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COA NO. . 43438-5-II.

SUPREME COURT OF WASHINGTON

ROBERT BARRY, Appellant,

v.

STATE OF WASHINGTON, Respondent,

Petition for Review

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STATUTES

I. IDENTITY OF PETITIONER

Mr. Barry asks this court to accept review of the Court of Appeals decision designated in Proceeding Portions of this petition.

II. COURT OF APPEALS DECISION

On Direct Review, Division II of the Court of Appeals upheld Mr. Barry's conviction.[1] A copy of the decision is in the Appendix at pages A-1 through 26 (hereinafter "Opinion").

III. ISSUES PRESENTED FOR REVIEW

A. Whether the Trial Court's Erroneous Instruction telling the Jury to Consider Mr. Barry's Demeanor During Trial Violated the Fifth Amendment and Article I, section 9.

A. Whether the Trial Court's Erroneous Instruction telling the Jury to Consider Mr. Barry's Demeanor During Trial Violated the Sixth Amendment.

B. Whether the Court of Appeals Improperly Required Mr. Barry to Show that the Error in the Jury Instruction was Harmless and, if so, Whether the Court Improperly Applied that Standard.

IV. STATEMENT OF THE CASE

Robert Barry was convicted of first-degree child molestation in the Kitsap Superior Court. Here are the relevant facts of the case, as summarized by the Court of Appeals:

> The State charged Barry with first degree child molestation (domestic violence) committed against CC, his grandson. The case

[1] As discussed infra, the appellate court never made a specific finding as to the sufficiency of the evidence for the kidnapping conviction. Instead, it appeared to confuse the sufficiency of the evidence argument, with one of merger and double jeopardy.

proceeded to trial. During its deliberations, the jury sent a note asking the court, "Can we use as 'evidence', for deliberation, our observations of the defendant's—actions—demeanor during the court case[?]" Clerk's Papers (CP) at 115. The trial court instructed the jury, "Evidence includes what you witness in the courtroom." CP at 115. Barry objected to this instruction.

Despite his objection, the court proceeded with the instruction. Soon thereafter, the jury found Barry guilty of one count of child molestation.

Barry appealed, asserting three interrelated arguments that are relevant here. First, he argued that the jury instruction previously violated his Fifth Amendment right against self-incrimination. Second, he advanced a related argument that the trial court had violated his "Sixth Amendment to a verdict based solely upon the evidence" presented at trial. Third, even if the trial court had not violated his Fifth Amendment rights with that instruction, Barry argued that the trial court violated a non-constitutional right that forbids the jury from considering his trial demeanor as evidence unless he testified at trial.[2]

The court rejected all three arguments in a partially reported opinion. In the published portion of the opinion, the court of appeals rejected the first two arguments. Though it recognized that it was error to instruct the jury that Mr. Barry's demeanor could be considered "as

[2] *See* RCW 10.52.040; *State v. Epefanio,* 156 Wn. App. 378, 388, 234 P.3d 253 (2010).

evidence" of guilt, the court upheld his conviction claiming that Mr. Barry was not prejudiced by the error. The court of appeals, however, applied the wrong standard of prejudice.

According to the court of appeals, the jury instruction did not violate Mr. Barry's Fifth or Sixth Amendment rights, so it was not an error of constitutional magnitude, which would have required the State to prove that the error was harmless beyond a reasonable doubt. Additionally, the court of appeals improperly placed the burden of proving prejudice on Mr. Barry, even though instruction errors are presumed prejudicial in Washington if the defendant objects to them, as did Mr. Barry here.

V. WHY THIS COURT SHOULD ACCEPT REVIEW

A. The Trial Court's Erroneous Instruction telling the Jury to Consider Mr. Barry's Demeanor During Trial Violated the Fifth Amendment and Article I, section 9.

