NO. 101549-6
(COA NO. 83125-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FALLON,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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A. INTRODUCTION

Eighty-two-year-old Charles "Chuck" Fallon was a beloved fixture of his Renton neighborhood. Though he lived a breath away from homelessness in a makeshift shack, Mr. Fallon was always ready to lend a hand to his neighbors. Many saw him as family.

After Mr. Fallon lived in the area for almost a decade, two children reported he touched them years earlier, leading to criminal charges. At the trial, the prosecutor argued that, if the jury believed the children, it was necessarily convinced Mr. Fallon was guilty beyond a reasonable doubt. This misstatement of the burden of proof misled the jury to believe it did not need to consider other reasonable inferences that weighed against guilt. As a result, Mr. Fallon will likely die in prison.

B. IDENTITY OF PETITIONER

Petitioner Charles Fallon asks for review of the decision affirming his convictions despite the prosecution's misrepresentation of the burden of proof.

C. COURT OF APPEALS DECISION

Mr. Fallon seeks review of the unpublished opinion in *State v. Fallon*, No. 83125-9-I (Wash. Ct. App. Nov. 14, 2022).

D. ISSUES PRESENTED FOR REVIEW

1. A prosecutor's misstatement of the burden of proof is serious misconduct. The prosecutor told the jury that, if it believed the complainants' testimony, it was necessarily convinced of guilt beyond a reasonable doubt. This prejudiced Mr. Fallon by leading the jury to believe it did not need to consider reasonable inferences that did not lead to guilt. In affirming anyway, the Court of Appeals contravened this Court's precedent and deprived Mr. Fallon of a fair trial.

2. Article I, section 16 forbids a court from commenting on the evidence. The jury instructions used the complainants' initials rather than their names, implying they were victims needing protection. In turn, this necessarily implied Mr. Fallon was guilty of a crime against them. The trial court's use of the complainants' initials in the jury instructions was a comment on the evidence, and the Court of Appeals's decision to the contrary misapplied this important provision of the Washington Constitution.

E. STATEMENT OF THE CASE

Mr. Fallon is 82 years old and has lived in the Seattle area since 1986. RP 1067, 1592.

1. Mr. Fallon becomes a beloved fixture of his Renton neighborhood.

Mr. Fallon lived in a motor home he parked in a friend's driveway with permission. RP 1594. Mr. Fallon used his carpentry skills to add rooms to the motor

home—his neighbors described it as a "shack" or a "shed." RP 1347, 1429, 1539, 1597. After a few years, he replaced the shack with a large travel trailer. RP 1539, 1597.

Mr. Fallon became fast friends with many of his neighbors. He mowed their lawns, fed their dogs while they were away, and did other odd jobs. RP 1370–71, 1531. He "always was there to lend a hand." RP 1531.

Mr. Fallon met Alina K.[1] and her family around Christmas in 2008 when Alina asked him for help with carpentry work. RP 1600. Alina and her husband had six children, the youngest of which was Ramona.[2] RP 1211, 1261, 1600–01. Mr. Fallon became close with Alina's family and would come over to her house for

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[1] This brief uses first names for Alina and other adults to avoid disclosing the identities of minors. No disrespect is intended.

[2] "Ramona" is a pseudonym.

dinner. RP 1218, 1268, 1410, 1412, 1602. He was "like a part of the family." RP 1269.

Ramona has a cousin, Kayla T.,[3] a year younger than her. RP 1214. Kayla's family met Mr. Fallon through Ramona's family, and also came to regard him a "family member." RP 1344, 1349, 1365, 1411–12. Mr. Fallon often visited Kayla's home. RP 1410, 1612–13.

Mr. Fallon became close friends with Peter S. in 2009. RP 1615. He and Mr. Fallon went to garage sales together. RP 1533. Peter would bring his daughters Jolene and Audrey[4] along. RP 1536, 1617. Mr. Fallon visited Peter's house to talk with him and his father. RP 1163–64, 1534–35. After Peter's father died, Peter found Mr. Fallon's presence comforting. RP 1578.

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[3] "Kayla" is a pseudonym.

[4] "Jolene" and "Audrey" are pseudonyms.

Mr. Fallon was known for making up imaginative games to play with the neighborhood children. RP 1411, 1580. He also attached multiple trailers to his bicycle to form a train and gave children rides around the block. RP 1166–67, 1283, 1608. He often gave children piggyback rides. RP 1188, 1285, 1411. He wore a white shirt that he encouraged kids to draw designs on. RP 1534. He also drew chalk art on the sidewalk that Peter found impressive. RP 1577.

When Mr. Fallon visited Alina's house, he would play with the girls in the basement while the other adults were upstairs. RP 1194, 1220, 1355, 1410, 1558. They would play imaginative games, and Mr. Fallon would give them piggyback rides. RP 1411. Ramona and Kayla played with Mr. Fallon for only "a few summers" until they grew out of these games. RP 1354–55, 1363, 1452.

Neighborhood kids visited Mr. Fallon at his home, usually with their parents' permission. RP 1301, 1357, 1635. He built a space for children to play and paint inside. RP 1348.

