100196-7

Supreme Court No. (to be set)
Court of Appeals No. 37538-2-III

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.

Jeremey Pedersen,
Petitioner.

Chelan County Superior Court Cause No. 18-1-00732-2
The Honorable Judge Lesley A. Allan

Petition for Review

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INTRODUCTION AND SUMMARY OF ARGUMENT

Jeremy Pedersen's constitutional rights were violated at his trial. The Supreme Court should accept review and reverse his conviction.

First, three witnesses provided opinion testimony on witness credibility. The improper opinion testimony violated Mr. Pedersen's right to due process and his right to a jury determination of the facts.

Second, the trial court violated Mr. Pedersen's right to counsel. The court accepted Mr. Pedersen's waiver of counsel without telling him that conviction would lead to life in prison with the possibility of parole.

Third, the prosecutor committed flagrant and ill-intentioned misconduct by taking advantage of Mr. Pedersen's pro se status. The prosecutor elicited improper opinions on credibility, introduced inadmissible hearsay, and argued that

repetition is a valid test of veracity, contrary to longstanding precedent.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Mr. Pedersen was in a relationship with Jessica Baxter, and they lived together with Baxter's daughter N.R. RP (2/13/20) 426-427. They broke up after 4 years together, in 2015. RP (2/13/20) 426-427.

At the age of 12, in 2018, Baxter's daughter N.R. got in trouble for bringing marijuana to school. RP (2/12/20) 319; RP (2/13/20) 406. N.R.'s cousin had been molested, and the two girls had been talking and texting about it. RP (2/13/20) 382-383. N.R. then claimed that Mr. Pedersen molested her when she was 5 or 6 years old. RP (2/12/20) 318.

N.R. first claimed that Mr. Pedersen had touched her inner thigh while she and her 2-year-old stepsister were in the bath. RP (2/12/20) 309-310, 320: RP (2/13/20) 409. She later added a claim that he put his penis in her mouth while she sat

on the floor of her room. RP (2/12/20) 316-318, 320; RP (2/13/20) 410, 433. N.R. struggled to tell a consistent story about where the two allegations occurred. RP (2/12/20) 307-308, 329-334, 341, 345; RP (2/13/20) 515.

The state charged Mr. Pedersen with Rape of a Child in the First Degree and Child Molestation in the First Degree. CP 1-2. At arraignment, he was notified that the maximum penalty was life in prison. RP (3/6/19) 6.

After multiple continuances (over Mr. Pedersen's objection), Mr. Pedersen came to believe that only he truly understood his own defense. RP (3/27/19) 12-15; RP (5/13/19) 17; RP (5/15/19) 17-35. He wanted to be able to talk directly to the jury: he believed if he could represent himself, he could show the jury who he really was. RP (5/15/19) 17-35.

The judge discussed with Mr. Pedersen several issues relating to self-representation. RP (5/15/19) 17-35. The court told Mr. Pedersen that he was facing 240 to 318 months incarceration. RP (5/15/19) 17. The judge did not tell him that

conviction would carry a sentence of life in prison with a possibility of parole.[1] RP (5/15/19) 17-35.

At a later hearing, the court reminded Mr. Pedersen that his standard range was 240 to 318 months. RP (5/20/19) 25. Once again, the court did not tell him that he would be sentenced to life in prison with a possibility of parole if convicted. RP (5/20/19) 25.

The week before trial started, the prosecutor filed an amended information. CP 10-11. This added two aggravating factors: abuse of trust and vulnerable victim. CP 11. Standby counsel objected based on the late filing, but the court allowed the amendment. RP (2/5/20) 165; RP (2/6/20) 137.

The judge did not ensure that Mr. Pedersen understood that aggravating factors could raise his minimum term above the standard range. RP (2/6/20) 137-139. Nor did the court tell

[1] Nor did the judge mention that the statutory maximum sentence was life in prison.

Mr. Pedersen that he faced life in prison with a possibility of parole.[2] RP (2/5/20) 163-167; RP (2/6/20) 137-138.

At trial, the state called a sexual assault expert to explain to jurors why a child would report abuse long after it occurred. RP (2/13/20) 393-406. In response to a question from the prosecutor, she told the jury that children lie about sexual abuse less than 4% of the time.[3] RP (2/13/20) 402.

Four state witnesses relayed what N.R. had told them about her allegations. At the prosecutor's request, each witness repeated N.R.'s accusations. RP (2/13/20) 378-487. N.R.'s grandmother even told the jury that she did not have "any doubt in what [N.R.] was saying." RP (2/13/20) 413.

Detective Evitt told the jury that he'd been trained "how to determine if there are concerns with regards to a disclosure," and that his training included "specific things that happen when

[2] Or that that the statutory maximum was life in prison.

[3] On cross-examination, Mr. Pedersen had asked if children lie. RP (2/13/20) 401-402.

a disclosure is not true."[4] RP (2/13/20) 478- 479. He reviewed N.R.'s account, and highlighted factors suggesting (to him) that she was truthful. (2/13/20) 479-483.

The jury returned a verdict of not guilty on the child molestation charge. RP (2/14/20) 574-576. The jury found Mr. Pedersen guilty of first-degree rape of a child and answered "yes" to both aggravating circumstances. RP (2/14/20) 574-576; CP 48.

The judge sentenced Mr. Pedersen to life in prison. For the minimum term, the court imposed an exceptional sentence above the standard range. RP (4/9/20) 615-616; CP 51, 53.

Mr. Pedersen appealed. CP 68. The Court of Appeals affirmed his conviction, but vacated his sentence based on the Supreme Court's decision in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Opinion, pp. 21-22.

[4] The detective also testified that he'd been trained to detect when a child's testimony had been coached. RP (2/13/20) 479.

ARGUMENT

I. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE OPINION TESTIMONY ON CREDIBILITY VIOLATED MR. PEDERSEN'S SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION OF THE FACTS.

Three witnesses provided opinion testimony on N.R.'s credibility and suggested that her account was truthful. This deprived Mr. Pedersen of his constitutional right to an independent jury determination of the facts.

A. A witness may not provide an opinion on the credibility of another witness.

An accused person has a right to an independent jury determination of facts required for conviction. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §§21 and 22; *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). Testimony vouching for the credibility of another witness "invades the province of the jury and jeopardizes the right to a fair trial." *State v. Lang*, 12 Wn.App.2d 481, 488–89, 458 P.3d 791 (2020); *see also State v. Sutherby*, 138 Wn.App. 609, 617, 158

P.3d 91 (2007), *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009).

Vouching testimony invades the province of the jury if it is "a nearly explicit statement by the witness that the witness believed the accusing victim." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007); *see also State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). Such statements create manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 936.