The accused has a constitutional right to testify on his or her own behalf.[3] Federally, the defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments.[4] In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. Both Constitutions make this a "fundamental" right.[5] This constitutional protection applies to all compelled testimonial evidence that

[3] *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).
[4] *Id.* at 51-52.
[5] *State v. Robinson*, 138 Wn.2d 753, 758-59, 982 P.2d 590, 594 (1999).

is admitted to prove the defendant's guilt in a criminal proceeding.[6]

A criminal defendant has a constitutional right to request an instruction to prevent the jury from inferring guilt from his silence.[7] And if ever a defendant requests such an instruction, "[A] state trial judge has the constitutional obligation . . . to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify."[8] Such an instruction is so important that the U.S. Supreme Court has held that a proper instruction is "perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination," because "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime."[9]

Here, the trial court initially instructed the jury to not consider the defendant's demeanor as evidence, in its written instructions. In response to a directed question on the issue, the trial court completely contradicted its original instruction, by telling the jury that Mr. Barry's demeanor during trial could be used as evidence of his guilt. Mr. Barry did not testify at trial and he objected to the instruction, but the court gave it anyway. On appeal, the court rejected this argument, reasoning that there was no

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[6] *U.S. v. Hubbell*, 530 U.S. 27, 34-35, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000).
[7] *Carter v. Kentucky*, 450 U.S. 288, 303, 101 S.Ct. 1112, 1120, 67 L.Ed.2d 241 (1981).
[8] *Carter*, 450 U.S. at 305.
[9] *Carter*, 450 U.S. at 302.

coercion. Though the court was correct to recognize that Government coercion is necessary to show a Fifth Amendment violation, the court of appeals was incorrect to hold that no coercion occurred here.

A criminal defendant has the freedom to remain silent "unless he chooses to speak in the unfettered exercise of his own will."[10] That rule is "well established" and deciding whether or not to testify rests with the defendant.[11] No one—including the State, the court, or even the defendant's own defense counsel—can force a defendant to give up that right.[12] By definition, therefore, "a necessary element of compulsory self-incrimination is some kind of compulsion."[13]

The court of appeals held that Mr. Barry failed to show any compulsion because "neither the State nor the trial court forced Barry to do anything with regard to his demeanor."[14] This holding is incorrect because it assumes that Government must have "forced" Mr. Barry to engage in some kind of specific type of incriminating demeanor in order to show Government compulsion. But, this is incorrect, because the government can "compel" testimony without such force.

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[10] *Carter*, 450 U.S. at 305.
[11] *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).
[12] *Id*; *Robinson*, 138 Wn.2d at 758-59 (Though an attorney may "advise" the defendant against testifying, for instance, this Court has held that an attorney may not force a defendant to testify, or prevent him from testifying.).
[13] *Lakeside v. Oregon*, 435 U.S. 333, 339, 98 S.Ct. 1091, 1094-95, 55 L.Ed.2d 319 (1978).
[14] Opinion at 5.

In *Estelle v. Smith*, for instance, the Supreme Court held that the admission of incriminating statements made during the course of court-ordered psychiatric examinations violated the Fifth Amendment.[15] There the court had compelled the defendant, by court order, to take the exam. But, prior to submitting to the court ordered exam, no one made the defendant aware that the results might be used as evidence against him. Accordingly, any evidence obtained from that exam should have been suppressed. Without any such warning, it was impossible for the defendant to execute a valid waiver of his right to remain silent. Accordingly, the Court held that the evidence could not be used to prove Mr. Barry's guilt.

Here, like in *Estelle*, Mr. Barry was forced to give evidence against himself without first being told that the evidence could be used against him. He was compelled to be at his own trial, much like Estelle was compelled to attend the psychiatric exam. Mr. Barry's mere attendance at trial is not sufficient to show a Fifth Amendment violation, just as Estelle's attendance at the court-ordered psychiatric exam was not, by itself, a Fifth Amendment violation.

But, also like the defendant in *Estelle*, Mr. Barry was never informed, prior to the judge's erroneous instruction to the jury, that the

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[15] *Estelle v. Smith*, 451 U.S. 454, 468-69, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981); see also *Powell v. Tex.*, 492 U.S. 680, 681, 109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989) (per curam) (5th Amendment applies to statements made during court-ordered psychiatric examination relating to future dangerousness of defendant).

jury would be able to use his demeanor as evidence against him. Prior to his trial, no one warned him that the jury would be allowed to consider, "as evidence," his demeanor throughout the entire trial. In fact, no one could have anticipated such an erroneous ruling. Barry had every right to believe that his demeanor would not be used as evidence against him, because it is clearly not admissible to show guilt, as the court of appeals conceded. His forced presence at the trial, when combined with the trial court's ***late and erroneous*** ruling completely prevented him from making a knowing, intelligent, an voluntary decision with regard to whatever his "demeanor" during the trial could have been because he had every right to assume the trial court would follow the law correctly.