As fond of him as his neighbors were, Mr. Fallon sometimes did things suggesting he did not understand boundaries. RP 1535–36. For example, Peter's daughter Jolene was sitting on the couch, and Mr. Fallon sat on top of her. RP 1168. He did not get up when she protested, and she bit him. RP 1168, 1564.

In addition to boundaries, Mr. Fallon appeared not to understand that children's interest in playing games with him would change as they got older. Neighborhood children enjoyed playing with Mr. Fallon when they were young. RP 1176, 1271–72. As they got older, however, Mr. Fallon still wanted to play the same childish games. RP 1176, 1452, 1564.

2. Based on a report years after the fact, Mr. Fallon is arrested and charged with sex crimes against children.

Kayla and Ramona were friends with Peter's daughter Jolene, who was around the same age. RP 1161–62. One day in 2018, when the girls were around 11 years old, either Ramona or Kayla or both told Jolene Mr. Fallon touched them "a few years ago." RP 1247–48, 1312–13, 1442; *accord* RP 1046–47. Soon afterward, Jolene told Peter that Mr. Fallon "touched" Kayla and Ramona. RP 1170, 1173.

After Peter repeated to Ramona's parents and adult sister what Jolene told him, Kayla's mother asked her if anything happened with Mr. Fallon. RP 1358–59. Kayla said Mr. Fallon touched her bottom during a piggyback ride, but otherwise denied he did anything inappropriate. RP 1359, 1475. Only after Kayla's mother said she was molested as a child did

Kayla say Mr. Fallon touched her inappropriately. RP 1360–61, 1476.

The prosecution charged Mr. Fallon with one count of first-degree rape of a child, four counts of first-degree child molestation, and one count of immoral communication with a minor as to Kayla. CP 82–83. It charged him with one additional count of first-degree child molestation as to Ramona. CP 84.

3. At Mr. Fallon's trial, the prosecutor misstates the burden of proof and the jury instructions imply the complaining witnesses are victims.

Ramona was 14 when she testified. RP 1210. She said that, at about five years old, she and Kayla played a game in the basement, standing at either end of a billiard table. RP 1223, 1226. Sometimes she perceived Mr. Fallon behind her and felt his hand touch her bottom inside her underwear. RP 1223–24, 1234, 1297. He kept his hand there for a "few seconds" to a

"minute." RP 1228. Ramona also saw Mr. Fallon stand behind Kayla and appear to touch her. RP 1233–34.

Kayla was 13 when she testified. RP 1404. She said Mr. Fallon put his hand into her pants and touched her bottom while giving her a piggyback ride in Ramona's basement. RP 1412–13. She said his hand would remain there for a "few seconds to like a minute, maximum." RP 1414. This happened only "a few times." RP 1418. Kayla never saw Mr. Fallon touch Ramona. RP 1418, 1429.

Kayla also testified Mr. Fallon touched her at her own house, in her bedroom. RP 1420. She said he touched her vagina with his hand, "[t]rying to put his fingers up" for "a few seconds." RP 1421. She was clear that he "couldn't get it in." RP 1422. The pressure from Mr. Fallon's fingers caused Kayla to feel pain inside and outside her vagina. RP 1424–25. Mr. Fallon also

touched her vagina at his home on one occasion. RP 1430–32, 1434.

Kayla also said Mr. Fallon once changed clothes in front of her "in the bedroom part of his house." RP 1437. She said he showed her his penis and asked if she wanted to touch it. RP 1437. She said no, and he finished changing clothes. RP 1438.

Though both parties used Kayla's and Ramona's full names throughout the trial, the jury instructions referred to them only by their initials. RP 1697–1714; CP 110–37; *see, e.g.*, RP 1723 (closing argument).

During closing argument, the prosecutor told the jury, "if you believe them, if you believe [Kayla] and [Ramona], if you found them credible[,] then you have been satisfied beyond a reasonable doubt." RP 1755–56. Mr. Fallon's counsel objected and pointed out this

remark misstated the prosecution's burden of proof. RP 1756. The trial court overruled the objection. RP 1756.

The prosecutor then repeated, "The evidence that they gave you[,] if you find that evidence credible, you have been satisfied beyond a reasonable doubt." RP 1756. Mr. Fallon raised the same objection. RP 1756. This time, the court sustained it. RP 1756.

The prosecutor nevertheless continued to misstate the burden. He said, "if the testimony that you heard from [Kayla] and [Ramona], if you find them credible, if you believe them, they have established for you all the elements of each and every one of these crimes." RP 1756. He then repeated, "If you find them credible, if they laid all that out for you, you have been satisfied beyond a reasonable doubt." RP 1756–57.

Mr. Fallon again objected that the prosecutor misstated the burden of proof. RP 1757. The trial court

called for a side bar. RP 1757. Afterward, the trial court not only overruled Mr. Fallon's objection, but it reversed its previous ruling sustaining his earlier objection. RP 1757.

