing arguments, the State commented that Olson feigned his tears during his testimony, and that he tailored his testimony in such a way that would make it appear as if he committed third degree rape rather than second degree rape, which required proof of forcible compulsion. The State also tasked the jury with declaring a verdict that represents the truth and stated that the truth included Olson raping K.B. Olson argued that the case did not involve the question of whether he raped K.B. or whether K.B. consented. Rather, Olson argued that the State did not produce enough evidence to convict him of second degree rape, as opposed to third degree rape. Finally, during rebuttal, the State asserted that, after considering all the evidence, there was no longer any reasonable doubt that Olson raped K.B. as charged.

The jury convicted Olson of two counts of second degree rape. The trial court sentenced Olson to pay $2,800 in legal financial obligations, and it prohibited him from consuming any alcohol. Olson appeals his convictions for crimes against K.B.

ANALYSIS

I. ER 404(b)—Admission of G.C.'s Rape

Olson first argues that the trial court committed reversible error when it admitted, under ER 404(b), evidence of his rape against G.C. But, the trial court did not abuse its discretion as it admitted the evidence only after applying the appropriate test for admission under ER 404(b) and allowing the testimony for a proper purpose, to show a common plan or scheme.

We review evidentiary rulings for abuse of discretion. *State v. Morales*, 154 Wn. App. 26, 37, 225 P.3d 311 (2010), *aff'd in part, rev'd in part on other grounds*, 173 Wn.2d 560, 269 P.3d 263 (2012). We will not disturb a trial court's ER 404(b) ruling absent a manifest abuse of

discretion such that no reasonable trial judge would have ruled as the trial court did. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Lord*, 161 Wn.2d at 284.

ER 404(b) provides that evidence of "other crimes, wrongs, or acts" is inadmissible to prove "action in conformity therewith" on a particular occasion. Exceptions to 404(b) also exist to allow evidence of prior bad acts. The common scheme or plan exception applies when the defendant had devised a plan and used it repeatedly to perpetuate separate but similar crimes. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). Under ER 404(b), evidence of prior bad acts is admissible to prove a common scheme or plan where (1) the acts are proved by a preponderance of the evidence, (2) they are admitted for the purpose of proving a common scheme or plan, (3) the acts are relevant to prove an element of the crime charged or to rebut a defense, and (4) the evidence is more probative than prejudicial. *Lough*, 125 Wn.2d at 852. Trial courts must carefully consider and weigh both the relevance and prejudice, as the potential for prejudice is at its highest in sex cases. *State v. Sutherby*, 165 Wn.2d 870, 886, 204 P.3d 916 (2009).

Here, the State sought to admit evidence of Olson's rape against G.C. under ER 404(b).[4]

[4] The State also sought to admit the evidence under RCW 10.58.090; but the court resolved the issue applying ER 404(b). This appeal deals only with ER 404(b).

The State detailed the similarities between Olson's rapes of K.B. and G.C. to demonstrate a common scheme or plan of abuse. Specifically, the State indicated that Olson and Emery worked in tandem; targeted girls who did not know them; approached victims in the evening and transported them by vehicle to an isolated area; forced oral sex and ejaculated in or on the victims; and, both involved activity at the Saars Market Place.

This case most closely mirrors *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). In *DeVincentis*, the trial court allowed ER 404(b) evidence of prior sexual misconduct because DeVincentis's charged crime uniquely resembled his earlier misconduct: he would invite girls into his home, alone with him, where he would wear revealing underwear and massage the girls until he ultimately ejaculated on them. *DeVincentis*, 150 Wn.2d at 13-15. DeVincentis used this unique plan with multiple victims, and the trial court properly found that the common scheme or plan exception applied. *DeVincentis*, 150 Wn.2d at 16, 25. Like DeVincentis, Olson and Emery used a unique plan. They worked in tandem to find a vulnerable lone woman, and traveled by vehicle to a site near the Saars Market Place where they would both have sex with the girl in the vehicle until they ejaculated in or on her. Once satisfied, they would part with their victims. Both DeVincentis and Olson/Emery utilized a common plan or scheme to pursue their victims.