Finally, the instruction given here was so broad that it failed to adequately prevent the jury from using observations of Mr. Barry during trial, which would certainly be "testimonial" in nature. Unless the defendant waives his right to remain silent or to testify, "nonverbal act[s] may be testimonial in nature."[16] Testimonial evidence is a communication, verbal or non-verbal, that "explicitly or implicitly, relate[s] a factual assertion or disclose[s] information."[17] Accordingly, an accused may not be compelled to reveal, either directly or indirectly, "his knowledge of

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[16] *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797, 800 (1988).
[17] *Pennsylvania v. Muniz*, 496 U.S. 582, 594, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1998)).

facts relating him to the offense or from having to share his thoughts and beliefs with the Government."[18]

Here, the jury could have noticed countless "testimonial" acts based upon Mr. Barry's trial conduct over the course of the trial. Throughout that trial, the jury observed Mr. Barry and his demeanor, as he reacted to witness testimony, opening and closing argument, the trial court's rulings, and an infinite number of other occurrences throughout the trial. And the jury instruction informed the jury, that it could use any of these observations "as evidence" against Mr. Barry. The instruction did not limit those observations so as to exclude observations that would create impermissible inferences against his right to remain silent, such as a perceived failure to show remorse, which should be protected by the Fifth Amendment, at least to the extent that the Court should not specifically tell the jury that any such observations are "evidence" of the defendant's guilt.

Instructing the jury that it could consider Mr. Barry's demeanor "as evidence" without limitation on the type of evidence certainly allowed the jury to consider possible demeanor evidence that would be testimonial. The instruction violated the Fifth Amendment and the error was certainly not harmless beyond a reasonable doubt.

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[18] *Muniz,* 496 U.S. at 595.

B. The Trial Court's Instruction Erroneously Instructed the Jury to Consider Mr. Barry's Demeanor During Trial, Even Though Such Observations Cannot Be Considered as Evidence of Guilty. This Court Should Accept Review because this Instruction Violated his Sixth Amendment Right to a Verdict Based Solely on the Evidence.

Due process prohibits a defendant from being convicted of that which is not evidence. The Supreme Court has declared that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds . . . not adduced as proof at trial."[19]

In *Ferguson v Georgia*,[20] a defendant wished to testify in his own defense, but a state statute prevented his attorney from questioning him while on the stand. The Court held that this restriction violated Due Process because it deprived the accused of "the guiding hand of counsel." The Court noted that the rule unjustifiably restricted defense counsel's ability to aid his client in his defense.[21] The Court noted that by preventing a defendant's attorney from guiding the defendant through his testimony, the risk that the jury would unfairly infer guilt based upon speculation about his words and demeanor was far too great:

> An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than the

[19] *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468 (1978).
[20] *Ferguson v. Georgia*, 365 U.S. 570, 573–83, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961).
[21] *Id.*

> offender, who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order anywhere, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances.'[22]

And without his lawyer's guidance through his testimony, an innocent defendant still "faces the danger of conviction because he does not know how to establish his innocence."[23]

Here, just as in *Ferguson*, the trial court's erroneous instruction to the jury violated Due Process because it robbed Mr. Barry of the "guiding hand of counsel." The timing of the jury instruction compels this result. Although the court of appeals characterized this as an "evidentiary ruling," that was clearly not the case. It was a jury instruction and it was given after closing argument and during jury deliberations. An evidentiary ruling tells the parties what is and is not evidence and gives the parties an opportunity to use and respond to it. No such warning was given here.

There was absolutely no way defense counsel or Mr. Barry could have anticipated this ruling. Defense counsel surely did not observe Mr. Barry's demeanor throughout the trial, and he certainly did not argue that it could have somehow proved his innocence. The trial court injected an entire world of evidence for the jury to consider, but the timing of the ruling made it impossible for defense counsel to use or refute any of it.