Later, outside the presence of the jury, the court explained that it overruled Mr. Fallon's objection because a witness's testimony "could be enough to convict" even without corroboration. RP 1759. The court overlooked prosecutor's assertion that the jury *had no choice but* to convict if it believed Kayla and Ramona. RP 1755–57.

The jury found Mr. Fallon guilty on all counts. RP 1812–13; CP 149–50, 152, 154, 156, 158–59. The court sentenced him to an indeterminate term of 20 years to life. RP 1846, 1885; CP 230. The court and both parties agreed he is likely to die in prison. RP 1874, 1876–77.

F. WHY THIS COURT SHOULD ACCEPT REVIEW

1. **The Court of Appeals contravened precedent and denied Mr. Fallon a fair trial by holding the prosecutor did not commit misconduct.**

"The duty of the prosecutor is to seek justice, not merely to convict." *State v. Rivers*, 96 Wn. App. 672, 675 n.3, 981 P.2d 16 (1999) (quoting Am. Bar Ass'n, Standards for Criminal Justice, Standard 3-1.2(c)). "[A] prosecutor must 'seek convictions based only on probative evidence and sound reason.'" *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (*quoting State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

Reversal is required where (1) a prosecutor made improper arguments, and (2) "the improper comments caused prejudice." *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). A prosecutor's misconduct resulted in prejudice if it was substantially likely to

affect the verdict. *State v. Pinson*, 183 Wn. App. 411, 419, 333 P.3d 528 (2014).

The prosecutor committed misconduct by asserting the jury was necessarily satisfied of Mr. Fallon's guilt beyond a reasonable doubt if it believed Kayla's and Ramona's testimony. The Court of Appeals contravened precedent in concluding otherwise. The improper argument prejudiced Mr. Fallon by misleading the jury to believe it did not have to consider reasonable inferences that do not lead to a finding of guilt. This Court should grant review.

a. The prosecutor misstated the burden of proof by asserting the jury is necessarily convinced beyond a reasonable doubt if it believes the complaining witnesses are credible.

An argument that misstates "the State's burden to prove the defendant's guilt beyond a reasonable doubt" is prosecutorial misconduct. *Lindsay*, 180 Wn.2d at 434. As a representative of the State, a prosecutor's

misstatement of the applicable law in any way is "a serious irregularity having the grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

One way a prosecutor may misstate his burden is to "ask the jury to reach its verdict based on who the jury believes is telling the truth." *State v. Crossguns*, 199 Wn.2d 282, 298, 505 P.3d 529 (2022). The jury's task is to decide whether the prosecution "has proved the offenses beyond a reasonable doubt," not whether the prosecution's witnesses are lying. *Id.* at 298–99.

As in *Crossguns*, the prosecution misled the jury about the inferences it could draw from the evidence against Mr. Fallon. The prosecutor argued to the jury,

> *if you believe them, if you believe [Kayla] and [Ramona], if you found them credible[,] then you have been satisfied beyond a reasonable doubt.*

> MR. ARALICA: Objection, misstates burden.
>
> THE COURT: And that's overruled.
>
> MR. BROOKHYSER: The instructions tell you, the instructions that Judge McKee gave you told you testimony is evidence. The evidence that they gave you[,] *if you find that evidence credible, you have been satisfied beyond a reasonable doubt.*
>
> MR. ARALICA: Objection, misstates burden.
>
> THE COURT: And that's sustained.

RP 1755–56 (emphasis added).

Though the trial court sustained counsel's objection, the prosecutor repeated this argument several more times:

> MR. BROOKHYSER: The instructions you have been given tell you that testimony is evidence. And if the testimony that you heard from [Kayla] and [Ramona], *if you find them credible, if you believe them, they have established for you all the elements of each and every one of these crimes.* There is no requirement that there be independent witnesses, there is no requirement that there be DNA. There is no requirement that

there be video surveillance. There is no requirement that there be bodily fluids. These crimes are committed in secret, in private by someone who knew what he was doing. *If you find them credible, if they laid that all out for you, you have been satisfied beyond a reasonable doubt.*

And that means you don't get to throw up your hands and say I wish I had more evidence. I believe them, but I wish there was more. Because if you believe them and you know why there is no other evidence, but if you believe them and already have more than enough—

MR. ARALICA: Objection, misstates burden.

THE COURT: Let's have a side bar.

(Sidebar Conference)

THE COURT: Thank you for your patience and the prior two objections are overruled.

RP 1756–57 (emphasis added).

[MR. BROOKHYSER:] And these two witnesses have told you what happened to them. *And if you find them credible, if you believe them when they tell you what happened, you are satisfied beyond a reasonable doubt.* There was no need that you get some corroboration.

RP 1757 (emphasis added).

The Court of Appeals arrived at the remarkable conclusion that these statements do not "assert that the jury *must* convict if they found the witnesses credible." Slip op. at 7. On the contrary, no other interpretation is possible—the prosecutor told the jury they would be "satisfied beyond a reasonable doubt" if they "believe[d Kayla] and [Ramona]." RP 1755–56.

