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SUPREME COURT NO. ________

NO. 84234-0-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CAREY,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN KOCH & GRANNIS, PLLC
The Denny Building
2200 Sixth Avenue, Suite 1250
Seattle, Washington 98121
206-623-2373

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner John Carey seeks review of the Court of Appeals' unpublished decision in State v. Carey, filed November 14, 2022 ("Op."), which is appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Three requirements must be satisfied for a hearsay statement to qualify as an excited utterance under ER 803(a)(2). A startling event must occur, the declarant must make the statement while under the stress of excitement caused by the event, and the statement must relate to the startling event. Although there is a dearth of Washington authority, a surprising *allegation* may serve as the startling event, and an accused person's startled statement in response may satisfy the rule's criteria. Did the trial court fail to observe the rules of evidence and deny Carey his right to present a defense and when it excluded Carey's highly probative immediate reaction—denial—to news that a family member was alleging sexual misconduct?

2. Where several family members testified they saw nothing untoward, the trial court instructed the jury, over defense objection, that it was not necessary that the complainant's testimony be corroborated. But this Court's own Committee on Jury Instructions has explicitly recommended against a non-corroboration instruction, noting corroboration to be a matter of evidentiary sufficiency best left to counsel's arguments. Yet appellate courts have denied challenges to the disfavored jury instruction based on a 73-year-old case from this Court.[1] Should this Court grant review to revisit that case and hold that trial court commented on the evidence, and violated Carey's right to due process, when it instructed the jury the testimony of the complainant need not be corroborated?

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[1] State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949).

C. STATEMENT OF THE CASE[2]

1. **Introduction to facts**

Carey is a member of large extended family living in Clark County. RP 394, 564-65. Carey's family (which included his children and his partner's children) had a close relationship with his brother Kevin's family, gathering at weekly dinners. RP 398-99, 564-65, 614. Kevin's children, including complainant I.C., also spent the night at Carey's house playing video games and hanging out with Carey's and his partner's children. RP 399-400, 566, 614. But, in late 2018, then-16-year-old I.C. accused Carey of inappropriate touching, occurring when she was between 13 and 15 years old. Carey was charged with seven related offenses,[3] and the case went to trial in March of 2021.

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[2] This petition refers to the verbatim reports as in the brief of appellant.

[3] The State charged Carey with a single count of second degree child molestation (Count 1), three counts of third degree child molestation (Counts 2, 6 and 7), and three counts of third degree child rape (Counts 3, 4, 5). CP 21-23.

2. **Trial testimony and exclusion of excited utterance**

Complainant I.C., 18 years old during trial, testified that when she was about 13 years old, Carey would slap her butt, and "it became a thing." RP 203. The activity was treated as a game, and others joined in, but I.C. didn't like it. RP 203-04, 285-86; see also RP 402-03. I.C. said Carey also grabbed her butt sometimes. RP 205. I.C. estimated she was still 13 when Carey started touching her breasts over her clothes. It continued when she was 14 and 15. RP 207-12.

Carey also grabbed I.C.'s front genital area over her clothes. RP 213-15. Carey touched I.C. under her clothes as well. On one occasion, while driving in Carey's Suburban, Carey pulled down I.C.'s pants and put a finger in her vagina. RP 218-20. I.C. also testified that on one occasion while spending the night at Carey's house, she got up to use the bathroom in the middle of the night. As she was leaving the bathroom, Carey pushed her back into the bathroom, pulled down her pants, turned her body so she was facing away from

him, and digitally penetrated her vagina. RP 222-26. I.C. was initially confused about what was happening and asked Carey what he was doing; she did not recall his response. RP 224. I.C. also testified about incidents (also occurring in that bathroom) during which Carey masturbated while penetrating her vagina with his fingers. RP 226-27. In addition, on one occasion when I.C. was 14 or 15, Carey placed her hand on his penis while they were in Carey's car. RP 229-33. Carey also sent I.C. photos of his genitals on messaging applications. But she did not keep the photos. RP 228-29.

I.C. stopped going to Carey's house for sleepovers. RP 234, 314; see also RP 590-91 (I.C.'s mother's testimony). A few months later, in late 2018, I.C. made a disclosure on a written questionnaire at a routine medical appointment. RP 234; see also RP 345-46 (mental health counselor's testimony). Asked about the questionnaire, I.C. told her physician that her uncle had done sexual things to her. RP 239. The physician set up an appointment with an affiliated mental health counselor. RP 239-

41. At that appointment, I.C. told her father, Kevin, that Carey had touched her. RP 241. I.C. and Kevin then told I.C.'s mother. RP 242-43. I.C. gave additional details at an interview with a forensic interviewer; a nurse later examined her. RP 246-47, 305.

On cross-examination, I.C. acknowledged details of her disclosures changed over time. For example, she gave details of a bathroom incident to the forensic interviewer. But she disavowed this disclosure at trial. RP 319-21. I.C.'s estimates regarding the number of incidents in the bathroom and car varied between various interviews and trial. RP 306-07, 323-24. I.C. also acknowledged that, although other people were around at times when Carey touched her, no one ever saw. See, e.g., RP 207-08, 231-32, 309-11.