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[22] *Ferguson*, 365 U.S. at 573–83.
[23] *Id.* at 595.

The instruction placed Mr. Barry in the obvious position of a potentially innocent man who now "faces the danger of conviction because he does not know how to establish his innocence."[24]

C. The Trial Court Erred When It Erroneously Reframed Mr. Barry's Instructional Argument as an "Evidentiary Ruling" and in Doing that, it Robbed him of the Presumption that the Error was Prejudicial and Improperly Shifted the Burden on Him to Prove Harmlessness.

In Washington, all instruction errors are presumed to be prejudicial, so long as the defendant makes a timely objection.[25] As previously noted by this Court, this is a "well-established rule" in Washington. If the error is of constitutional magnitude, it is then up to the State to prove that the error was harmless beyond a reasonable doubt.[26] If the error is not of constitutional magnitude, the presumption is still the same, but the State's burden to show that the error was harmless is slightly lower.[27] For non-constitutional error, the State must show that within reasonable probabilities, had the error not occurred, the outcome of the trial would not have been materially affected.[28]

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[24] *Id.*
[25] *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917, 919 (1997); *State v. Hicks*, 102 Wn.2d 182, 683 P.2d 186 (1984) (failure to give an instruction beneficial to a defendant is presumed to be prejudicial); *State v. Belmarez*, 101 Wn.2d 212, 215, 676 P.2d 492, 494 (1984).
[26] *State v. Belmarez*, 101 Wn.2d 212, 215, 676 P.2d 492, 494 (1984) (holding that "conclusive presumption that petitioner knew his codefendant was armed at the time of the offense" was presumed prejudicial).
[27] *See State v. Southerland*, 109 Wn.2d 389, 745 P.2d 33 (1987).
[28] *Id.*

The court of appeals did not follow this required presumption however. Instead, the court of appeals avoided this presumption by characterizing the court's instruction as "essentially an evidentiary decision" because it allowed "the jury to consider Barry's demeanor as evidence."[29] The opinion, however, provided no authority for this assertion, and none has been located to date. Not only is this assertion not supported by case law, it contracts it and stands in stark contrast to opinions from this Court that hold quite the opposite.

In *Southerland*, for instance, this Court applied the presumption to a non-constitutional statutory right to have the jury instructed on "a lesser included offense."[30] Likewise, in *Wanrow*, the trial court instructed the jury in a way that limited the jury's ability to *consider evidence* pertaining to the defendant's self-defense claim, such as "the acts and circumstances which the jury could consider in evaluating the nature of the threat of harm as perceived by" the defendant.[31]

Additionally, the trial court's ruling was not merely an evidentiary ruling because it directly contradicted another instruction that was previously given to the jury, certainly creating confusion as to which one to apply. And when the court gives two instructions, as it did here, one

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[29] Opinion at 5.
[30] Southerland, 109 Wn.2d 389.
[31] *State v. Wanrow*, 88 Wn.2d 221, 237-38, 559 P.2d 548, 557 (1977)

correct and one erroneous, this Court has refused "to substitute its judgment for that of the jury by inferring that the verdict was reached under the correct instruction."[32]

Finally, even if the presumption of prejudice did not apply to *all instructional errors* that are objected to at trial, it still applies here because the instruction error directly contradicted its earlier instruction which surely misled the jury as to its duty under the law. If two jury instructions appear to conflict with each other, the defendant is prejudiced if the jury was mislead "as to its function and responsibilities under the law."[33] And where such an inconsistency is the result of a "clear misstatement of the law," the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.[34]

Here, the trial court gave the jury two instructions that clearly conflicted with each other, and the trial court made no effort to fix the confusion. Instead, the second instruction told the jury to do exactly what the law demands it not do: consider everything it sees in the courtroom, which would of course include Mr. Barry's demeanor, "as evidence."

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[32] *See, e.g. State v. Stein*, 144 Wn.2d 236, 27 P.3d 184 (2001) (conviction reversed) ("When a defendant is convicted under alternative theories, one acceptable and the other based on an erroneous instruction, the Supreme Court is not willing to substitute its judgment for that of the jury by inferring that the verdict was reached under the correct instruction.").