By asserting that Kayla's and Ramona's testimony, if believed, *necessarily* established Mr. Fallon's guilt beyond a reasonable doubt, the prosecutor misstated his burden. It may well be the witnesses' testimony *permitted* the jury to find all elements of the charged offenses. But their testimony did not *require* this conclusion.

The rape of a child count as to Kayla illustrates the prosecutor's misrepresentation most clearly. To

convict Mr. Fallon of this offense, the prosecution had to prove "sexual intercourse"—"any penetration of the vagina . . . however slight." RCW 9A.44.010(14)(b); RCW 9A.44.073(1); CP 110–11.

Even if the jury believed every word Kayla said, it did not have to find penetration. Kayla testified Mr. Fallon touched her vagina with a finger as if he were "[t]rying to get inside." RP 1424. She felt Mr. Fallon's finger only outside her vagina but felt "pain" both outside and inside. RP 1424–25. Kayla was clear that Mr. Fallon "couldn't get it [his finger] in." RP 1422.

Kayla's pain permitted—but *did not require*—an inference of slight penetration. As trial counsel explained, an alternative inference is the finger did *not* penetrate to any degree—in that event, the pain would be due entirely to outside pressure. RP 1788.

By arguing Kayla's testimony, if credible, must *necessarily* satisfy the jury beyond a reasonable doubt, the prosecution conveyed the jury did need not to consider the other reasonable inference defense counsel offered. If Kayla's testimony led necessarily to the conclusion Mr. Fallon committed rape of a child, the jury would have no reason to consider whether her pain resulted from penetration or from something else.

In fact, however, the prosecution bore the burden of proving every element beyond a reasonable doubt, including sexual intercourse. RCW 9A.44.073(1); *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). It was not entitled to relieve itself of its burden to prove penetration by asserting Mr. Fallon was guilty merely if the jury believed Kayla's testimony. The prosecution misstated its burden of proof.

A similar conclusion follows for the counts of child molestation as to Kayla and Ramona. Both witnesses testified Mr. Fallon touched their bottoms—and Kayla said he touched her vagina—for at least several seconds. RP 1224, 1227–28, 1234, 1413, 1421–22. Of course, the jury could conclude this touching was for sexual gratification. RCW 9A.44.010(13); RCW 9A.44.083(1); CP 115–16. But, as defense counsel explained, it did not *have to* reach this conclusion. It could attribute the touching to Mr. Fallon's inability to understand boundaries, or even to an unknown reason. *E.g.*, RP 1763–64, 1765, 1776–77, 1787–88, 1792.

Nor did Kayla's testimony require the jury to find Mr. Fallon guilty of immoral communication. Her account that he asked if she wanted to touch his "front part" was likely enough to find an "immoral purpose[] of a sexual nature." RP 1464–65; *State v. McNallie*, 120

Wn.2d 925, 933, 846 P.2d 1358 (1993); RCW 9.68A.090(1). But the jury could have found Mr. Fallon acted with a purpose unrelated to sexual impropriety.

Contrary to the Court of Appeals, reading the remarks "in context of the entire case" does not make the misstated burden any less misleading. Slip op. at 7; *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). It is true that the prosecutor told the jury it bore the burden of proof and the jurors would have to weigh credibility. Slip op. at 7; RP 1728, 1733–34. But the prosecutor did not stop there—he asserted Mr. Fallon was necessarily guilty if Kayla and Ramona were credible. RP 1755–57. The necessary implication is the jury did not need to consider other inferences.

The prosecution did just what this Court forbade in *Crossguns*: it told the jury to find Mr. Fallon guilty based only on who it "believes is telling the truth." 199

Wn.2d at 298. The opinion the Court of Appeals cites is not on point—it considered an argument the prosecution *shifted* the burden of proof, not that it *misstated* the burden. *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43 (2011); *see* Slip op. at 6.

The Court of Appeals's conclusion the prosecutor did not misstate the burden of proof contravenes this Court's precedent. *Crossguns*, 199 Wn.2d at 298; *Davenport*, 100 Wn.2d at 763; RAP 13.4(b)(1). In affirming the conviction, the Court of Appeals sanctioned a deprivation of Mr. Fallon's right to a fair trial. *Glasmann*, 175 Wn.2d at 704; *Lindsay*, 180 Wn.2d at 431; *Rivers*, 96 Wn. App. at 675 n.3; RAP 13.4(b)(3), (b)(4). This Court should grant review.

b. Because the complaining witnesses' testimony merely permitted—but did not require—a guilty verdict, the repeated, improper argument caused prejudice.

The prosecutor's misstatement of the burden of proof prejudiced Mr. Fallon. Whether penetration occurred or Mr. Fallon acted for sexual gratification were central issues. By falsely asserting the jury *must* convict Mr. Fallon if it believed Kayla and Ramona, the prosecution relieved itself of proving these key facts.

The prosecutor repeated his misstatement of the burden of proof many times during closing argument. RP 1755–57. The prosecutor restated the argument even after the trial court sustained a defense objection. RP 1756. The "cumulative effect" of the prosecutor's repeated misconduct was far greater than it would be had he misstated the burden only once. *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015) (quoting *Glasmann*, 175 Wn.2d at 707).