I.C.'s father Kevin testified. Carey is Kevin older brother. RP 393. After I.C.'s disclosure, Kevin sent Carey a text message alerting Carey to the disclosure and cancelling holiday dinner plans. RP 450-51, 467.

The State introduced this text exchange via screenshots from Kevin's phone. Exs. 1, 2; see also RP 534, 536 (Kevin texted screenshots to detective). According to Kevin, Carey did not deny the texted allegations but, rather, responded by asking Kevin what he was going to do so Carey could "get stuff in order." RP 452. Kevin texted back that the allegations were made to a mandatory reporter, so the matter was out of Kevin's hands. RP 453. Carey responded by asking "when" and also texted "I'm sorry." RP 453. Kevin texted back that he was not sure when a case had been opened but guessed "12/21." RP 453. According to Kevin, Carey responded, "Okay. Thank you. Sorry. And apologize to her too." RP 454. Carey's last text was, "It's up to you on charges though, to press or not." RP 454. I.C.'s mother was present while Kevin was texting back and forth with Carey. RP 602-03.

Carey and his partner Chantel Cannady testified the text thread purportedly memorialized in Exhibits 1 and 2 had been altered. RP 664-65; cf. RP 463 (Kevin's testimony

acknowledging individual texts may be deleted from text threads). Carey's statements denying culpability had been deleted.[4] RP 665, 733-37, 844-49. But Carey no longer had the phone he used to send the texts because it had been dropped and broken. RP 737, 743, 837.

Carey sought to introduce Cannady's testimony that, shortly after receiving Kevin's initial text, Carey entered the room where Cannady was located. He was shaking and appeared shocked. RP 650. Carey stated, "Are you F-ing kidding me[?]" RP 650. Defense counsel argued this statement qualified as an excited utterance, an exception to the evidence rule prohibiting the introduction of hearsay. RP 652; ER 803(a)(2).

But the trial court excluded the statement because it was a denial of culpability by an accused person. And, although Carey

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[4] Carey's statements deleted by Kevin included "WTF [are you] talking about, and "[H]ow do you think I could do something like this." RP 845. Carey also sent a message urging Kevin to get I.C. help because he suspected someone else may have harmed her. RP 847.

made the statement after a startling event, it was not the type of startling event contemplated by the evidence rules. The court stated

> So the general rule is . . . the statement has to be made after a particularly exciting or shocking event, and the person still has to be under . . . the effect of the event. And there's all sorts of events that have been identified in case law, automobile accidents, assaults, that sort of thing.
>
> So here the event is a receipt of a text message with an accusation of a sexual assault. And, you know, certainly that . . . could provoke an emotional response. I think there's no real question about that. But, you know, is it the sort of startling event that the rule was structured to reflect[?]
>
> . . . .
>
> And there's a concern. [The prosecutor] pointed out that essentially it's an opportunity [for] the declarant to get away from cross-examination by getting the statement in as a hearsay exception. So, you know, in this case I just don't find that . . . the event is of the startling nature . . . that the case law I think requires.
>
> You know, I'm not going to say that the defendant did not . . . have an emotional response. I think somebody accused of a crime like this would have

> an emotional response. [I]t's just not of the nature that the rule contemplates. So I sustain the objection.

RP 654-55.

Carey testified and denied all allegations. RP 849, 875. But, as stated, the trial court prohibited both Carey and Cannady from testifying about Carey's initial statement after learning of his niece's allegations.

Relatives testified on Carey's behalf. Carey's son, I.C.'s cousin, testified I.C. was rarely alone when she visited for sleepovers, and the teenagers, including Christian and I.C., stayed up later than the adults. RP 615-17; see also RP 783. Cannady testified Carey rarely drove alone with I.C. Except for one specific occasion that Cannady could recall, family members were always present. RP 634-35, 643-44, 671, 675. Cannady's daughter Isabell testified that during sleepovers at Carey's residence I.C. slept in Isabell's room, and Isabell tended to stay up later than I.C. RP 782, 798, 800.

3. **Non-corroboration jury instruction**

The State proposed a "non-corroboration" jury instruction relating to I.C.'s testimony. Carey objected. RP 881-91, 996. Overruling the objection, the trial court instructed the jury that "to convict a person of the [charged] crimes of child molestation in the second degree, child molestation in the third degree, or rape of a child in the third degree as defined in these instructions, *it is not necessary that the testimony of the alleged victim be corroborated*." CP 48 (instruction 21) (emphasis added).