Here the trial court issued a written ruling detailing its decision to admit the evidence, and that decision, satisfied the four-part *Lough* test. First, the trial court found by a preponderance of the evidence that the prior bad act occurred. It noted that, in fact, a jury had already convicted Olson on the G.C. rape. This finding satisfies the first part of the *Lough* test. *See Lough*, 125 Wn.2d at 852.

Second, the trial court found that Olson's rape against G.C. was admitted for the purpose of proving a common scheme or plan. The court noted, "[T]here were certain nominally [sic] similarities between the two acts." Clerk's Papers (CP) at 56. The court described the similarities: they occurred in the evening hours; they involved an automobile; they occurred in the same part of town; they each involved the same two perpetrators and one female victim; and Olson and Emery did not know their victims. Thus, the court determined that the evidence would be "relevant to prove a common scheme of [sic] plan of which the alleged crime is a part. The evidence may also tend to demonstrate intent and motive." CP at 56. This finding satisfies the second part of the *Lough* test. *See Lough*, 125 Wn.2d at 852.

Third, the trial court found that Olson's rape of G.C. was relevant to prove an element of the rape Olson allegedly committed against K.B. The court noted the rarity of rapes occurring between perpetrators and victims who do not know one another, as well as the unique nature of simultaneous rapes occurring between multiple perpetrators and the victim in a setting that does not involve an intoxicated victim. The court also identified the rare circumstance of multiple perpetrators conspiring to commit rape. The court reasoned that, because many of the characteristics of these rapes were so unusual, they were relevant to prove that Olson raped K.B. This finding satisfies the third part of the *Lough* test. *See Lough*, 125 Wn.2d at 852.

Fourth, the trial court found that the probative value of Olson's rape against G.C. outweighed its potential for unfair prejudice. The court reasoned:

> So does this evidence merely show propensity, that these are bad guys, just criminals? While there is certainly a concern in any case like this that the jury will convict the defendants because they did something else that was illegal, in this case the other crime goes a long way to explain the State's theory of the case and is not

> merely to put the defendants in a bad light. Its probative value outweighs its prejudicial effect. The Court concludes that the evidence is admissible under 404(b).

CP at 58. This finding satisfies the fourth part of the *Lough* test. *See Lough*, 125 Wn.2d at 852.

The trial court adequately applied the four-part *Lough* test in deciding to allow evidence of Olson's other rape. Accordingly, as the trial court's decision was not manifestly unreasonable or exercised on untenable grounds or for untenable reasons, it did not abuse its discretion in admitting evidence of Olson's rape against G.C.

II. Prosecutorial Misconduct

Next, Olson asserts various prosecutorial misconduct claims. He argues (1) that the State improperly asserted its own personal opinion of Olson's credibility, (2) that the State improperly encouraged the jury to draw an adverse inference from Olson's exercising his right to appear, defend and testify on his own behalf, (3) that the State improperly opined as to Olson's guilt, (4) that the State improperly tasked the jury with reaching a verdict to represent the truth, and (5) that the State misstated the law during closing arguments. Olson does correctly assert that the State erred in telling the jury to reach a verdict that represents the truth; but this was harmless error, and his remaining prosecutorial misconduct claims lack merit.

To establish prosecutorial misconduct, an appellant must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). To show prejudice, an appellant must demonstrate that there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A defendant's failure to object to alleged prosecutorial

misconduct at trial fails to preserve the issue for appeal unless the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). And, we review the State's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561.

A. Opining as to Olson's Credibility

Olson asserts that the State committed misconduct, asserting its personal opinion as to Olson's credibility as a witness when it argued that he feigned tears and said, "He is manipulating you; he is manipulating the truth; and he is distorting the truth in an effort to avoid responsibility." 8 VRP at 553. Olson did not preserve this issue for appeal because he failed to object or demonstrate a flagrant and ill-intentioned action evincing an enduring and resulting prejudice incurable by a curative instruction.