Moreover, the trial court overruled all of defense counsel's objections to the improper argument. RP 1756–57. The court sustained defense counsel's second objection after overruling counsel's first one. RP 1756. But, when the prosecutor nonetheless repeated the argument and defense counsel objected a third time, the court not only overruled defense counsel's third objection, but changed its ruling on the second objection as well. RP 1756–57.

By overruling all of defense counsel's objections, the trial court conveyed to the jury the prosecutor's misstatement of the burden of proof "was a proper interpretation of law." *Allen*, 182 Wn.2d at 378.

The prosecution's misstated burden of proof also fatally undermined defense counsel's closing. Counsel stated the law correctly: "you can believe [Kayla] and [Ramona], but still find that the state has not proven

this case beyond a reasonable doubt." RP 1785. In turn, counsel offered reasonable inferences that did not lead to guilt. RP 1763–64, 1765, 1776–77, 1787–88, 1792. By overruling defense counsel's well-founded objections, the trial court implied that the prosecution's misrepresentation was correct, and the jury did not need to think about any alternative inferences.

"Finally, misconduct by the State is particularly egregious." *Allen*, 182 Wn.2d at 380. The prosecutor's repeated misstatement of the burden of proof was "a serious irregularity" with "the grave potential to mislead the jury." *Allen*, 182 Wn.2d at 380 (quoting *Davenport*, 100 Wn.2d at 763).

The Court of Appeals did not address the issue of prejudice. Slip op. at 3–7.

The prosecutor's misstatement of the burden of proof focused the jury's attention only on whether

Kayla and Ramona were credible, and distracted it from the key issue of whether their testimony established all elements beyond a reasonable doubt. Prejudice resulted. This Court should grant review.

2. The trial court's use of the complaining witnesses' initials in the to-convict instructions violated the constitutional prohibition of judicial comments on the evidence.

A trial court may not comment on the evidence. Const. art. IV, § 16.

A to-convict instruction that conveys to the jury the defendant's guilt has been proved is a comment on the evidence. See *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). In *Jackman*, the charges required proof the victims were minors. *Id.* at 740 & n.3. The to-convict instructions included each victim's birthdate, implying the fact of the victims' minority was already established. *Id.* at 740–41 & n.3, 744.

Accordingly, the Supreme Court held the instructions commented on the evidence. *Id.* at 744.

As in *Jackman*, the to-convict instructions in this case conveyed to the jury Mr. Fallon was guilty of an offense. Throughout the trial, the parties, witnesses, and court freely referred to the complaining witnesses by their names. *See, e.g.*, RP 1723 (closing argument). Nevertheless, when the time came to instruct the jury, the trial court used their initials, even modifying the pattern versions of the instructions to do so. *Compare* CP 110, 113, 115, 117, 120, 123, 124, 126, 127, 129, 130, 132, 134, 136, 137, 138, 140, 141 *with* WPIC 44.11, 44.21, 35.26.

This grant of anonymity conveyed to the jury the court believed the complaining witnesses were crime victims who needed protection. Based on the evidence, the only person who could have victimized them was

Mr. Fallon, and he could have done so only via the crimes the prosecution charged. By implying in the to-convict instructions the complaining witnesses were victims in need of protection, the trial court commented on the evidence. *Jackman*, 156 Wn.2d at 744.

Many courts remark that a jury may perceive a grant of anonymity as "a subliminal comment on the harm the alleged encounter with the defendant has caused." *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014). "[T]he very knowledge by the jury that pseudonyms were being used would convey a message to the fact-finder that the court thought there was merit to the plaintiffs' claims." *James v. Jacobson*, 6 F.3d 233, 240–41 (4th Cir. 1993); *accord Doe v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

The Court of Appeals held use of initials in the to-convict instructions is not a judicial comment in *State v. Mansour*, 14 Wn. App. 2d 323, 470 P.3d 543 (2020), *rev. denied*, 196 Wn.2d 1040 (2021).

The Court first observed "the name of the victim . . . is not a factual issue requiring resolution." 14 Wn. App. 2d at 329–30. Second, "a juror would likely not presume that [the minor] was a victim—or believe the court considered her one—merely because the court chose to use [the minor]'s initials." *Id.* at 330. Third, in the federal cases cited above the civil plaintiffs acted anonymously, while in *Mansour* the parties used the complainant's full name in court. *Id.* at 330.

Mansour's reasoning is unpersuasive. First, it does not matter that the victim's name is not an element—the court's use of the complainant's initials communicated she was a victim and, therefore, the

defendant committed a crime. Second, it is not plausible to suggest the jury would not catch on to the implications of using initials. Third, granting anonymity to any degree in any context risks being perceived as "a subliminal comment" on the need for protection from the defendant. *Doe*, 307 F.R.D. at 10.

Here, the Court of Appeals relied on the mistaken conclusion *Mansour* is binding authority. Slip op. at 9–10 & n.3. The same Court has held that its published decisions do not have stare decisis effect in future cases. *Grisby v. Herzog*, 190 Wn. App. 786, 808–09, 362 P.3d 763 (2015). The Court of Appeals's opinion in this case does not address *Grisby*. Slip op. at 9–10 n.3.