B. Three witnesses provided opinion testimony on N.R.'s credibility.

Tina Scott. The prosecutor asked N.R.'s grandmother Tina Scott "did you have any doubt in what [N.R.] was saying?" RP (2/13/20) 413. She replied "No." RP (2/13/20) 413. This was an explicit statement by Scott that she "believed the accusing victim." *Kirkman*, 159 Wn.2d at 936.

According to the Court of Appeals, "it appears the prosecutor's question was designed to address the clarity of the

information relayed by N.R., not the veracity of what she was saying." Opinion, p. 12. But even if the prosecutor had this intent, there is no indication that the grandmother did. Nor would a reasonable juror believe that the grandmother was talking solely about clarity rather than veracity.

The improper opinion testimony infringed Mr. Pedersen's right to due process and his right to a jury trial. *Sutherby*, 138 Wn.App. at 617-618.

Detective Evitt. Evitt testified as an expert on credibility. He claimed that he'd "spent time learning and studying about how to determine if there are concerns with regards to a disclosure." RP (2/13/20) 478. His "training and experience" included "specific things that happen when a disclosure is not true." RP (2/13/20) 479.

Evitt applied each of these factors to N.R.'s statements, highlighting those suggesting that she was truthful and discounting others that might suggest dishonesty. RP (2/13/20)

479-483. This conveyed Evitt's belief that N.R.'s allegations were true.

His testimony is akin to that found improper in *State v. Barr*, 123 Wn.App. 373, 98 P.3d 518 (2004) and *State v. Flook*, 199 Wn.App. 1052 (2017) (unpublished). In each case, an officer outlined cues from which to judge credibility, and applied those cues to witness statements. The convictions were reversed in both cases.

In this case, the Court of Appeals did not mention *Barr* or *Flook.* Instead, the court cited two cases upholding trial court decisions to *exclude* opinion testimony on credibility. Opinion, p. 17 (citing *State v. Willis*, 151 Wn.2d 255, 87 P.3d 1164 (2004) and *State v. Morales*, 196 Wn.App. 106, 123, 383 P.3d 539 (2016)). Both cases focused on ER 702, not the Sixth Amendment right to a jury determination of the facts.

The Court of Appeals also cited *State v. Madison*, 53 Wn.App. 754, 770 P.2d 662 (1989). *Madison* does not apply here. The *Madison* court pointed out that "[a] witness may

properly describe the manner and demeanor of a child at the time he is making such statements, and that description may include inferences." *Id.,* at 760. The case involved lay witness testimony; it did not address "expert" testimony of the type offered by Evitt.

As in *Barr* and *Flook,* Detective Evitt provided nearly explicit opinions vouching for N.R.'s credibility, couched in terms of his supposed expertise in assessing truthfulness. *See Barr,* 123 Wn.App. at 378; *Flook,* 199 Wn.App. at 1052 (unpublished). His opinions were "especially dangerous" because of his "heightened aura of authority" as a police officer. *Lang,* 12 Wn.App.2d at 488.

Jessica Johnson. Ms. Johnson testified as an expert, telling jurors that "less than four percent" of children lie about sexual abuse. RP (2/13/20) 402.

An expert may not testify regarding the percentage of children who make false accusations of sexual abuse. *United States v. Brooks,* 64 M.J. 325, 329 (C.A.A.F. 2007). Such

testimony is "the functional equivalent of saying that the victim in a given case is truthful or should be believed." *Id.*

In *Brooks*, a prosecution expert testified that false accusations of child sexual abuse occur between two and five percent of the time. *Id.* The appellate court criticized this testimony as "a mathematical statement approaching certainty about the reliability of the victim's testimony." *Id.* It found that the testimony went "directly to the core issues of the victim's credibility and truthfulness." *Id.*

Numerous jurisdictions have reached this same result. *See People v. Wilson*, 33 Cal. App. 5th 559, 568, 245 Cal. Rptr. 3d 256 (2019), *reh'g denied* (Apr. 24, 2019), *review denied* (July 17, 2019), *cert. denied sub nom. Wilson v. California*, 140 S. Ct. 543, 205 L. Ed. 2d 346 (2019) (collecting cases).

Johnson's testimony that "less than four percent" of children make false accusations falls squarely within this

prohibition.[5] *Brooks*, 64 M.J. at 329-330. The "practical result [of her testimony] was to suggest to the jury that there was an overwhelming likelihood [N.R.'s] testimony was truthful." *Wilson*, 33 Cal. App. 5th at 570.

This is so even though Johnson's testimony "was not expressly directed to" N.R.'s credibility. *Id.* The "practical result" of Johnson's statistic "was to suggest to the jury that there was an overwhelming likelihood [N.R.'s] testimony was truthful." *Id.* It is therefore irrelevant that Johnson's testimony "was limited to children in general, not N.R. specifically." Opinion, p. 12.

Nor did Mr. Pedersen open the door to the expert's statistical testimony by asking "Do children lie?"[6] RP (2/13/20) 401; *see* Opinion, pp. 12-13 ("The testimony was in direct response to the topic opened by Mr. Pedersen"). An accused

[5] The testimony was "especially dangerous" because she had "a heightened aura of authority" as an expert. *See Lang*, 12 Wn.App.2d at 488.

[6] Johnson responded to Mr. Pedersen's question ("Do children lie?") by saying "In my experience, not very often; but, yes, it could happen." RP (2/13/20) 401-402.

person "can 'open the door' to testimony on a particular subject matter, but he does so under the rules of evidence." *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307 (2008) (*Jones* I).

The open-door doctrine "provides the State with a broader landscape of relevant evidence;" however, "it does not provide license to disregard constitutional and evidentiary limitations on the admission of evidence." *Lang*, 12 Wn.App.2d at 487. Relevant evidence "is still subject to possible exclusion based on constitutional requirements, pertinent statutes, and the rules of evidence." *State v. Rushworth*, 12 Wn.App.2d 466, 474, 458 P.3d 1192 (2020).

Even if Mr. Pedersen's question made Johnson's testimony relevant, this did not make her testimony admissible. *Id.* Johnson infringed Mr. Pedersen's right to a jury trial by telling jurors that "less than four percent"[7] of children lie about sexual abuse. *See Brooks*, 64 M.J. at 329; *see also State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) ("[T]rial

[7] RP (2/13/20) 402.

courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness.")

Jurors should not have heard this statistic. If the prosecutor believed Mr. Pedersen's question ("Do children lie?") was inappropriate, the "proper course of action was to object to [the] question." *Jones* I, 144 Wn.App. at 295. It was not to introduce testimony that violated Mr. Pedersen's constitutional rights.