[33] *State v. Hayes*, 73 Wn.2d 568, 439 P.2d 978 (1968).

[34] *Wanrow*, 88 Wn.2d at 237-38.

Accordingly, the trial court's second instruction to the jury certainly mislead the jury "as to its functions and responsibilities under the law, and the court of appeals was therefore required to presume prejudice. Had the court of appeals correctly followed any of these doctrines, it would have presumed prejudice and it would have been up to the State to overcome that burden to prove prejudice. And under the facts of this case, such a task would certainly have been "impossible," as the court of appeals noted.

D. The Trial Court's Erroneous Instruction telling the Jury to Consider Mr. Barry's Demeanor During Trial Violated the Sixth Amendment.

1. The Opinion Sets an Impossible Burden on a Criminal Defendant to Prove Prejudice.

The Opinion, if given precedential value, will set a standard for prejudice that is illogical and imposes an impossible burden on the appellant, even when the defendant, like Mr. Barry, makes a timely objection to the comment. Following the court's prejudice reasoning, Barry could have shown prejudice if he could have identified what the jury was thinking about Mr. Barry's demeanor during his trial. But, at the same time, the Opinion paradoxically recognized that this is really "impossible" for Barry to do because we would always be forced to speculate as to what demeanor evidence the jury relied on and if so, how it affected their

verdict. As shown by his timely objection, Mr. Barry's trial counsel knew that the jury was not allowed to consider Mr. Barry's demeanor as evidence, so he certainly could not have argued against it during closing, which he did not. Moreover, defense counsel could not argue against using any of it to the jury, because closing argument had already occurred.

It appears to incorrectly assume that we must understand *what the jury was thinking* during its deliberations in order to hold that the error was not harmless. Here, what the court of appeals failed to realize, however, is that "it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors."[35] In actuality, Mr. Barry did everything that he could have done to prevent the jury from considering such evidence, including making a timely objection and even suggesting to the court the proper response to the jury note: instruct the jury to re-read the correct instructions. But the court overruled the objection. At that point, nothing else could be done to protect Mr. Barry from being convicted based upon that erroneous ruling. But now, the Court of Appeals has said, quite clearly, that Mr. Barry has absolutely no recourse whatsoever. Under the court's logic, even though Barry had a right to not have the jury consider evidence against him, he could never obtain relief, even after doing everything the law asks of him to do to

[35] *State v. Robinson*, 24 Wash.2d 909, 917, 167 P.2d 986 (1946).

preserve that right.

2. Harmless Error Does not Require a showing that the result "Would Have Been Different." It Only Requires that there Be a "Reasonable Probability."

When applying the harmless error standard the appellate court looks at several factors, including the evidence presented at trial, the importance of defendant's credibility, and the effect that erroneously admitting the inadmissible evidence "*may have had on the jury.*"[36] For non-constitutional errors, the defendant will usually bear the burden to prove prejudice. Yet, to do this, he need not show that he was "actually prejudiced" by the error. Instead, he must only show that "*within reasonable probabilities*, had the error not occurred, the outcome of the trial would have been materially affected."[37] This standard is sometimes called the "contribution test" for harmlessness and is well recognized in Washington as applying to review of non-constitutional errors.[38] The court of appeals only paraphrased this rule, ignoring the requirement that there need only be a "reasonable probability" of a different verdict. The Opinion boldly claims that Mr. Barry must show that "the trial outcome *would have been different* absent the error."

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[36] *State v. Hardy*, 133 Wn.2d 701, 712, 946 P.2d 1175, 1181 (1997).
[37] *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207, 219 (2012) (quoting *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).
[38] *State v. Grenning*, 169 Wn.2d 47, 58, 234 P.3d 169, 175-76 (2010); *Gresham*, 173 Wn.2d at 425.