The Court of Appeals's reliance on *Mansour* to dispose of Mr. Fallon's argument contravenes its own precedent. RAP 13.4(b)(2). The Court's holding is also incorrect—using a complaining witness's initials in the

to-convict instructions is a comment on the evidence. RAP 13.4(b)(3). This Court should grant review.

G. CONCLUSION

This Court should grant review.

Per RAP 18.17(c)(10), the undersigned certifies this brief of appellant contains 4,615 words.

DATED this 14th day of December, 2022.

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APPENDIX

FILED
11/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. CHARLES PATRICK FALLON, Appellant.	No. 83125-9-I DIVISION ONE UNPUBLISHED OPINION

SMITH, A.C.J. —A jury convicted Charles Fallon of one count of first degree rape, four counts of first degree child molestation, and one count of communicating with a minor for immoral purposes. He appeals, asserting that the prosecutor committed misconduct by misstating the burden of proof during closing arguments and that the court impermissibly commented on the evidence by using the victims' initials in the to-convict instructions. We affirm.

FACTS

Charles Fallon lived in a travel trailer on a neighbor's property in Renton, Washington. He befriended families in the neighborhood and frequently played with, and gave bike rides to, the neighborhood children.

Victims K.T. and R.K. remember playing with Fallon beginning when they were approximately five years old. Both initially enjoyed spending time with Fallon. But both stopped playing with Fallon between the ages of eight and ten years old because of the molestation. A few years later, either K.T. or R.K. told their friend J.S. that Fallon molested them when they were younger. J.S. told her

father, P.S., who reported the abuse to a school guidance counselor. The guidance counselor called the police.

Fallon was charged with one count of first degree rape, four counts of first degree child molestation, and one count of communicating with a minor for immoral purposes.

At trial, both K.T. and R.K. testified. During closing argument, the prosecutor asserted to the jury that K.T. and R.K.'s testimony was credible. The prosecutor argued: "And if you believe them, if you believe [K.T.] and [R.K.], if you found them credible then you have been satisfied beyond a reasonable doubt." The prosecutor also stated: "The [jury] instructions tell you . . . testimony is evidence. The evidence that [K.T. and R.K.] gave you[,] if you find that evidence credible, you have been satisfied beyond a reasonable doubt." Finally, the prosecutor told the jury: "[I]f you find them credible, if you believe them, they have established for you all the elements of each and every one of these crimes. . . . [I]f you believe them when they tell you what happened, you are satisfied beyond a reasonable doubt." Defense counsel objected to each of these statements as misstating the burden of proof. After a side bar with counsel, the trial court overruled each objection.

The jury found Fallon guilty on all counts. Fallon appeals.

ANALYSIS

Prosecutorial Misconduct

Fallon contends that the prosecutor committed misconduct by misstating the burden of proof and reversal is therefore required. We conclude that the prosecutor did not commit misconduct and reversal is unwarranted.

Prosecutors have " 'wide latitude' " in closing argument to argue reasonable inferences from the evidence at trial, including evidence regarding the credibility of witnesses, but their argument must not misstate the applicable law. State v. Crossguns, 199 Wn.2d 282, 296-97, 505 P.3d 529 (2022) (quoting In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 713, 286 P.3d 673 (2012) (plurality opinion)); State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). The defendant bears the burden to prove prosecutorial misconduct. Thorgerson, 172 Wn.2d at 442. To prevail on a claim of prosecutorial misconduct, the defendant must demonstrate (1) that the prosecutor's conduct was improper and (2) the conduct was prejudicial in the context of the entire record and the circumstances at trial. Thorgerson, 172 Wn.2d at 442; State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If the defendant objected to the alleged misconduct at trial, they must demonstrate that the prosecutor's misconduct resulted in prejudice that had a "substantial likelihood" of affecting the jury's verdict. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

In all criminal matters, the State carries the burden to prove each element of the crimes charged beyond a reasonable doubt. Crossguns, 199 Wn.2d at 297. "Arguments by the prosecution that shift or misstate the State's burden to

prove the defendant's guilt beyond a reasonable doubt constitute misconduct." State v. Lindsay, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). It is misconduct for a prosecutor to ask the jury to decide who is telling the truth. Glasmann, 175 Wn.2d at 704. Likewise, it is also misconduct for a prosecutor to tell the jury it must find that the State's witnesses are lying in order to acquit the defendant. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209 (1991). "The jury's job is not to determine the truth of what happened. . . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760 (citations omitted). Therefore, asking the jury to decide a case based who it believes is telling the truth or lying is misconduct because it impermissibly shifts the burden away from the State. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). However, credibility determinations are squarely within the province of the jury. State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969).