C. The Supreme Court should accept review and reverse.

Mr. Pedersen's argument that the credibility opinions offered here violated the constitution is available for the first time on review. Jurors heard three nearly explicit opinions on credibility; this created manifest error affecting Mr. Pedersen's right to due process and his right to a jury trial. RAP 2.5(a)(3). All necessary facts were available to the trial judge; thus, each violation is "obvious on the record," and "the court could have corrected the error." *State v. O'Hara,* 167 Wn.2d 91, 99-100,

217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (citing RAP 2.5(a)(3).

Review is appropriate because the Court of Appeals' decision conflicts with *Sutherby* and *Barr*. RAP 13.4(b)(2). In addition, this case involves significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

Courts need guidance on when testimony amounts to a "nearly explicit"[8] opinion on credibility. This case provides three examples for the court to examine: the direct comment that N.R.'s grandmother believed her, Johnson's expert testimony that only 4% of children lie about sexual abuse, and Evitt's "human lie detector" testimony.

The Supreme Court should accept review, reverse Mr. Pedersen's conviction, and remand for a new trial with instructions to exclude the inadmissible opinion testimony.

[8] *Kirkman*, 159 Wn.2d at 936.

II. THE SUPREME COURT SHOULD ACCEPT REVIEW AND HOLD THAT THE TRIAL COURT VIOLATED MR. PEDERSEN'S RIGHT TO COUNSEL.

A. A waiver of the right to counsel must be knowing, voluntary, and intelligent.

An accused person has a constitutional right to the assistance of counsel. U.S. Const. Amend. VI, XIV; Wash. Const. art. I, §22. A person may waive the right to counsel, but only if the waiver is knowing, intelligent, and voluntary. *State v. Burns*, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019). Courts indulge every reasonable presumption against waiver. *Id.*, at 202.

Before accepting a waiver, the court must conduct a colloquy on the record. *Id.*, at 203. The colloquy, "at a minimum, should… inform[ ] the defendant of… the maximum penalty upon conviction." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

A waiver is valid only if the court "ascertained that [the defendant] understood the possible penalties he faced." *United States v. Erskine*, 355 F.3d 1161, 1169 (9th Cir. 2004). A

waiver should not be accepted if the court fails to ensure that the defendant understands the maximum possible penalty. *Acrey*, 103 Wn.2d at 211; *Erskine*, 355 F.3d at 1167; *see also State v. Nordstrom*, 89 Wn.App. 737, 743, 950 P.2d 946 (1997).

B. The trial court never advised Mr. Pedersen that conviction would require a sentence of life with the possibility of parole.

The court did not tell Mr. Pedersen that a conviction would result in a life sentence with the possibility of parole RCW 9.94A.507. Instead, the court outlined the standard range, which was 240-318 months.[9] RP (5/15/19) 25-26; RP (5/20/19) 25. This was misleading, as conviction would *require* the imposition of life with a possibility of parole. RCW 9.94A.507.

The Court of Appeals did not address this argument. Opinion, pp. 4-5. Instead, the court focused on the court's

[9] After the prosecutor added aggravating factors to the charge, the court did not ensure that Mr. Pedersen understood that he could be sentenced to a minimum term that was above the standard range. CP 9-11; RP (2/5/20) 163-166; RP (2/6/20) 137-138. This failure also invalidated Mr. Pedersen's waiver of his right to counsel. *See, e.g., United States v. Hantzis*, 625 F.3d 575, 581 (9th Cir. 2010); *State v. Rhoads*, 813 N.W.2d 880, 889 (Minn. 2012).

failure to advise Mr. Pedersen of the maximum penalty during his colloquy with the judge. Opinion, pp. 4-5. The Court of Appeals concluded that "it would have been preferable for the trial court to review the statutory maximum penalty during the counsel-waiver colloquy, [but that] this was not required." Opinion, p. 5. According to the court, mention of the maximum penalty at arraignment sufficed to inform Mr. Pedersen, even though more than two months passed before he first sought to waive counsel. Opinion, p. 5. This is incorrect: the trial judge should have ensured that Mr. Pedersen was notified of the statutory maximum during the colloquy – when he was contemplating self-representation.

The court's failure to advise Mr. Pedersen that he faced life in prison with the possibility of parole[10] invalidates his waiver of counsel. *Id.* Mr. Pedersen's conviction must be

[10] And the court's failure to ensure he understood the statutory maximum was life in prison.

reversed, and the case remanded for a new trial. *Id.; Acrey*, 103 Wn.2d at 211.

The Supreme Court should accept review. This case involves a significant constitutional issue that is of substantial public interest. RAP 13.4(b)(3) and (4). The right to proceed without counsel is a fundamental constitutional right. Criminal defendants often exercise this right in Washington courts. Clarification of the standards for accepting a waiver is significant not only in this case, but also in every case where the accused seeks self-representation.

III. THE SUPREME COURT SHOULD ACCEPT REVIEW AND REVERSE BECAUSE THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT BY TAKING ADVANTAGE OF MR. PEDERSEN'S PRO SE STATUS.

The prosecutor took advantage of Mr. Pedersen's pro se status by eliciting inadmissible opinion testimony bolstering N.R.'s credibility, by introducing inadmissible hearsay that did not fit within a hearsay exception, and by making arguments

contrary to law. The misconduct was flagrant and ill-intentioned.

A prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Prosecuting attorneys "must function within boundaries while zealously seeking justice." *Id.*

Prosecutorial misconduct can deprive the accused of due process. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, §22. A conviction must be reversed where the misconduct prejudices the accused. *Id.* Absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Id.*, at 704.

Inadmissible opinion testimony. It is misconduct for a prosecutor to "deliberately elicit[ ] impermissible opinion testimony" on credibility. *State v. Hawkins*, 14 Wn.App.2d 182,

190, 469 P.3d 1179 (2020); *see also State v. Jerrels*, 83 Wn.App. 503, 508, 925 P.2d 209 (1996); *State v. Cook*, 17 Wn.App.2d 96, 105-110, 484 P.3d 13 (2021). Here, the prosecutor improperly asked questions designed to elicit opinions on N.R.'s credibility. RP (2/13/20) 406-491. For decades, the law has been clear that such questioning amounts to flagrant misconduct. *See State v. Jones*, 117 Wn.App. 89, 90-92, 68 P.3d 1153 (2003) (*Jones* II); *see also State v. Suarez-Bravo*, 72 Wn.App. 359, 366, 864 P.2d 426 (1994). The misconduct here was flagrant and ill-intentioned; it requires reversal of Mr. Pedersen's conviction. *Jerrels*, 83 Wn.App. at 506-508.