4. **Verdicts and sentence**

The jury acquitted Carey of the single charge of second degree child molestation. CP 56. But it found him guilty of the remaining six charges, three counts of third degree child molestation and three counts of third degree child rape. CP 57-62. The jury also found by special verdict that Carey used a position of trust or confidence to facilitate the crimes. CP 64-69. The court found the jury's special verdict was a substantial and compelling reason to impose an exceptional sentence upward, as

was Carey's high offender score based solely on the current offenses. CP 117-18 (citing RCW 9.94A.535(3)(n) and RCW 9.94A.535(2)(c)); see CP 122 (no prior offenses). The court sentenced Carey to a total exceptional sentence upward of 120 months (consecutive 60-month terms), plus a consecutive term of 36 months of community custody (standard range incarceration reduced to impose community custody). CP 125.

Carey timely appealed. CP 139. He raised several issues, including the two issues identified above. The Court of Appeals rejected both arguments and affirmed the convictions. Op. at 4-10. Carey now asks that this Court grant review on both issues and reverse the Court of Appeals.

D. REASONS REVIEW SHOULD BE GRANTED

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

Review is appropriate under RAP 13.4(b)(3) and (4) because the case presents a significant question of law under the state constitution (issue 2) and an issue of substantial public

interest related to excited utterances by accused persons (issue 1).

2. **The trial court misapplied the law in excluding Carey's exculpatory excited utterance, violating the rules of evidence and Carey's constitutional right to present a defense.**

Perhaps because there is a dearth of Washington law addressing the scenario in the present case, the trial court misapplied the law in excluding Carey's exculpatory excited utterance. That court's decision boiled down to a legal determination—an incorrect one—about whether the excited utterance rule hearsay exception[5] could apply at all considering the type of startling event that occurred in this case.

An accused person has a constitutional right to present testimony in their defense. U.S. CONST. amend. VI; CONST. art. I, § 22; State v. Orn, 197 Wn.2d 343, 347, 482 P.3d 913 (2021);

[5] Under ER 803(a)(2), a statement relating to a startling event made while the speaker is under the stress or excitement caused by the event—an "excited utterance"—will not be excluded as hearsay.

State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); accord Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

This right extends to presenting a meaningful defense. State v. Jones, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). The constitutional right to present a complete defense circumscribes even the government's ability to draft rules that limit evidence. State v. Cayetano-Jaimes, 190 Wn. App. 286, 297, 359 P.3d 919 (2015). An accused person has the right to present relevant evidence. Id. at 297-98.

A trial court abuses its discretion when it applies the wrong legal standard or bases its ruling on an erroneous view of the law. Orn, 197 Wn.2d at 351; accord State v. Arndt, 194 Wn.2d 784, 799, 453 P.3d 696 (2019).

Three requirements must be satisfied for a hearsay statement to qualify as an excited utterance under ER 803(a)(2).

First, a startling event must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event. Third, the statement must relate to the startling event. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The crucial question is whether the declarant was still under the influence of the event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment. State v. Briscoeray, 95 Wn. App. 167, 173, 974 P.2d 912 (1999). The key consideration is spontaneity. State v. Woods, 143 Wn.2d 561, 598, 23 P.3d 1046 (2001). In determining spontaneity, courts look to the amount of time that passed between the startling event and the utterance, as well as any other factors that indicate whether the witness had an opportunity to reflect on the event and fabricate a story about it. Briscoeray, 95 Wn. App. at 173-74.

Although no Washington case squarely addresses the matter, persuasive authority from sister jurisdictions establishes

that the startling event may be an accusation of a crime rather than the underlying charged crime or incident. People v. Vanderpauye, 500 P.3d 1146 (Colo. App. 2021), review granted, 2022 WL 3021564 (2022); see also United States v. Moolick, 53 M.J. 174, 177 (C.A.A.F. 2000) (rape allegation, not underlying charged conduct, was the startling event provoking defendant's statement, which court erroneously excluded). This reasoning makes sense on a fundamental level.

Here, the trial court's stated reason for excluding the excited statement was that accusation of a crime was not the right *sort* of startling event as contemplated by the rules of evidence. See RP 654-55 ("And, you know, certainly [an accusation] could . . . provoke an emotional response. I think there's no real question about that. But, you know, *is it the sort of startling event that the rule was structured to reflect*?" (emphasis added)).

Significantly, the trial court did not determine the event itself was not sufficiently startling. Rather, the court stated it was the wrong *sort* of event. The court continued, "I just don't find

that . . . the event is of the startling nature . . . that the case law I think requires." RP 655. Further clarifying the *type* of event was the sticking point, the court stated, "You know, I'm not going to say that the defendant did not—was not—did not have an emotional response." RP 655. Carey is unaware of certain types of startling events that qualify and certain types that don't.