The State may not assert its personal opinion as to a witness's credibility. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). But, a prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence. *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010).

In *Reed*, the State accused the defendant witness, at least four separate times, of lying, stated that Reed had no case, and asserted that Reed was clearly a "murder two." *Reed*, 102 Wn.2d at 145-46. Finally, the State implied that the jury should not believe defense counsel because they drove from out of town in fancy cars. *Reed*, 102 Wn.2d at 146. The Supreme Court determined that, not only did these words constitute error, but they prejudiced the

defendant. *Reed*, 102 Wn.2d at 147.

Here, during its rebuttal, the State made the following argument and observations regarding Olson's trial testimony and how it compared to K.B.'s brother's[5] testimony:

> [Olson] is trying to manipulate the outcome of this trial in the same way he was trying to manipulate your feelings by feigning crying. Contrast that with [D.B.'s] demeanor.
>
> . . . .
>
> . . . [K.B. and D.B.] go downstairs, and [D.B.] holds her hair back, her semen covered hair, [as] she spits into the sink, as she spits Anthony Emery's semen into the sink. That's what [D.B.] told you on the stand, and you saw his demeanor. You saw the way in which that affected him and contrast that with [Olson's] outbursts, covering his face in his hands because there were no tears. [Olson] is manipulating you; he is manipulating the truth; and he is distorting the truth in an effort to avoid responsibility.

8 VRP at 552-53. Olson did not object to this argument during trial.

Absent objection, to claim this error on appeal, Olson must show that not only did the State err in making these statements, but also that the State's comment was so flagrant and ill intentioned that it evinced an enduring and resulting prejudice incurable by a curative instruction. *Gregory*, 158 Wn.2d at 841. Olson does not demonstrate that the State erred in observing Olson's demeanor on the witness stand, or moreover, that those observations equated to flagrance and ill intent. His failure to make such a showing precludes him from raising this issue for the first time on appeal.

B. Olson's Right to Testify on his Own Behalf

Next, Olson argues that the State committed misconduct by improperly encouraging the jury to draw an adverse inference from his exercising his constitutional right to appear, defend,

[5] To protect K.B.'s privacy, we refer to K.B.'s brother as D.B.

and testify at trial. But, Olson's claim fails because he did not object at trial or, on appeal, demonstrate a flagrant and ill-intentioned action evincing an enduring and resulting prejudice incurable by a curative instruction. *See Gregory*, 158 Wn.2d at 841.

Here, the State argued during closing:

> When Mr. Olson, under cross-examination, was being asked about rape, he said, I read the definition of rape. What is the inference from that, that he read the definition of rape? Mr. Olson knows exactly what he needed to say on that stand to convince you or to try to convince you, I'm only guilty of Rape 3. I'm not guilty of Rape 2. He is trying to manipulate the outcome of this trial in the same way he was trying to manipulate your feelings by feigning crying.

8 VRP at 552. Olson failed to object to this argument.

Again, the State enjoys wide latitude in its closing argument to draw reasonable inferences from the evidence. *Lewis*, 156 Wn. App. at 240. During trial, Olson testified that he had read the rape statute and understood the elements of rape. So, Olson does not demonstrate that the State's drawing inferences from that testimony and Olson's body language constitutes error; moreover, Olson cannot demonstrate that the State's relatively accurate recounting of Olson's testimony was so flagrant and ill intentioned that it evinced an enduring and resulting prejudice incurable by a curative instruction. Accordingly, Olson cannot prevail on appeal. *See Gregory*, 158 Wn.2d at 841.

C. Tasking the Jury with Declaring the Truth

Olson next argues that the State improperly tasked the jury with reaching a verdict that represents the truth and then opined to his guilt. Olson is correct that the State erred; but, Olson failed to preserve this issue for appeal because he cannot characterize these statements as being so

flagrant and ill intentioned that they evinced an enduring and resulting prejudice incurable by a curative instruction.