Instead, as formulated and applied in the Opinion, the court of appeals appeared to conflate the "Reasonable Probabilities" harmless error test with the "actual prejudice" test as defined in RAP 2.5. To show "actual prejudice," in the context of RAP 2.5, the defendant must identify the specific consequences of the error in the record that would have made the error obvious to the trial court.[39] Under the actual prejudice rule, "the facts necessary to adjudicate the claimed error" must "be in the record on appeal."[40] This rule encourages the defendant to make a timely objection and make a record of it on appeal. But this rule only applies if, unlike here, the defendant fails to object at trial.[41] So the higher burden of actual prejudice clearly does not apply here and to the extent that such a standard is implied by the Opinion, it conflicts with the precedent of this court.

Moreover, the court's reasoning appears to require the appellant to know that it was nearly certain that the error caused the jury to convict. In reasoning that Mr. Barry failed to meet this standard the court reasoned that "we do not know what demeanor 'evidence' the jury may have considered."[42] But we do not need to "know" what the specific demeanor

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[39] When the defendant fails to object, he must show meet this higher burden and show "actual prejudice," meaning he must plausibly show the asserted error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). And even when it does apply, the "actual prejudice" inquiry is completely distinct from the harmless error inquiry. *State v. Haq*, 166 Wn. App. 221, 268 P.3d 997 (2012).
[40] *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756, 761 (2009).
[41] *Sed id.*
[42] Opinion.

evidence was used to conclude that there is a reasonable probability that the ruling affected the outcome of the case. Though that can be a factor in determining whether an error was harmless, as noted in *Hardy*, the inquiry still requires the court to speculate as to the probable effect *of the error*, not necessarily specific "evidence" that was admitted because of the error.[43] The Opinion also incorrectly claims that "we do not know . . . whether his demeanor could have affected the verdict." [44] But, this claim fails to apply the "reasonable probability" standard correctly by equating it with some measure of actual prejudice.

In *Gresham*, this Court held that admission of a defendant's prior conviction was not harmless under the contribution test. After first noting that the defendant carries the burden to prove prejudice, the court still found that there was a reasonable probability that the result of the trial would have been different had the conviction evidence not been admitted. The court reached this conclusion because (1) the victim testified "that Gresham had molested her," (2) she testified that Gresham had had the opportunity to molest her, (3) an investigating officer testified favorably for the State, (4) but there were no eyewitnesses to the alleged incidents of

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[43] *Hardy*, 133 Wn.2d at 712 (considering the effect that erroneously ruling "*may have had on the jury.*").
[44] Opinion.

molestation.[45] In that case, just as in this one, the court had no idea, like the court here, whether the prior evidence affected the jury's verdict.

Similarly, in *Hardy*, the Supreme Court held that the trial court erroneously admitted the defendant's prior conviction and that there was at least a reasonable probability that the error affected the trial's outcome.[46] The *Hardy* court focused on three factors: (1) there was no physical evidence establishing the force for the alleged robbery, (2) there were no eyewitnesses except the defendant and the victim, making the case essentially a swearing contest between the victim and Hardy, so credibility was crucial to the verdict, and (3) the fact that the prior conviction had "almost no impeachment value" and the risk that the impeachment evidence "may have" affected the jury's determination of Hardy's credibility. After considering these three factors, the court concluded that "here was at least a reasonable probability that this improper impeachment affected the jury's determination."

When *Hardy* and *Gresham* are reviewed in light of their reasoning, it becomes clear that they were really applying a variation of the "contribution test" or maybe even an entirely different test completely, one called the "overwhelming evidence test." Under that test, the court

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[45] *Gresham*, 173 Wn.2d at 433-34.

[46] *Hardy*, 133 Wn.2d at 712-13.

must evaluate the strength of the State's case against the defendant to determine whether the committed error could not have affected the verdict, in light of the strength or weaknesses of the State's case.

Here, applying the correct standard, Mr. Barry surely could have shown a "reasonable probability" that the trial result could have been different. One could say that it is equally likely that he benefited from the instruction as it is that he did not, giving him a 50-50 chance that the jury convicted him erroneously. But, the court need not find actual prejudice here, only a reasonably probability. And a 50-50 chance is certainly enough to find a "reasonable probability" that he was acquitted under these facts, because to show a reasonable probability, the appellant need not even show that the error "more likely than not altered the outcome [of] the case."[47]

VI. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated February 27, 2014

Mitch Harrison
Attorney at Law

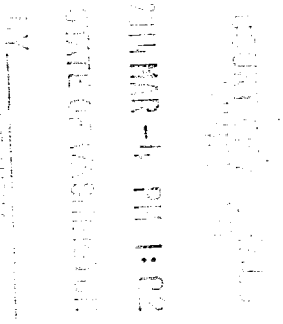
[47] *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

PROOF OF SERVICE

On February 27, 2014, I filed the original copy of the attached document and proof of service in person at the Court of Appeals, Division I. In addition, a copy was also sent to the King Prosecuting Attorney's Office AND Mr. Robert Barry.