Inadmissible hearsay. A prosecutor does not fulfill the obligation to see justice done "by securing a conviction based on proceedings that violate a defendant's right to a fair trial—such convictions in fact undermine the integrity of our entire criminal justice system." *State v. Walker*, 182 Wn.2d 463, 476,

341 P.3d 976 (2015) (*Walker* I); *Hawkins*, 14 Wn.App.2d at 188.

Here, the prosecutor committed misconduct by introducing inadmissible hearsay and by arguing that repetition is proof of veracity. This misconduct was flagrant and ill-intentioned and requires reversal.

In opening statements, the prosecutor told jurors that N.R. had given multiple consistent statements. RP (2/12/20) 289. After N.R. testified, the prosecutor introduced statements N.R. had made to her mother, her grandmother, her cousin, and Detective Evitt. RP (2/12/20) 322-327; RP (2/13/20) 378-392, 409-410, 433-444, 451, 453-456; Ex. 1.

These out-of-court statements were introduced for their truth. They qualified as hearsay, and no exception justified their admission at trial. *See* ER 801-ER 804. The prosecutor took advantage of Mr. Pedersen's ignorance as a pro se litigant by introducing inadmissible hearsay.

The prosecutor also committed misconduct by misstating the law in closing argument. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Jones*, 13 Wn.App.2d 386, 403, 463 P.3d 738 (2020) (*Jones* III). A prosecutor's misstatement of the law "is a serious irregularity having the grave potential to mislead the jury." *State v. Walker*, 164 Wn.App. 724, 736, 265 P.3d 191, 198 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012) (*Walker* II).

Misconduct during argument can be particularly prejudicial; there is a risk that jurors will lend it special weight because of the prestige associated with the prosecutor's office. *Glasmann*, 175 Wn.2d at 706.

Prior consistent statements are not admissible to reinforce or bolster testimony. *State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). This is so because repetition "is not a valid test of veracity." *Id.* Despite this, the prosecutor suggested that N.R. was credible because she repeated her statements:

> Detective Evitt [told] you about how [N.R.] was consistent with him from interview to interview. RP (2/14/20) 552.
>
> She went through three separate interviews, two days of trial, and she was consistent throughout… She didn't waiver [sic]. RP (2/14/20) 557.
>
> [She] told you what happened, and she didn't shake from that… She did not change on that at all…. She did not waiver [sic]. Throughout the course of this case over a year, she has not waivered [sic]. RP (2/14/20) 570.

The prosecutor's argument suggested that N.R.'s statements were true because she repeated them. But the prosecutor knew (or should have known) that repetition "is not a valid test of veracity." *Id.* By encouraging jurors to accept N.R.'s repetition as proof of her credibility, the prosecutor committed flagrant and ill-intentioned misconduct.

Cumulative effect. A conviction must be reversed where the cumulative effect of a prosecutor's misconduct prejudices the accused person. *Allen*, 182 Wn.2d at 375, 376. Here, the prosecutor committed flagrant and ill-intentioned misconduct on numerous occasions.

The State's attorney elicited improper opinion testimony from three separate witnesses. RP (2/12/20) 406-491. The prosecutor also introduced inadmissible hearsay (repeating N.R.'s accusations) through multiple witnesses. RP (2/13/20) 406-491. Throughout the trial, the prosecutor suggested that repetition is a valid test for veracity. RP (2/13/20) 406-491; RP (2/14/20) 551-559, 570-571.

Each instance of misconduct was aimed at bolstering N.R.'s credibility. The improper opinion testimony, the inadmissible hearsay, and the misstatements of the law all suggested that N.R. told the truth. Because credibility "played such a crucial role," reversal is required despite the absence of an objection. *Jerrels*, 83 Wn.App. at 508.

Appellate courts have found flagrant misconduct for less. *See Jerrels*, 83 Wn.App. at 506-507; *Jones* II, 117 Wn.App. at 90; *Walker* II, 164 Wn.App. at 729-739; *Jones* III, 13 Wn.App.2d at 402-408.

The Supreme Court should accept review and reverse Mr. Pedersen's conviction. This case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4(b)(3) and (4). Claims of prosecutorial misconduct arise frequently. Determining when misconduct is flagrant and ill-intentioned can prove difficult. *See State v. Slater*, 197 Wn.2d 660, 486 P.3d 873 (2021) (reversing Court of Appeals); *State v. Loughbom*, 196 Wn.2d 64, 470 P.3d 499 (2020) (same).

Review is appropriate under RAP 13.4(b)(3) and (4).

IV. THE SUPREME COURT SHOULD ACCEPT REVIEW OF OTHER FEDERAL CONSTITUTIONAL ISSUES RAISED BY MR. PEDERSEN.

A. The trial court violated Mr. Pedersen's right to testify.

An accused person has the right to testify in a criminal trial. Wash. Const. art. I, §22; U.S. Const. Amends. V, VI, XIV. The right to testify is "fundamental." *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). The right

is absolute and cannot be abrogated. *Robinson,* 138 Wn.2d at 758.

During a pretrial hearing, the prosecutor said "Mr. Pedersen, obviously, can't testify on his own behalf, if he's going to be representing himself." RP (5/29/19) 43. The court did not correct this misstatement. RP (5/29/19) 43.

Furthermore, the judge's colloquies with Mr. Pedersen included ambiguous statements about his right to testify. For example, the court told Mr. Pedersen "You could represent yourself, but not testify." RP (5/15/19) 19.

Mr. Pedersen did not testify.

The court and the prosecutor deprived Mr. Pedersen of his "fundamental" right to testify. *See Rock*, 483 U.S. at 52. Mr. Pedersen's conviction must be reversed, and the case remanded for a new trial.

This case involves a significant constitutional issue that is of substantial public interest. The Supreme Court should accept review. RAP 13.4(b)(3) and (4).

B. The trial court interfered with Mr. Pedersen's right to represent himself.

The right to self-representation is protected by the state and federal constitutions. U.S. Const. Amend. VI and XIV; *Faretta v. California*, 422 U.S. 806, 819-836, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Wash. Const. art. I, §22; *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). In addition, a criminal defendant has a due process right to a fair trial. U.S. Const. Amend. XIV; *see Strickland v. Washington*, 466 U.S. 668, 684-685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Here, the trial court interfered with Mr. Pedersen's right to due process and his right to self-representation. First, the court gave misleading legal advice, suggesting that a witness's prior statements could only be used for impeachment and were inadmissible for other purposes. RP (2/3/20) 154-155.