Specifically, Olson claims the State erred in arguing during closing:

> When you go back there and you find that the State has satisfied each element of the crime, you will return a verdict that represents the truth of the matter. The truth is that Aaron Olson raped [K.B.] on May 18th.
>
> I ask you to return a verdict that represents the truth and find him guilty of both counts and hold him accountable.

VRP at 528-29. Olson did not object to these statements.

In the past, we have been asked to review the propriety of the State's tasking the jury with finding the truth in its verdict. The jury's role, however, is not to declare or determine the truth, but rather to determine whether the State proved its allegations against a defendant beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

In *State v. Walker*, we held that the State errs when it argues that the jury's job is to declare a case's truth. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). In *Walker*, during closing argument the State tasked the jury to declare the truth with its verdict:

> And so by your verdict in this case, you folks, the 12 of you who will deliberate, will decide the truth of what happened . . .
>
> . . . So, it's time for the truth. . . . So I talked to you at the very beginning about this—about declaring the truth as part of your role in returning a verdict. The truth is, the defendant is guilty of [the charged crimes].

Walker, 164 Wn. App. at 733. Walker did not object to these statements at trial. We reversed Walker's conviction for cumulative error and remanded for a new trial because not only did the State improperly task the jury with declaring the truth, but it also emphasized this error in

PowerPoint slides and made various other improper statements, including misstatements relating to applicable rules of law and mischaracterizations relating to the reasonable doubt standard. *Walker*, 164 Wn. App. at 737-39.

Like *Walker*, Olson did not object to the statements he contests on appeal. This error, appearing in just three sentences, did not prejudice Olson because the jury instructions properly informed the jury of its role as the trier of fact. And, during closing arguments, the State twice properly advised the jury that its role was to determine whether the State proved each element charged in the crimes.

Moreover, even if Olson can show that the State's comments were flagrant and ill intentioned, he cannot demonstrate he suffered any prejudice from the State's comments. Despite Olson's claim that K.B. "helped" him rape her, K.B.'s and Henning's testimony demonstrated otherwise. 8 VRP at 493. K.B. testified that she tried to remove Olson's hands when he groped her. She also testified that Olson grabbed her face and forced her to kiss him before she was able to pull away. The jury heard from K.B. that as Olson touched K.B., she was "asking him to stop" and was "freak[ing] out" and "struggling." 5 VRP at 101, 102. K.B. testified that she tried to hold her pants up, but Olson and Emery "grabbed ahold of my hands with one of theirs and took their other hands and pulled my pants off." 5 VRP at 103. K.B. stated that she tried to protect herself, but she was not strong enough to overcome Olson and Emery's combined strength. She also spoke about how Emery had to pry her mouth open and push her head down onto his lap so that she would perform sexual acts. Moreover, Henning added that, following the rape, K.B. showed injuries to her vagina and perianal area, as well as to her legs—injuries consistent with

forcible rape.

Given the weight of this evidence supporting the jury's conviction on second degree rape, Olson cannot demonstrate that the State's improper statements regarding the jury's role prejudiced the outcome of his trial. Accordingly, Olson did not preserve this issue for appeal because he failed to demonstrate that the error was so flagrant and ill-intentioned such that it evinced an enduring and resulting prejudice incurable by a curative instruction. *See Gregory*, 158 Wn.2d at 841.

E. Stating the Law

Olson also asserts that the State misstated the law during its rebuttal, when it argued to the jury:

> Ladies and gentlemen, it is no longer reasonable to doubt any of the elements in Count I and Count II. It is no longer reasonable to doubt that Aaron Olson is guilty of Rape in the Second Degree for vaginally raping [K.B.] It is no longer reasonable to doubt that Aaron Olson is guilty of Rape in the Second Degree for facilitating the rape of [K.B.] at the hands of Tony Emery.