It appears that, for the trial court, there was another sticking point—the court was concerned that if Carey was permitted to introduce an out-of-court statement, he would be insulated from cross-examination. RP 655. This calls to mind the debunked distaste for "self-serving" hearsay. Yet there is no "self-serving hearsay" rule barring admission of statements favorable to the defense where the statements would otherwise satisfy a hearsay exception. State v. Pavlik, 165 Wn. App. 645, 650, 268 P.3d 986 (2011). Washington adopted the Rules of Evidence in 1979, which provide that a statement is not hearsay if it is offered against a party and is the party's own statement. Id. at 651-52 (citing ER 801(d)(2)). Pre-rule cases admitted such

admissions by party-opponents as hearsay exceptions rather than of excluding them from the hearsay definition altogether. Under this approach, admissions of a party were hearsay, but admissible against the party if relevant. Pavlik, 165 Wn. App. at 653. Several cases referenced self-serving hearsay as undesirable, but the cases failed to recognize the phrase as a reference to pre-rule authority. Id. Indeed, "[t]he rules of evidence contain no self-serving hearsay bar that excludes an otherwise admissible statement." Id.; see also State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967) ("self-serving" is shorthand way of saying statement is hearsay and does not fit recognized exception to hearsay rule).

Courts, however, must address admissibility under the recognized hearsay exceptions. Pavlik, 165 Wn. App. at 653-54. ER 803(a)(2) is one such exception, and there is no *exception to the exception* for statements by an accused person. See, e.g., Hinck v. State, 260 So. 3d 325, 331 (Fla. Dist. Ct. App. 2018) (where a defendant's statement otherwise qualifies by evidence

as an excited utterance, fact that statements are exculpatory "is not, in and of itself, a sufficient evidentiary basis for their exclusion"). "A flat rule of exclusion of declarations of a party on the grounds that they may be described as 'self-serving' even though otherwise free from objection under the hearsay rule and its exceptions, detracts from the fund of relevant information which should be available to the jury." United States v. Dellinger, 472 F.2d 340, 381 (7th Cir. 1972). Yet the trial court appeared to rule to the contrary in this respect.

The trial court's decision boiled down to a legal determination about whether the excited utterance hearsay exception could apply at all to the type of starling event at issue in this case. This Court should grant review to clarify that it can.

Nonetheless, the Court of Appeals declined to clarify the law or to find error. Op. at 5. Instead, to dispense with Carey's claim, it found any error harmless under both evidentiary and constitutional error standards, because Carey presented other

similar evidence. Op. at 5-8. The Court of Appeals' analysis is flawed in this respect, as well.

As Carey explained in the Court of Appeals, the excluded evidence—evidence of Carey's immediate reaction—was crucial to Carey's defense, not merely cumulative of other evidence. Although partner Cannady testified that upon receiving Kevin's text Carey appeared to be in shock and was shaking, RP 650-51, these physical reactions were just as likely to result from a truthful allegation than a false one and did not carry the same significance as the excluded evidence. And although Carey testified about responsive texts he dictated, and Cannady sent, to Kevin, RP 844-45, these were necessarily sent after Carey had time to reflect, unlike the excluded utterance. Finally, Carey did testify and deny culpability at trial, years later. RP 849, 875. But the court's ruling prevented Carey from presenting evidence of his immediate reaction to the allegations, which was likely to have enhanced his credibility in the eyes of jurors.

In Vanderpauye, 500 P.3d 1146, for example, the Colorado appellate court held that exclusion of an analogous statement was not harmless. There, the court held that a trial court erred in excluding a defendant's statement made immediately following an accusation by a rape complainant. Id. at 1153. The defendant stated that he thought he had received consent. Id. The court held the statement qualified as an excited utterance under Colorado's evidence identical evidence rule, id., and determined that the error was not harmless under a nonconstitutional harmless error standard:

> Because the [complainant's] lack of consent is an element of the charge for which Vanderpauye was convicted, whether [they] consented to sexual intercourse, the extent and substance of that consent, and whether [they were] in fact, asleep during the incident were all critical factual determinations for the jury. Vanderpauye's statement was directly relevant to these factual determinations.

Id. at 1154-55 (internal citation omitted). Further, the appellate court rejected the prosecution's claim that the "jury would not have credited [Vanderpauye's] self-serving hearsay statement."

Id. at 1155. The court stated, "Maybe so. But the determination of the credibility of witnesses is solely within the province of the jury. We cannot say what weight the jury would have given the evidence." Id. (internal quotations omitted). The court concluded, "there is a reasonable probability that Vanderpauye's statement could have affected the jury's verdict. Id.

As in that case, exclusion of Carey's spontaneous reaction denying I.C.'s allegations prejudiced Carey, warranting reversal under either constitutional or nonconstitutional harmlessness standards. This Court should grant review.

3. **The trial court commented on the evidence, in violation of the state constitution, when it instructed the jury over defense objection that the testimony of the complainant need not be corroborated.**

This Court should also reverse Carey's convictions because the trial court commented on the evidence.[6] Overruling

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[6] The instruction also violated Carey's due process rights under the state and federal constitutions. U.S. CONST. amends. V, XIV, § 1; CONST. art. I, § 3. It is fundamentally unfair to instruct the jury that no corroboration of a complainant's testimony is

a defense objection, the trial court instructed the jury that "to convict a person of the [charged] crimes of child molestation in the second degree, child molestation in the third degree, or rape of a child in the third degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." CP 48 (instruction 21). This instruction constituted an unconstitutional comment on the evidence.