Second, the court limited the role of standby counsel without input from Mr. Pedersen. RP (1/15/20) 93-99; CP 5-8. The court had the discretion to permit or require broader participation by standby counsel. *United States v. Lawrence*,

161 F.3d 250, 253 (4th Cir. 1998); *see, e.g., McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Third, the court entered an order prohibiting Mr. Pedersen from having contact with any witness. CP 73. The order was included in Mr. Pedersen's conditions of release. CP 73. To be meaningful, the right to self-representation must include "some access to… witnesses." *Milton v. Morris*, 767 F.2d 1443, 1445 (9th Cir. 1985), *abrogated on other grounds by Kane v. Garcia Espitia*, 546 U.S. 9, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005).

The misleading legal advice, the limitations placed on standby counsel without input from Mr. Pedersen, and the prohibition against contact with witnesses violated Mr. Pedersen's right to due process and his right to self-representation under the state and federal constitutions. *Faretta*, 422 U.S. at 819-836; *Madsen*, 168 Wn.2d at 503; *Strickland*, 466 U.S. at 684-685.

The Supreme Court should accept review and reverse Mr. Pedersen's conviction. This case presents significant constitutional issues that are of substantial public interest. RAP 13.4(b)(3) and (4).

CONCLUSION

The Supreme Court should accept review and reverse Mr. Pedersen's conviction. The conviction was based in part on improper opinion testimony bolstering N.R.'s credibility. In addition, the prosecutor committed flagrant and ill-intentioned misconduct, taking advantage of Mr. Pedersen's pro se status to introduce inadmissible evidence and to make arguments contrary to law. Finally, Mr. Pedersen's waiver of his right to counsel was invalid. He was never informed that he would receive life in prison with a possibility of parole if convicted.

The Supreme Court should also accept review to address violations of Mr. Pedersen's constitutional right to testify and his right to self-representation.

Respectfully submitted on September 10, 2021,

BACKLUND AND MISTRY

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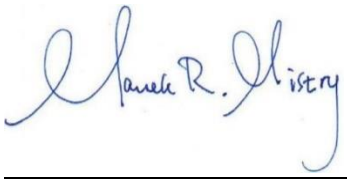

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CERTIFICATE

Jodi Backlund declares as follows:

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4805 words, as calculated by our word processing software.

On today's date, I mailed a copy of this document to:

Jeremey Pedersen, DOC #840025
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed on September 10, 2021 in Olympia, Washington.

_____
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CASE # 375382
State of Washington v. Jeremey Douglas Pedersen
CHELAN COUNTY SUPERIOR COURT No. 181007322

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or, if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

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FILED
AUGUST 31, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JEREMEY DOUGLAS PEDERSEN, Appellant.	)))))))))	No. 37538-2-III UNPUBLISHED OPINION

PENNELL, C.J. — Jeremy Pedersen appeals his conviction for first degree child rape. We affirm the conviction but remand for resentencing.

FACTS

In 2018, 12-year-old N.R. told her grandmother she had been molested six years earlier by her mother's boyfriend, Jeremy Pedersen. The grandmother immediately called N.R.'s mother about the disclosure. N.R.'s mother then contacted law enforcement and Detective Stephen Evitt conducted a forensic interview with N.R. The State charged Mr. Pedersen with one count of first degree child molestation and one count of first degree child rape.

Mr. Pedersen was initially represented by court-appointed counsel. At arraignment, he was informed of the maximum penalties of life in prison and/or a $50,000 fine on both

charges. Together with his court-appointed attorney, Mr. Pedersen reviewed and signed an acknowledgement of advice of rights that restated the maximum penalty for his charges.

Subsequent to arraignment, Mr. Pedersen advised the court he wished to represent himself. Mr. Pedersen indicated he was satisfied with his attorney, but he thought he could better show the jurors who he was through self-representation. The trial court engaged Mr. Pedersen in a lengthy colloquy regarding his rights and the dangers and disadvantages of self-representation. The court advised Mr. Pedersen of the standard sentencing range he could face upon conviction. The court did not reiterate the statutory maximum terms of incarceration. The court ended the colloquy by giving Mr. Pedersen several days to reconsider his request for self-representation. Mr. Pedersen subsequently confirmed he wished to proceed pro se. The court accepted this position and appointed Mr. Pedersen's existing attorney as standby counsel.

Prior to trial, the State filed an amended information adding two sentencing aggravators to each of the charges.[1] The amended information stated the maximum sentence of life in prison and/or a $50,000 fine. At a hearing, Mr. Pedersen indicated

[1] The two aggravators were the particularly vulnerable victim aggravator as defined in RCW 9.94A.535(3)(b), and the position of trust aggravator as defined in RCW 9.94A.535(3)(n).

he reviewed the amended information. At the trial court's request, the State informed Mr. Pedersen the sentencing aggravators, if found by the jury, allowed the court to sentence him beyond his standard range.

At trial, the State elicited testimony from N.R., her mother, her grandmother, her cousin, Detective Evitt, and Jessica Johnson, an expert on sexual abuse. During his case in chief, Mr. Pedersen elicited testimony from N.R. and Detective Evitt. Mr. Pedersen did not testify.

The jury found Mr. Pedersen guilty of first degree child rape, but acquitted him of child molestation. The jury also found the two sentencing aggravators on the child rape charge.

At sentencing, Mr. Pedersen faced a standard range of 240 to 318 months' imprisonment. Mr. Pedersen's offender score was based in part on a prior conviction for possession of controlled substances. The trial court imposed an exceptional sentence of 342 months' imprisonment, which was 24 months above the high end of the standard range. The court also imposed lifetime community custody and a $500 victim penalty assessment. The State represented that Mr. Pedersen was indigent and did not ask for any additional legal financial obligations. Nevertheless, Mr. Pedersen's judgment and

sentence states Mr. Pedersen is required to "pay supervision fees as determined by DOC [Department of Corrections]" while on community custody. Clerk's Papers at 53.

Mr. Pedersen now appeals his conviction and sentence.

ANALYSIS

Waiver of right to counsel

Individuals charged with crimes enjoy competing rights to counsel and self-representation. *State v. James*, 138 Wn. App. 628, 635, 158 P.3d 102 (2007). The default is the right to counsel. In order for the right to counsel to give way to the right to self-representation, the trial court must ensure the waiver of counsel is "knowing, voluntary, and intelligent." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984).

There is no set formula for assessing the validity of a waiver of counsel. *James*, 138 Wn. App. at 636. "[A]t a minimum" the defendant should be advised of "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical, procedural rules governing the presentation of the accused's defense." *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). The ultimate question is whether the defendant made an informed choice "with eyes open." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942). We review a trial

court's decision regarding waiver of the right to counsel for abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011).