Here, Fallon contends that the prosecutor committed misconduct by misstating the burden of proof during closing argument. In his briefing, Fallon takes issue with the following statements from the prosecutor's closing argument, emphasizing portions as follows:

> And if you believe them*, if you believe [K.T.] and [R.K.], if you found them credible then you have been satisfied beyond a reasonable doubt*.
>
> . . .
>
> The instructions tell you, the instructions that Judge McKee gave you told you testimony is evidence. The evidence that they gave you[,] *if*

> *you find that evidence credible, you have been satisfied beyond a reasonable doubt*.
>
> . . .
>
> And if the testimony that you heard from [K.T.] and [R.K.], *if you find them credible, if you believe them, they have established for you all the elements of each and every one of these crimes*.
>
> . . .
>
> *If you find them credible, if they laid that all out for you, you have been satisfied beyond a reasonable doubt.*
>
> And that means you don't get to throw up your hands and say I wish I had more evidence. I believe them, but I wish there was more. Because if you believe them and you know why there is no other evidence, but if you believe them and already have more than enough—. . .

And finally:

> And these two witnesses have told you what happened to them. *And if you find them credible, if you believe them when they tell you what happened, you are satisfied beyond a reasonable doubt.* There was no need that you get some corroboration.

Fallon contends that the italicized portions of the prosecutor's argument misstated the burden of proof because the jury could have found both victims to be credible and still drawn other reasonable inferences from the evidence to find Fallon innocent. Regarding the rape charge, Fallon contends that the jury could have concluded from K.T.'s testimony that no penetration occurred and therefore that the State had not met its burden of proving every element of the crime beyond a reasonable doubt.[1] And for the child molestation charges, Fallon argues that even though both K.T. and R.K. testified that Fallon touched their

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[1] At trial, K.T. testified that Fallon tried to put his fingers inside her "but was unsuccessful" in doing so. She testified that she knew he was trying because she felt discomfort and pain. She said the pain she felt was "outside" her vagina. But she also said that when she felt pain, Fallon's finger was "[s]till on the outside but more towards the inside." And she testified that she felt pain inside her vagina "maybe once or twice."

bottoms, the jury did not have to conclude that this touching was for sexual gratification—it could have attributed the touching to Fallon's "inability to understand boundaries." Lastly, Fallon argues that K.T.'s testimony did not require the jury to find him guilty of immoral communication because the jury could have found that Fallon "acted with a purpose unrelated to sexual impropriety" when he requested that K.T. touch his "front part."

Thorgerson is instructive here. In Thorgerson, the prosecutor discussed the "beyond a reasonable doubt" burden of proof, argued that there were no holes in the victim's testimony, and advised the jury that it should not acquit the defendant if it believed the victims and found her credible. 172 Wn.2d at 454. The prosecutor told the jury: "Look, if you believe her, you must find him guilty unless there is a reason to doubt her based on the evidence in this case." Thorgerson, 172 Wn.2d at 454. The defendant argued that the prosecutor committed misconduct by telling the jury that there was no credible basis for doubting the victim's testimony. Thorgerson, 172 Wn.2d at 454. Our Supreme Court concluded the statements, taken in context, did not amount to misconduct because the prosecutor did not tell the jury there was a presumption that the victim was telling the truth; rather, the prosecutor argued that the jurors should believe the victim's testimony, and if they did, they should find the defendant guilty. Thorgerson, 172 Wn.2d at 454. The Court opined that this was not misconduct, particularly given the latitude prosecutors have in arguing from the evidence during closing argument. Thorgerson, 172 Wn.2d at 454.

Here, the prosecutor's statements do not amount to misconduct when viewed in context of the entire case. The prosecutor clearly conveyed to the jury that the State carried the burden of proof by stating: "Beyond a reasonable doubt is the [S]tate's burden and the [S]tate's burden alone." The prosecutor then argued that the evidence the jury heard had "more than established this burden." The prosecutor argued the testimony at trial supported "[t]he only reasonable inference"—that penetration had occurred—and told the jury that it was "necessary that [they] conduct [a] credibility analysis" in evaluating the evidence presented. This was not a misstatement of the burden of proof. Rather, the prosecutor recounted the evidence and asserted that the jury should conclude that the testimony supported a single reasonable inference. The prosecutor did not, as Fallon contends, assert that the jury *must* convict if they found the witnesses credible. The comments Fallon complains of are argument concerning the reasonable inferences the jury could glean from the evidence, not misconduct.

Use of Initials

Fallon argues that the use of K.T. and R.K.'s initials, rather than their full names, throughout the jury instructions constituted an impermissible judicial comment on the evidence. We disagree.

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 [their] 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. Mansour, 14 Wn.App.2d 323, 329, 470 P.3d 543 (2020) (internal quotation marks omitted) (quoting State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)) (review denied 196 Wn.2d 1040, 479 P.3d 708 (2021)). "We review de novo whether a jury instruction constituted an improper comment on the evidence 'within the context of the jury instructions as a whole.' " Mansour, 14 Wn.App.2d at 329 (quoting Levy, 156 Wn.2d at 721). We presume a comment on the evidence is prejudicial and the State bears the burden of showing no prejudice occurred. Levy, 156 Wn.2d at 725.