Article 4, section 16 of the Washington Constitution specifies, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits judges from making any statement that amounts to a "comment on the evidence." State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Further, the constitution prohibits a judge from giving instructions that single out specific parts of the prosecution's case or emphasize specific evidence. State v. Lewis, 6 Wn. App.

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required to *convict* but not to inform jurors that no corroboration of defense witnesses' testimony is needed to *acquit*.

38, 41-42, 492 P.2d 1062 (1972). The provision also prohibits judicial officers from conveying their personal attitudes towards the merits of the case or instructing a jury that matters of fact have been established. State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

An appellate court applies apply a two-step analysis to determine if a judicial comment requires reversal of a conviction. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). First, the court examines the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence. State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). "It is sufficient if a judge's personal feelings about a case are merely implied." Id. If the trial court improperly commented on the evidence, the appellate court presumes the comment is prejudicial, "and the burden is on the State to show that the defendant was not prejudiced, unless the

record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 723.

This Court addressed the non-corroboration instruction in State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949). The State charged Clayton with "an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years." Id. at 572. At trial, the trial court instructed the jury as follows:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Id. Clayton argued on appeal that the instruction was an impermissible comment on the evidence. Id. at 572-73. This Court briefly examined the instruction, agreed with Clayton's

concession that it was a correct recitation of the law, and upheld the instruction. Id.

This Court hasn't addressed the instruction again since 1949. Notably, however, the Washington Pattern Criminal Jury Instructions (WPIC) do not include a corroboration instruction. State v. Zimmerman, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), review granted, cause remanded, 157 Wn.2d 1012 (2006). The Washington Supreme Court Committee on Jury Instructions has explicitly recommended *against* such instruction, finding corroboration to be a matter of sufficiency of the evidence "best left to the argument of counsel." 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 45.02 cmt. (5th ed. 2021); see Zimmerman, 130 Wn. App. at 182 (citing second edition).

The Court of Appeals has, after Clayton, likewise expressed misgivings about the constitutionality of an instruction telling jurors the testimony of one witness is enough to convict. In Zimmerman, for instance, Division Two noted it shared the

WPIC Committee's misgivings about the instruction, but it felt "bound by Clayton to hold that the giving of such an instruction is not reversible error." Zimmerman, 130 Wn. App. at 182-83. Similarly, a concurring Division One judge expressed concern in State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13, review denied, 184 Wn.2d 1023 (2015). The judge declared, "If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction." Id.

Other jurisdictions hold that giving such an instruction is error, even where, as in Washington, the instruction correctly reflects that corroboration is not required for evidentiary sufficiency. See, e.g., State v. Kraai, 969 N.W.2d 487, 492 (Iowa 2022) (trial court erred by giving such an instruction); State v. Stukes, 416 S.C. 493, 499-500, 787 S.E.2d 480 (2016) (same); Gutierrez v. State, 177 So. 3d 226, 230-34 (Fla. 2015) (same); Ludy v. State, 784 N.E.2d 459, 461-63 (Ind. 2003) (same); State v. Williams, 363 N.W.2d 911, 914 (Minn. Ct. App. 1985).

Carey recognizes that, at present, Clayton is the law in Washington. This Court granted review of State v. Svaleson, noted at 3 Wn. App. 2d 1065, 2018 WL 2437289, review granted, 195 Wn.2d 1008 (2020), solely on the issue of the non-corroboration instruction. State v. Svaleson, 195 Wn.2d 1008, 458 P.3d 790 (Table) (Mar. 6, 2020). However, this Court terminated review after Mr. Svaleson's death. See State v. Garza, noted at 16 Wn. App. 2d 1028, 2021 WL 351991, *7 (discussing events following grant of review in Svaleson), review denied, 197 Wn.2d 1014 (2021).

This Court should grant review in this case and should reverse its prior decision in Clayton. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (this Court may reject its own prior rationale if it is incorrect and harmful).

The next question is prejudice. When a judge comments on the evidence in a jury instruction, this Court will presume prejudice. Jackman, 156 Wn.2d at 743. The prosecution bears

the burden of showing there was no prejudice. Levy, 156 Wn.2d at 725. The prosecution cannot do so here.

I.C.'s in-court and out-of-court statements, many of which were inconsistent, constituted the only evidence supporting the charges. No other physical evidence or eyewitnesses corroborated her allegations. E.g., RP 207-08, 231-32, 309-11 (I.C.'s testimony that although there were people around, they didn't see anything); RP 615-17, 634-35, 643-44, 671-72, 783-84, 798, 800 (household members' testimony they did not see inappropriate contact and establishing limited opportunities for such contact). The jury clearly had doubts about some of I.C.'s allegations, acquitting Carey on Count 1. Under the circumstances, the State cannot demonstrate with certainty that the court's instruction to the jury, that I.C.'s testimony needed no corroboration, was harmless. CP 106. As such, should this Court determine that the court erred, Carey's convictions must be reversed.