Dated February 27, 2014

Mitch Harrison
Attorney at Law



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT BARRY, Appellant.	No. 43438-5-II PART PUBLISHED OPINION

MAXA, J. – Robert Barry appeals his conviction of first degree child molestation (domestic violence), claiming that the trial court erred in admitting child hearsay statements and erred in instructing the jury that it could consider Barry's courtroom demeanor as evidence. In the published portion of this opinion, we hold that the trial court's instruction regarding consideration of Barry's demeanor was erroneous, but Barry cannot show prejudice from the trial court's instruction. In the unpublished portion, we hold that the record supports the trial court's child hearsay findings. Accordingly, we affirm.

FACTS

The State charged Barry with first degree child molestation (domestic violence) committed against CC, his grandson. The case proceeded to trial. During its deliberations, the jury sent a note asking the court, "Can we use as 'evidence', for deliberation, our observations of the defendant's – actions – demeanor during the court case[?]" Clerk's Papers (CP) at 115. The

trial court instructed the jury, "Evidence includes what you witness in the courtroom." CP at 115. Barry objected to this instruction.

The jury found Barry guilty as charged. Barry appeals.

ANALYSIS

Barry argues that the trial court erred in instructing the jury that "[e]vidence includes what you witness in the courtroom," in response to the jury's question about whether during deliberations it could use as evidence Barry's actions and demeanor during the case. CP at 115. He asserts that allowing the jury to consider his demeanor violated both his Fifth Amendment[1] privilege against self-incrimination and his Sixth Amendment[2] right to a verdict based solely on the evidence.

We disagree that the trial court's instruction violated the Fifth Amendment. And although we agree that the trial court's instruction misstated the law, we do not find a constitutional error. We hold that the absence of any record regarding the nature of Barry's demeanor precludes him from showing that the improper instruction prejudiced him.

A. RIGHT TO NOT TESTIFY

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington State Constitution also states that "[n]o person shall be compelled in any criminal case to give evidence against himself." Under both provisions,[3] a defendant has a right to not

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[1] U.S. CONST. amend. V.

[2] U.S. CONST. amend. VI.

[3] Our Supreme Court has held that the scope of these provisions is the same. *E.g.*, *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

testify at trial. RCW 10.52.040; *State v. Epefanio*, 156 Wn. App. 378, 388, 234 P.3d 253 (2010). Barry apparently argues that by equating his demeanor with evidence, the trial court violated this right. We disagree.

Under the plain language of the constitutional provisions, the violation of the right against self-incrimination must involve some form of government compulsion. *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979). Here, neither the State nor the trial court forced Barry to do anything with regard to his demeanor. He had full control over how he acted in the courtroom. Other than citing the Fifth Amendment, Barry does not explain how he was *compelled* to give evidence against himself. We hold that allowing the jury to consider the defendant's demeanor as evidence does not violate the Fifth Amendment or article I, section 9.

B. DEFENDANT'S DEMEANOR AS EVIDENCE

Barry argues that the trial court's instruction violated his Sixth Amendment right to a verdict based solely on the evidence. Implicit in this argument is that a defendant's demeanor at trial is not evidence and therefore that the instruction misstated the law. We review claimed errors in instructions de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). We agree that Barry's demeanor at trial was not "evidence" and therefore that the instruction was improper. But we hold that Barry cannot establish prejudice.