Here, Fallon contends that the judge commented on the evidence by using K.T. and R.K.'s initials in the to-convict jury instructions. This court contemplated the same issue in Mansour and held that the use of initials to identify a victim of child molestation in the to-convict jury instructions is not a judicial comment on the evidence. 14 Wn.App.2d at 330. In Mansour, we explained that the name of the victim of child molestation is not a factual issue requiring resolution. 14 Wn.App.2d at 329. Therefore, using initials in to-convict instructions does not impermissibly instruct the jury that a matter of fact had been established as a matter of law. Mansour, 14 Wn.App.2d at 330. Also, a juror is unlikely to presume that a complainant is a victim—or that the court considers them to be—merely because the court chooses to use their initials. Mansour, 14 Wn.App.2d at 330. We observed that "even the use of the term 'victim' has 'ordinarily been held not to convey to the jury the court's personal opinion of the case.' "

Mansour, 14 Wn.App.2d at 330 (quoting State v. Alger, 31 Wn. App. 244, 249, 640 P.2d 44 (1982)).

Nonetheless, Fallon argues that Mansour was wrongly decided and urges us not to follow it. In support of his argument, Fallon cites the same cases and recycles much of the same argument as the defendant in Mansour. As in Mansour, we do not find the federal cases Fallon cites persuasive. All four are civil cases in which the respective plaintiffs sought to use pseudonyms to conceal their identities *throughout* judicial proceedings.[2] See Jane Doe v. Cabrera, 307 F.R.D. 1, 2 n.2 (D.D.C. 2014) (permitting use of a pseudonym throughout the pretrial process); James v. Jacobsen, 6 F.3d 233, 240-41 (4th Cir. 1993) (considering pseudonym use throughout trial for parents to protect identity of their minor children); Does I through XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1068 (9th Cir. 2000) (considering pseudonym use throughout pretrial proceedings); Jane Doe v. Rose, No. CV-15-07503-MWF-JCx, 2016 WL 9150620, at *1 (C.D. Cal. Sept. 22, 2016) (court order) (reserving for pretrial conference whether plaintiff would be permitted to use a pseudonym at trial). By contrast, here, both R.K. and K.T. were referred to by their full names throughout trial and their identities were in no way concealed from the jury. Mansour contemplated the same issue now before us and is controlling authority.[3]

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[2] And two of the cases he cites—Jane Doe v. Cabrera, 307 F.R.D. 1, 2 n.2 (D.D.C. 2014) and Jane Doe v. Rose, No. CV-15-07503-MWF-JCx, 2016 WL 9150620, at *1 (C.D. Cal. Sept. 22, 2016)—are the same cases the defendant in Mansour relied on.

[3] Contrary to Fallon's assertions, published opinions of this court do have precedential value. See RCW 2.06.040 ("All decisions of the court having

14 Wn.App.2d at 328-30 (concluding that the use of initials in the to-convict instructions is not a judicial comment on the evidence).

Ignoring our holding in Mansour, Fallon tries to analogize the circumstances here to those in State v. Jackman to assert that a to-convict instruction that conveys to the jury that the defendant's guilt has been proved is a comment on the evidence. 156 Wn.2d 736, 132 P.3d 136 (2006). But Fallon's reliance on Jackman is misplaced. The defendant in Jackman was also charged with communication with a minor for immoral purposes, of which age of the victim is an element. In Jackman, a critical element of the crime at issue was whether the victims were minors. 156 Wn.2d at 743. And because the two victims testified that they had previously lied to Jackman about their ages at the time of the offenses, their credibility was an issue at trial. Jackman, 156 Wn.2d at 744, n.7. The jury could have chosen not to believe their testimony as to their correct birth dates at the time of the events. Jackman, 156 Wn.2d at 744, n.7. Therefore, the victims' ages were a factual issue for the jury to resolve. Jackman, 156 Wn.2d at 744. Thus, when the court in Jackman included the victims' birth dates in the to-convict instructions, it conveyed to the jury that those dates had been proven true. 156 Wn.2d at 744. This was an impermissible

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precedential value shall be published as opinions of the court."); cf. GR 14.1 ("Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court."). And "we are exceedingly reluctant to disagree with recent opinions." Little v. King, 147 Wn. App. 883, 889, 198 P.3d 525 (2008).

judicial comment on the evidence because it allowed the jury to infer that the age element had been proved by the State. Jackman, 156 Wn.2d at 744.[4]

Here, use of the victims' initials is not a judicial comment on the evidence. The victims' ages were not a disputed element; they were all still minors at the time of trial. Like in Mansour, we are unpersuaded that the use of R.K. and K.T.'s initials here conveyed anything to the jury about the judge's personal attitudes on the merits of the case. For these reasons, we hold that the use of the victims' initials in the to-convict instructions was not a judicial comment on the evidence

We affirm.

Smith, A.C.J.

WE CONCUR:

Birk, J.

Andrus, C.J.

[4] We note, too, that the Jackman defendant did not take issue with the court's use of the victims' initials in the to-convict instructions. 156 Wn.2d at 740-41.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83125-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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