This Court should grant review and, like the several states that reject such an instruction, revisit the Clayton decision regarding the non-corroboration instruction and reverse.

E. CONCLUSION

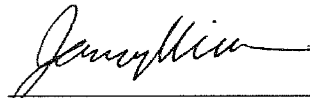
This Court should accept review under RAP 13.4(b)(3) and (4) and reverse Carey's convictions.

I certify this document contains 4,989 words, excluding those portions exempt under RAP 18.17.

DATED this 12th day of December, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

FILED
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN CHRISTOPHER CAREY, Appellant.	No. 84234-0-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — John Carey appeals his child molestation and child rape convictions. He contends the trial court denied him the right to present a defense and improperly commented on the evidence. He further identifies several errors in his judgment and sentence. We affirm his convictions but remand for the trial court to correct the identified sentencing errors.

FACTS

In December 2018, 16-year-old I.C. was filling out a patient survey for a routine medical appointment when she answered affirmatively that someone in her life had made her feel uncomfortable through inappropriate touching. When her doctor questioned her about her response, I.C. disclosed that her paternal uncle, Carey, had done sexual things to her.

Citations and pin cites are based on the Westlaw online version of the cited material.

I.C. indicated that the molestation started when she was 13 years old and eventually escalated from groping to digital rape. Carey repeatedly told I.C. not to tell anyone about the sexual touching. Carey also sent I.C. messages on social media, which included pictures of his genitals.

I.C.'s father, Kevin,[1] had previously noticed that I.C.'s grades were declining, she was losing weight, and she had become withdrawn. And earlier that year, I.C. had stopped going to Carey's house for sleepovers with her cousin. After I.C. disclosed the sexual abuse to her doctor, a mental health counselor to whom she was referred helped I.C. disclose the abuse to Kevin.

On December 28, 2018, after I.C.'s revelations, Kevin confronted Carey via text message. Kevin told Carey that "it has been brought to our attention that you have had inappropriate contact with my daughter. Do not attempt to contact any member of my family. Do not attempt to come near our home. Do not come to dinner tonight. I'm sorry to convey the message in this manner." Carey responded in three consecutive texts: "What are you going to do?" "Please let me know" and "So I can get stuff in order." Kevin explained that I.C. had reported the molestation to her doctor and he thought that a case had been opened the week prior. Carey then said "Ok thank you. Sorry and apologize to her too." Carey's last text was, "It's up to you on charges though, to press or not."

The State introduced screenshots of this text exchange as exhibits at trial. Kevin and I.C.'s mother, Megan, both testified to the authenticity and accuracy of

[1] Because I.C.'s parents share a last name with Carey, we refer to them by their first names. We intend no disrespect.

the exhibits. Carey and his girlfriend, Chantel Cannady, however, both testified that this text thread had been altered and that Carey's initial statements denying culpability had been deleted. Cannady and Carey both testified that Carey's initial response to Kevin was "what the [f—k] are you talking about" and "how could you think I would do something like that."

Carey denied the allegations when he testified at trial and said he was "shocked and appalled" when he received Kevin's text. He admitted smacking I.C. on the buttocks on one occasion but denied any further touching or that he ever asked I.C. to touch him in return.

Carey sought to introduce Cannady's testimony that Carey was so shocked and angry when he received Kevin's text that he threw his phone down and said "Are you F---king kidding me." The trial court excluded the statement, concluding it was inadmissible hearsay.

The State charged Carey with one count of second degree child molestation, three counts of third degree child molestation, and three counts of third degree rape of a child. The State also alleged as an aggravating circumstance on all counts that Carey abused a position of trust or confidence in perpetrating these crimes. The jury acquitted Carey of second degree child molestation but found him guilty of all other charges and aggravating circumstances.

Based on the aggravating circumstances, the trial court imposed an exceptional sentence of consecutive 60-month terms, for a total of 120 months. The court also imposed 36 months of community custody following incarceration.

Because Carey is indigent, the trial court indicated its intent to waive all non-mandatory legal financial obligations. The trial court, however, did not strike the community custody supervision fees in the judgment and sentence. The court also imposed, as a condition of community custody, "No unauthorized use of electronic (web) media or devices."

Carey appeals.

ANALYSIS

A. Right to Present a Defense

Carey first argues the trial court infringed on his right to present a defense when it excluded evidence of his initial reaction to the sexual assault allegations.

The United States Constitution and the Washington State Constitution guarantee defendants the right to present a defense. U.S. Const., amend. VI, XIV; Wash. Const., art. I, § 3; *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). To determine whether the exclusion of evidence violates a defendant's constitutional right to present a defense, we engage in a two-part analysis. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). First, we review a trial court's evidentiary rulings for an abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. *Id.* at 59. We then consider de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. *Id.* at 58.