8 VRP at 558. Olson did not preserve this issue for appeal because he does not demonstrate that any error was so flagrant and ill intentioned such that it evinced an enduring and resulting prejudice incurable by a curative instruction.

To support his argument, Olson relies on our decision in *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813, *review denied*, 170 Wn.2d 1003 (2010). In *Venegas*, the State explained the jury's duty using a fill-in-the-blank analogy: "you have to say to yourselves: 'I doubt the defendant is guilty, and my reason is'—blank." *Venegas*, 155 Wn. App. at 523. The State also argued,

> [The] presumption of innocence . . . erodes each and every time you hear evidence that the defendant is guilty . . . . Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all the evidence, including the defendant's witnesses and the defendant, herself, and that presumption no longer exists, then that's when the State has proven the case beyond a reasonable doubt.

Venegas, 155 Wn. App. at 524. Venegas did not object to either of these statements, but on appeal, we held that the State's argument clearly misstated the law and that a defendant's presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during jury deliberations. *Venegas*, 155 Wn. App. at 524.

Like Venegas, Olson failed to object to the statements he now challenges. But, unlike Venegas, Olson cannot carry his burden to demonstrate that these statements constituted error or that they were so flagrant and ill intentioned so as to evince an enduring and resulting prejudice incurable by a curative instruction. Here, the State never told the jury that Olson's presumption of innocence had diminished over the course of the trial. Instead, the State merely argued that its evidence satisfied the elements of the charged crimes such that it should have left no reasonable doubt in the jurors' minds—a valid exercise. Accordingly, the State properly asserted during its rebuttal, that it adequately proved the second degree rape charges. This action does not even constitute error. Therefore, Olson did not preserve this issue for appeal. *See Gregory*, 158 Wn.2d at 841.

III. Cumulative Error

Olson next argues that cumulative error denied him a fair trial. Under the cumulative error doctrine, an appellate court may reverse a defendant's conviction when the combined effect of

errors during trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279.

The only discernable error at trial was the State's assertions during closing argument, that the jury's decision would represent the truth. Yet, the cumulative error doctrine does not apply here because that single harmless error did not combine with any other errors to affect Olson's trial outcome. *See Weber*, 159 Wn.2d at 279.

IV. Sentencing Errors

Olson finally argues that the trial court erred in imposing costs and fees against Olson, as well as imposing a no-alcohol condition in his judgment and sentence. The trial court, however, did not abuse its discretion in ordering Olson to pay costs or to obtain a substance abuse evaluation. The trial court may not require an indigent defendant to reimburse the state for costs unless the defendant has or will have the means to do so. Former RCW 10.01.160(3) (2005); *see State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). But, because the determination whether a defendant will have an ability to pay is speculative, the time to examine a defendant's ability to pay is when the government seeks to collect on that obligation. *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009).

An appellant may challenge an illegal or erroneous sentencing condition for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). And, former RCW 9.94A.700(5)(d) (2003), allowed a sentencing court to order an offender not to consume alcohol

as a condition of her or his community placement.[6]

Here, the trial court did not abuse its discretion in ordering Olson to pay costs associated with his trial. While Olson apparently lacks assets now, his future ability to pay is speculative. Accordingly, Olson cannot challenge these legal costs now, but rather when the State seeks payment on them, as provided under RCW 10.01.160.

Similarly, the trial court did not abuse its discretion in prohibiting Olson's alcohol consumption. Under state law, a sentencing court has discretion to impose special conditions, including prohibiting an offender's alcohol consumption. *See* former RCW 9.94A.700(5)(d). Under this statute, the prohibition against consuming alcohol does not need to be crime related. *See* former RCW 9.94A.700(5)(d).

We affirm.

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.

Johanson, A.C.J.

We concur:

[6] Former RCW 9.94A.700(5)(d), applicable to this matter, states:

> (5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:
>
> . . . .
>
> (d) The offender shall not consume alcohol.

Armstrong, J.

Penoyar, J.