Mr. Pedersen claims his counsel waiver was invalid because his colloquy with the trial court did not include advice regarding his statutory maximum term of incarceration. We are unpersuaded. While it would have been preferable for the trial court to review the statutory maximum penalty during the counsel-waiver colloquy, this was not required. Mr. Pedersen was advised of the statutory maximum term prior to his counsel waiver, during arraignment and through the advisement of rights form. Nothing in the record suggests Mr. Pedersen did not understand his maximum term of imprisonment. This case is therefore distinct from *State v. Nordstrom*, 89 Wn. App. 737, 744, 950 P.2d 946 (1997), where the defendant was never informed as to the maximum penalty and *United States v. Erskine*, 355 F.3d 1161, 1171 (9th Cir. 2004), where the defendant was misinformed as to the maximum penalty.

Mr. Pedersen also argues the court should have confirmed his desire for self-representation after the State filed amended charges. This is not required by our case law. *See State v. Modica*, 136 Wn. App. 434, 445, 149 P.3d 446 (2006), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008). Furthermore, the trial court revisited Mr. Pedersen's desire to

represent himself during a February 11, 2020 hearing. This was after the State filed the amended information but before trial.

Finally, Mr. Pedersen argues his constitutional rights were violated because he was erroneously advised he would waive his right to testify if he represented himself. The purported advice came during a CrR 3.5 hearing addressing the admissibility of Mr. Pedersen's statements to police. The CrR 3.5 hearing took place after Mr. Pedersen waived his right to counsel. During the hearing, the prosecutor and the court had the following colloquy:

> THE COURT: Does the State intend to introduce any of those statements?
>
> [THE PROSECUTOR]: Potentially. I don't know—Mr. Pedersen, obviously, can't testify on his own behalf, if he's going to be representing himself, so he's going to need to—those statements—depending on—I don't know. He could change his mind, between now and then, whether or not he wants an attorney. I don't know. So the State needs to be prepared for everything.
>
> So there are statements that are offered, that, if he changes his mind, day of trial, then I need to be prepared.
>
> THE COURT: Okay.

1 Report of Proceedings (RP) (May 29, 2019) at 42-43.

The prosecutor clearly misspoke when she said Mr. Pedersen could not testify if he represented himself. However, Mr. Pedersen has not shown how this comment impacted any of his rights. During the trial court's colloquies with Mr. Pedersen on self-

representation, the court repeatedly explained Mr. Pedersen had the right to testify, but was not required to do so. The court cautioned Mr. Pedersen that if he represented himself but chose not to testify, he would not get to use closing argument to tell his "side of the story." 1 RP (May 15, 2019) at 19. Mr. Pedersen repeatedly affirmed he understood the trial court's advice. Contrary to the arguments made on appeal, nothing about the trial court's explanation of the right to testify was contradictory or confusing.

Given the totality of the circumstances, Mr. Pedersen validly waived his right to counsel in favor of his right to self-representation.

Right of self-representation

Mr. Pedersen argues the trial court undermined his right of self-representation by misadvising him on the admissibility of prior witness statements, unnecessarily limiting the role of standby counsel, and issuing conditions of pretrial release impairing his access to witnesses. We address Mr. Pedersen's arguments in this order.

Advice on admissibility of prior statements

Mr. Pedersen claims the trial court erroneously told him he would only be able to admit testimony regarding N.R.'s prior out-of-court statements for impeachment purposes. Mr. Pedersen points out that a witness's prior statements can sometimes be

admitted as substantive evidence, not just impeachment. Thus, he claims the trial court's advice was faulty.

We disagree the trial court's comments were misleading. In context, it was apparent Mr. Pedersen was interested in impeaching N.R. with allegedly prior inconsistent statements. The trial court correctly advised Mr. Pedersen about the limited admissibility of such testimony. Mr. Pedersen fails to point to any authority requiring the trial court to volunteer that certain types of prior statements can be admissible as substantive evidence.

Even if the trial court had misspoken, Mr. Pedersen fails to show prejudice. The trial court made clear Mr. Pedersen had the right to call any witnesses to N.R.'s prior statements. Yet Mr. Pedersen declined to do so. There is no reason to think Mr. Pedersen's choice not to call witnesses was based on a misunderstanding regarding whether their statements would be considered impeachment or substantive evidence.

Role of standby counsel

Mr. Pedersen argues the trial court abused its discretion in limiting the role of standby counsel to legal research, assisting with subpoenas, facilitating communication with the State, and answering legal and procedural questions during trial. Mr. Pedersen did not ask standby counsel to play a greater role and he cites no authority to suggest a

trial court is obliged to offer a menu of services from standby counsel. "[T]here is no absolute right of the pro se defendant to standby counsel." *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). It is appropriate for a trial court to define standby counsel's role so counsel knows their obligations, does not infringe on the defendant's right of self-representation, and is not forced to serve as the defendant's law clerk or assistant. *See State v. Silva*, 107 Wn. App. 605, 627-28, 27 P.3d 663 (2001). The trial court here exercised appropriate discretion in defining the role of Mr. Pedersen's standby counsel.

Access to witnesses

Finally, Mr. Pedersen argues the trial court interfered with his ability to prepare his defense by signing a pretrial release order prohibiting him from contacting any and all witnesses. We disagree with this assessment. By the time Mr. Pedersen was released from custody, N.R. and her mother had already been interviewed by standby counsel and an investigator. Mr. Pedersen had authorization to use the services of the investigator to conduct pretrial interviews. Mr. Pedersen utilized his authorization to interview N.R.'s grandmother and Detective Evitt. During the pretrial process and trial, Mr. Pedersen never objected to the adequacy of the investigative tools provided by the trial court. His claim the trial court impaired his right to prepare a defense fails as a factual matter.

Unpreserved trial errors

For the first time on appeal, Mr. Pedersen claims the State committed various trial errors by illegally introducing evidence and engaging in improper argument. Litigants are generally not entitled to appellate review of unpreserved errors. *See* RAP 2.5(a). An exception exists for "manifest error affecting a constitutional right." RAP 2.5(a)(3). This exception is a narrow one. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Even in the criminal context, it does not entitle a party to review of an unpreserved issue based simply on the claim of a constitutional right to a fair trial. *See id.* Instead, the alleged constitutional error must be truly constitutional in nature, instead of mere trial or evidentiary error. *See State v. Powell*, 166 Wn.2d 73, 84, 206 P.3d 321 (2009). In addition, to be a candidate for review, the error must be "manifest," such that the existing record shows the error had a practical and identifiable impact on trial. *Kirkman*, 159 Wn.2d at 935.

The errors identified by Mr. Pedersen include allegations of improper opinion testimony, introduction of hearsay evidence, and prosecutorial misconduct during summation. We discuss each of the claims in turn.