At trial, Carey sought to admit the statement he made when he first learned of I.C.'s allegations against him. According to Cannady, Carey was outside

smoking when he received a text message from Kevin confronting Carey about the sexual assault. Carey sought to have Cannady testify that Carey showed her the message and said "are you F-ing kidding me." The trial court sustained the State's hearsay objection, concluding that the accusation was not the kind of startling event covered by the excited utterance hearsay exception.

Carey argues the trial court erred in ruling that the evidence was inadmissible under ER 803(a)(2). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless an exception or exclusion applies. ER 802. ER 803(a)(2) provides a hearsay exception for statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Hearsay is admissible under this exception if (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the startling event, and (3) the statement relates to the event. *State v. Magers*, 164 Wn.2d 174, 187-88, 189 P.3d 126 (2008). We review a trial court's ruling on the applicability of a hearsay exception for an abuse of discretion. *State v. Rodriquez*, 187 Wn. App. 922, 939, 352 P.3d 200 (2015).

The trial court excluded Carey's statement because it found that learning about his niece's sexual assault allegations did not constitute a startling event under this rule. Carey disagrees. But we do not need to decide that issue. Even if the court abused its discretion in excluding evidence of Carey's reaction to the accusations, the error was nevertheless harmless. To determine whether a trial court's abuse of discretion warrants reversal, the court applies a nonconstitutional

harmless error standard. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Nonconstitutional error is harmless if, within reasonable probability, it did not affect the verdict. *State v. Zwicker,* 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

Carey was able to present substantially the same evidence—that he was shocked at I.C.'s accusation and immediately denied the allegations—by other means. Cannady testified that Carey's initial response[2] to Kevin was "what the [f—k] are you talking about" and "how could you think I would do something like that." Carey similarly testified that his response was "WTF are you talking about?" and "how would you think I'd do these things?" Thus, the excluded evidence Carey challenges was cumulative of evidence already before the jury. There is no basis for concluding that a different verdict would have resulted had the court admitted Carey's additional statement of shock and surprise.

Next, we assess the impact of the ruling on Carey's Sixth Amendment rights. *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). In assessing a constitutional challenge to a trial court's evidentiary decision, we must first determine if the evidence is at least minimally relevant. *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). "If the evidence is relevant, the reviewing court must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Jennings*, 199 Wn.2d at 63. A court may bar evidence relevant to a theory of defense only where the

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[2] Cannady and Carey both testified that Cannady wrote out Carey's text message responses to Kevin on Carey's phone, as dictated by Carey.

evidence would undermine the fairness of the trial. *State v. Darden,* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The burden is on the State to show that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Jones,* 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Darden*, 145 Wn.2d at 622).

There is no dispute that the excluded statement is at least minimally relevant, as it constitutes a denial of the allegations and speaks to Carey's consciousness of guilt. But excluding this evidence did not violate his right to present a defense. The evidence was only minimally probative because the excluded statement was cumulative of other evidence admitted at trial and, as such, Carey's ability to present his theory of the case was unimpaired by its exclusion.

Cannady testified that Carey was shocked and angry when he first received Kevin's messages and learned of I.C.'s accusations. Cannady reportedly responded to Kevin on Carey's behalf because Carey was so shocked he was shaking. Cannady and Carey both testified that Carey's initial response to Kevin was "what the [f—k] are you talking about" and "how could you think I would do something like that." Carey also testified that he was "shocked and appalled" when he learned of the allegations. Thus, Carey presented ample evidence that he was shocked by I.C.'s allegations and that he immediately denied them. From this evidence, Carey argued in closing that, contrary to the State's assertions, he had always denied the allegations.

Carey's interest in presenting additional evidence of his initial reaction to I.C.'s allegations does not overcome the State's interest in avoiding the presentation of cumulative evidence.

B. Improper Comment on the Evidence

Next, Carey argues the trial court improperly commented on the evidence when it instructed the jury that the testimony of a sex crime complainant need not be corroborated.

Article IV, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional provision prohibits a judge "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

We apply a two-step analysis to determine if a judicial comment requires reversal of a conviction. *Levy*, 156 Wn.2d at 723. First, we examine the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence. *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). If we conclude the court made an improper comment on the evidence, we presume the comment is prejudicial, "and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 723.

The trial court instructed the jury that "to convict a person of the crimes of child molestation in the second degree, child molestation in the third degree, or rape of a child in the third degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated."

This instruction accurately reflects Washington law, which states that "it shall not be necessary that the testimony of the alleged victim be corroborated" in order to convict a defendant of a sex offense. RCW 9A.44.020(1). A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence by the trial judge. *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (citing *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)).

Washington courts repeatedly have held that non-corroboration jury instructions do not constitute a comment on the evidence. Our Supreme Court addressed this issue in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). There, the court concluded that it was not a judicial comment on the evidence to instruct the jury that

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Id. at 572; *see State v. Malone,* 20 Wn.App. 712, 714-15, 582 P.2d 883 (1978) (concluding a non-corroboration instruction was not a comment on the evidence).