Opinion testimony

Mr. Pedersen claims the prosecutor improperly elicited opinion testimony from three of the State's witnesses: N.R.'s grandmother, Jessica Johnson, and Detective Evitt. Our case law makes clear that witness testimony touching on an ultimate issue of fact, such as the veracity of a complaining witness, is not automatically reviewable as a manifest constitutional error. *Id.* at 936. Instead, "'[m]anifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." *Id.*

1. N.R.'s grandmother

The statement from N.R.'s grandmother is contained in the following testimony on direct examination:

> Q. . . . Did you tell [N.R.] what to say to make a disclosure?
> A. No.
> Q. When [N.R.] was crying and telling you, did you have any doubt in what she was saying?
> A. No.

1 RP (Feb. 13, 2020) at 413.

The grandmother's testimony does not include an explicit or nearly explicit statement that she believed the truth of N.R.'s allegation. Mr. Pedersen's defense strategy was to raise doubts about N.R.'s recollections about her abuse. He focused on the possibility N.R. mistook him for a different possible perpetrator. Given N.R. was crying

at the time she made a disclosure to her grandmother, it appears the prosecutor's question was designed to address the clarity of the information relayed by N.R., not the veracity of what she was saying.

2. Jessica Johnson

The testimony from Jessica Johnson was elicited during redirect examination. On cross-examination, Mr. Pedersen engaged Ms. Johnson in the following question and answer:

> Q. . . . Do children lie?
> A. In my experience, not very often; but, yes, it could happen.

Id. at 401-02.

The prosecutor followed up on this question during redirect:

> Q. Ms. Johnson, when we're talking about children lying, what does the research say about children lying about sexual abuse? Does that happen frequently?
> A. No. It's less than four percent.
> Q. Of all reported sexual assaults?
> A. Yes.

Id. at 402.

Ms. Johnson's testimony did not constitute a comment on N.R.'s credibility. Her testimony was limited to children in general, not N.R. specifically. The testimony

was in direct response to the topic opened by Mr. Pedersen during cross-examination. It was not improper.

3. Detective Evitt

The testimony at issue from Detective Evitt is more considerably extensive, as it involved his description of the protocols used to interview N.R. The following excerpts from the State's direct examination are relevant to Mr. Pedersen's claims:

> Q. . . . So when you're interviewing a child, are there certain steps or protocols that you follow?
> A. Yes. And that's where the Child Forensic Interview training comes along. It's a 40-hour course that—from my recollection of that, it's research based. The design of the course is to be as—as least suggestive to kids and how to ask questions as well as the initial—some of the initial protocols before asking the questions that are pertinent to the investigation to get an idea of their ability to communicate . . . .
> . . . .
> Q. And why do you ask for a promise to tell the truth?
> A. Again, based on the training, there are studies that show that have looked at child interviews over the years that that [sic] eliciting of a promise to tell the truth gets the desired results of kids will tell the truth.
> . . . .
> Q. Are there certain types of questions that you stay away from when you're doing a child forensic interview?
> A. Anything suggestive. And I'm not perfect. I know that I've asked suggestive questions on occasion. But suggestive questions, *yes* or *no* questions, unless the *yes* or *no* question is followed up with an open-ended question. . . .
> . . . .
> Q. When you interviewed [N.R.], did you use this protocol?

A. Yes.
. . . .
Q. And does it surprise you that there would be testimony from her grandmother that he touched her vagina and then with you it was very close to her vagina?
A. No, not at all.
Q. Why not?
A. The—based on my experience with interviewing people, the—the things that happened to the individual are—are imprinted in their minds differently than someone that is listening about that, and then you add time on to that as well. . . . And so I think the most critical piece of that is if it didn't happen to you, it's—it's not typically—the detail of it isn't necessarily remembered as well.
. . . .
Q. What word did she use?
A. She used the word "stick."
Q. And is it uncommon in your experience for a child to use—to not be comfortable using the anatomically correct word?
A. It's more common that children, regardless of age . . . . It's not uncommon. Most actually use whatever word typically they use in their family. . . .
. . . .
Q. Was [N.R.] consistent with you in what she told from you [sic] the first interview to the second interview?
A. Yes. . . .
. . . .
Q. Did you have any concerns about [N.R.'s] account of her abuse?
A. I did not.
Q. Have you had interviews in the past where you've had concerns?
A. Yeah.
. . . .
Q. Detective Evitt, based on your training and experience, are there things that you would expect to see if [N.R.] was just mimicking what happened to [her cousin] as part of her outcry?
THE DEFENDANT: Objection. Speculation.
THE COURT: Sustained without further foundation.

[PROSECUTOR]: Your Honor, he's testified at length that he's been a person [sic] detective for six years, that he's received extensive training in sexual abuse and sexual assault and handled two hundred plus child sexual assault cases. I believe that gives him a basis on—based on his training and experience to comment on that issue.

THE COURT: I don't know that it does, so you'll need to lay a foundation.

. . . .

Q. . . . Detective Evitt, as part of your training, do you—have you spent time learning and studying about how to determine if there are concerns with regards to a disclosure of sexual assault or sexual abuse?
A. Yes. That's been a part of many trainings that I've been to.
Q. And in every case that you take, do you take the time to be critical of the disclosure to make sure that you are proceeding appropriately?
A. Yes. My goal is to be both as thorough and as critical as I can.
Q. And as part of your training and experience, have you learned about specific things that can happen when a disclosure is not true?
A. Yes. I've noticed a few things.
Q. And have you received specific training in signs to look for when there has been a coaching of a disclosure?
A. Yes, there are some of those.
Q. And so what are some of the signs that you would look for when there's been coaching of a disclosure?
A. Some of them could be in particular with a physical act that is being described where the detail is lacking or perhaps there's an *I*—a significant amount of *I don't remembers*. Or we're also trained to look for the sights and smells and feelings and, you know, things that would be associated with a traumatic event that people in general, including children, would—would have—would have as a memory.
Q. When you interviewed [N.R.], was she able to tell you all the sights that she had surrounding both incidences of abuse?
A. She had some sights and they were very specific and some of the ancillary things around the room or—She did not describe, you

know, colors, and—but it was very specific to her—to her where she was located in relation to Mr. Pedersen.

Q. Did she have specific recollection of words that were said during the abuse?

A. Yes, she did.

Q. When a child is—when you're concerned about coaching, is there also a concern about the consistency of the disclosure?

A. Yes.

Q. Why is that a concern?

A. In general, not just with children, but when people talk about events that haven't happened or they're trying to remember something that they were either told or they made up themselves, it's very difficult to create the same details more than one time.

Q. And when did you initially interview [N.R.]?

. . . .

A. . . . The date of the forensic interview was July 11 of 2018.

. . . .

Q. Was [N.R.] clear to you during the interview with her about where precisely each act of sexual abuse took place?

A. As I recall in the initial stages of talking about what had happened, she mentioned that both incidences happened in one house. . . . And then towards the end . . . she separated them into the big—the front house and the back house. She didn't use the word *dollhouse* with me. . . .

Q. Does that cause you any pause with regards to her disclosure that she had the location first altogether and then separated out upon further questioning?

A. No.

Q. Why not?

A. Because when a child victim and/or even an adult, when trauma happens, there are things that you don't remember. At least that's been my experiences. . . .

Q. So at times, it can be significant; at times, it cannot?

A. Very circumstantial.

Q. Detective, based on your training and experience, why would [N.R.] only disclose part of her abuse initially to her family?

> THE DEFENDANT: Objection. Speculation.
> THE COURT: It was phrased in terms of his training and experience. I'll allow the question.
> THE WITNESS: Just based on my training and experience, sometimes—and it's personality and circumstances—some people don't feel comfortable disclosing everything all at once. . . . I mean, there isn't any one particular answer. There's multiple reasons why somebody might not disclose all of something at one time.

Id. at 446, 448, 450-53, 455, 457, 477-83.

The foregoing excerpts show Detective Evitt's testimony was focused on generalized issues regarding memory and recall. He also addressed potential concerns that he might have influenced N.R.'s testimony through the use of suggestive questioning. Our decisions have held these are permissible topics for expert opinions. *See State v. Willis*, 151 Wn.2d 255, 262-64, 87 P.3d 1164 (2004); *State v. Morales*, 196 Wn. App. 106, 122-25, 383 P.3d 539 (2016).

At times, Detective Evitt indicated that, based on his training and experience, he did not see any red flags with respect to N.R.'s account of abuse. But testimony that N.R. did not show signs of coaching, inconsistency, or other fabrication is not the same as explicitly stating N.R. was telling the truth or that Detective Evitt believed N.R. *See State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Indeed, a witness may provide a clear and consistent account of an event that raises no red flags, but is nevertheless false.

Kirkman, 159 Wn.2d at 930 ("A witness or victim may 'clearly and consistently' provide an account that is false.").

This case is far different from our recent decision in *State v. Cook*, 17 Wn. App. 2d 96, 484 P.3d 13 (2021). In *Cook*, the prosecutor engaged in repeated acts of vouching, including improperly asking witnesses to opine on the victim's credibility. A primary distinction between *Cook* and this case is that the prosecutor's actions in *Cook* generated at least some objections, which were overruled. In addition, the testimony in *Cook* contained far more explicit evaluations of the victim's credibility than what occurred here. For instance, when questioning the investigative detective in *Cook*, the prosecutor elicited testimony that it was the detective's practice to inform the prosecutor if he believed a victim was "lying," but no such information was reported in Mr. Cook's case. *Id*. at 102. The prosecutor also elicited testimony from a forensic interviewer that her interview process was "shown to produce truthful and accurate information." *Id*. Here, Detective Evitt never indicated he had made an assessment of whether N.R. was lying, he merely explained how N.R.'s interview did not raise any red flags when judged according to his forensic training. Unlike the interviewer in *Cook*, Detective Evitt never said his interview was designed to elicit the truth. Instead, Detective Evitt focused on ways in

which his interview was designed not to influence the child's testimony and to evaluate some red flags.

It is often appropriate for the prosecution or defense to elicit testimony regarding human memory and forensic interview techniques. In such cases, the line between permissible expert testimony and an improper opinion about credibility can become blurry. It is for this reason an objection is so important. A timely objection allows the trial court to orient the witness's testimony and remind the jury of their independent role in determining credibility. But when no objection is made, the nebulousness of the witness's testimony becomes irreparable. Appellate intervention is unwarranted in such circumstances.

Because Mr. Pedersen has not shown the State's witnesses provided explicit or nearly explicit opinions regarding N.R.'s credibility, his unpreserved complaints regarding improper opinion testimony will not be reviewed.

Hearsay evidence

Mr. Pedersen alleges the prosecutor improperly introduced evidence of N.R.'s prior consistent statements in violation of evidentiary hearsay rules. We decline to review this argument under RAP 2.5(a). Because N.R. testified, Mr. Pedersen's arguments do not implicate his constitutional right to confront witnesses. *See Crawford v. Washington*,

541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Moreover, even if there were a confrontation issue, this type of constitutional claim is not one that can be raised for the first time on appeal. *State v. Burns*, 193 Wn.2d 190, 210, 438 P.3d 1183 (2019).

Mr. Pedersen attempts to recast his hearsay argument as constitutional error by claiming it constituted prosecutorial misconduct. But prosecutorial misconduct is not a stand-alone constitutional claim. If an allegation of prosecutorial misconduct could resurrect an unpreserved evidentiary error, such as the introduction of hearsay evidence, RAP 2.5(a)'s exception for unpreserved errors would no longer be narrow. The exception would swallow the rule. We decline to review Mr. Pedersen's unpreserved hearsay arguments.

Improper argument

Mr. Pedersen argues the prosecutor committed misconduct in summation by suggesting N.R. was credible because she repeated her statements. Because this issue was not preserved, review turns on whether Mr. Pedersen can show the prosecutor's actions were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Here, the burden has not been met. The prosecutor is allowed to argue their case. This includes arguing the evidence at trial supports the victim's credibility. The fact that Mr. Pedersen

could have asserted a hearsay objection to some of the evidence supporting N.R.'s credibility did not bar the prosecutor from making arguments regarding the admitted evidence. There was no flagrant and ill-intentioned misconduct. *See State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996) ("Prosecutors may argue inferences from the evidence, including inferences as to why the jury would want to believe one witness over another.").

Sentencing issues

At sentencing, Mr. Pedersen's offender score was enhanced by a prior conviction for possession of controlled substances. The Supreme Court has since decided in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), that controlled substance convictions, such as Mr. Pedersen's, are void. A void conviction cannot be used to enhance a defendant's offender score. *See State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). Accordingly, Mr. Pedersen is entitled to resentencing.

At resentencing, Mr. Pedersen may ask for all discretionary legal financial obligations to be struck from the judgment and sentence based on indigence, including Department of Corrections supervision fees imposed pursuant to RCW 9.94A.703(2)(d). *See State v. Spaulding*, 15 Wn. App. 2d 526, 536, 476 P.3d 205 (2020).

CONCLUSION

Mr. Pedersen's conviction is affirmed. This matter is remanded for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, C.J.

WE CONCUR:

Lawrence-Berrey, J.

Staab, J.

BACKLUND & MISTRY

September 10, 2021 - 10:18 AM

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Appellate Court Case Title:	State of Washington v. Jeremey Douglas Pedersen
Superior Court Case Number:	18-1-00732-2

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