In *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005), Division Two addressed the same issue. The court noted that the non-corroboration instruction is not included within the Washington Pattern Criminal Jury Instructions and the Supreme Court Committee on Jury Instructions recommends against using the instruction. *Id.* at 182. The court nevertheless concluded "[a]lthough we share the Committee's misgivings, we are bound by *Clayton* to hold that the giving of such an instruction is not reversible error." *Id.* at 182-83.

As Carey seems to concede, we are still bound by *Clayton* to hold that this non-corroboration instruction is constitutional.

C. Sentencing Errors

Finally, Carey raises several errors in his judgment and sentence. First, he contends the community custody condition prohibiting the "unauthorized use of electronic (web) media or devices" unconstitutionally vague and overbroad. A community custody provision that completely prohibits the use of the internet without prior permission is unconstitutionally overbroad and impermissibly burdens a defendant's freedom of speech. *State v. Geyer*, 19 Wn. App. 2d 321, 329, 496 P.3d 322 (2021). The State concedes that the community custody provision identified here is impermissible.

The State argues the appropriate remedy is remand for the trial court to amend the restriction to say "You shall not use or access the internet unless specifically authorized by [the Department of Corrections (DOC)] through approved filters." This language was previously upheld in *State v. Johnson*, 197 Wn.2d 740, 487 P.3d 893 (2021). Carey argues that *Johnson* is distinguishable

on its facts and, as such, this language is not appropriately tailored enough to the facts of Carey's crime. In *Johnson*, the defendant was convicted after he used Craigslist to arrange to have a sexual encounter with someone he believed was a 13-year-old girl. *Id.* at 742-43. Here, by contrast, the internet arguably played a minimal role. We agree that the trial court should determine in the first instance how to narrowly tailor a community custody provision to address "the dangers posed" by Carey. *Id.* at 745.

Next, Carey argues that the court erroneously imposed a community custody supervision fee despite its intent to waive all discretionary fees. Supervision fees are discretionary legal financial obligations and may be waived by the trial court. *State v. Dillon*, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020). Here, the State concedes that the trial court intended to waive all discretionary legal financial obligations and that remand is appropriate. We accept this concession and remand for the trial court to strike the supervision fee.

Finally, Carey maintains that the judgment and sentence incorrectly stated that the ending date of each offense was December 12, 2018. As indicated in the information, the correct end date for the offenses was September 30, 2018. The State concedes this error as well. Accordingly, we remand for dates of Carey's offenses to be corrected in the judgment and sentence.

C. Statement of Additional Grounds

Carey raises several issues in a statement of additional grounds. We reject each in turn.

First, he argues that allowing the State to prove a sexual assault offense without requiring corroboration effectively shifts the burden of proof to the defendant to disprove the charges. He asserts that, under such scheme, the State can rely on an "accusation as fact" and need not present further evidence. We disagree. The State is required to prove each element of each offense beyond a reasonable doubt. RCW 9A.44.020(1) merely allows that the testimony from the alleged victim, without additional corroboration, may be accepted or rejected by the jury depending on its determination of that witness's credibility. This statute does not require Carey to present any evidence at all to obtain an acquittal. Carey does not cite to any authority supporting an argument to the contrary.

Next, Carey challenges the admission of his text message conversation with Kevin, which he seems to be arguing was not properly authenticated. He asserts that it was never "investigated or verified" and should have been excluded. But both Kevin and Megan authenticated the text messages at trial and testified to their accuracy. Moreover, Carey provides no authority for the proposition that the State is somehow required to independently verify the accuracy of this information before it can be admitted. To the contrary, any attack on the accuracy of the messages goes to the weight of the evidence, not its admissibility.

Next, Carey challenges the community custody provision dictating that Carey "[m]ay not enter into or frequent establishments or areas where minors congregate without being accompanied by a responsible adult approved by DOC and sex offender treatment provider to include, but not limited to: school grounds, malls, parks, or any other area designated by DOC." He seems to argue that this

is a violation of his First Amendment rights. But he again cites no authority supporting this proposition. A lack of meaningful argument on complex constitutional issues precludes appellate review. See, e.g., *State v. Johnson,* 119 Wn.2d 167, 170-71, 829 P.2d 1082 (1992) (declining to address an issue which the defendant failed to adequately brief).

Finally, he argues that his judgment and sentence does not show aggravating circumstances under RCW 9.94A.535(3) justifying the court's decision to run his sentence for count three consecutive to counts two and four. But the jury found that Carey used his position of trust or confidence to facilitate the commission of the crimes here—an aggravating circumstance under RCW 9.94A.535(3)(n)—and, in an appendix to the judgment and sentence, the trial court found that this aggravating circumstance justified the imposition of an exceptional sentence. This method of setting out the court's reasoning is permissible under RCW 9.94A.535, which allows a sentencing court to depart "from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently" in imposing an exceptional sentence.

We affirm Carey's conviction but remand for the trial court to correct the identified errors in the judgment and sentence.

Andrus, C.J.

WE CONCUR:

Coleman, J.

Mann, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

December 12, 2022 - 2:50 PM

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