Initially, we note that the trial court's instruction was improper in its overbreadth. The State cites no authority for the proposition that anything a jury witnesses in the courtroom constitutes evidence. And many things a jury might witness in the courtroom would not constitute "evidence." For example, our Supreme Court has held that trial spectators may be allowed to display buttons showing a photograph of the victim. *State v. Lord*, 161 W.2d 276,

284, 165 P.3d 1251 (2007). Such buttons obviously would not constitute "evidence" the jury could consider in determining the defendant's guilt.

Barry limits his argument to the jury's observations of his demeanor as evidence and not some other courtroom observations. Accordingly, we limit our analysis to that issue and conclude that a defendant's demeanor was not evidence in this case.

1. Court's Introductory Jury Instruction

The trial court instructions to the jury included an introductory instruction (instruction number 1) modeled after 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 13 (3d ed. 2008) that addressed consideration of a witness's demeanor. The instruction permitted the jury to consider "the manner of the witness while testifying" when evaluating the witness's credibility. CP at 120. However, as Barry points out, here he exercised his constitutional right to not testify, and neither his credibility as a witness nor his character was at issue. Accordingly, the jury could not have considered Barry's demeanor in evaluating his credibility as a witness. Further, even if a witness's credibility is at issue, nothing in the instruction states that a witness's manner in testifying constitutes "evidence." The witness's demeanor is just a factor for the jury to consider – along with several other factors – in assessing credibility.

Moreover, instruction number 1 establishes that the jury *cannot* consider the defendant's demeanor as evidence. The instruction expressly states that the evidence the jury may consider is the testimony of witnesses and the admitted exhibits. The defendant's demeanor does not fall into either category, and the instruction does not allow for the consideration of anything else as evidence. Because neither party objected to instruction number 1, it represents the law of this case. *See State v. Hickman,* 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

2. Washington Case Law

Although they are not directly on point, two Washington cases support our conclusion that a defendant's demeanor is not evidence. Both held that it is improper for a prosecutor to *comment* on the defendant's demeanor in closing argument. In *State v. Klok*, the prosecutor commented that the defendant had been laughing during the trial. 99 Wn. App. 81, 82, 992 P.2d 1039 (2000). Division One of this court stated that "it is improper to comment on a defendant's demeanor and to invite the jury to draw from it a negative inference about the defendant's character." *Klok*, 99 Wn. App at 85.

In *State v. Smith*, the prosecutor commented on the defendant's demeanor, describing him as someone who looked like he had an attitude and a chip on his shoulder. 144 Wn.2d 665, 679, 30 P.3d 2994 (2001), *superseded by statute on other grounds*, LAWS OF 2002, ch. 107, § 1. The court cited *Klok* in stating that "it may be improper to comment on a defendant's demeanor so as to invite a jury to draw a negative inference about the defendant's character." *Smith*, 144 Wn.2d at 679. The court also concluded that the prosecutor's comments about the defendant's demeanor "were likely improper." *Smith*, 144 Wn.2d at 679.

Neither of these cases controls because they both involve prosecutor comments on a defendant's demeanor, not whether a defendant's demeanor constitutes evidence. Here, the prosecutor did not comment on Barry's courtroom behavior and therefore did not encourage the jury to use character evidence in support of a guilty verdict as in *Klok* and *Smith*. However, *Klok* and *Smith* are inconsistent with a holding that a defendant's demeanor constitutes evidence. If a

defendant's demeanor constituted evidence that a jury could consider, a prosecutor's comment about such evidence in closing argument would not be improper.[4]

We hold that here the trial court erred in instructing the jury that "[e]vidence includes what you witness in the courtroom." CP at 115. This instruction improperly allowed the jury to consider Barry's courtroom demeanor as evidence they could consider in determining his guilt.

C. PREJUDICE

Barry argues that because the trial court's instructional error implicated his Sixth Amendment right to have the jury consider only the evidence properly before it, we must apply a constitutional error analysis and determine whether the instruction was harmless beyond a reasonable doubt. *State v. Maupin,* 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). We disagree, and hold that the nonconstitutional prejudice standard applies.

Even though the trial court gave an instruction to the jury, it essentially made an evidentiary decision – allowing the jury to consider Barry's demeanor as evidence. An error in admitting evidence generally is not reviewed under the more stringent constitutional standard for prejudice. *See, e.g., State v. Gresham,* 173 Wn.2d 405, 432-33, 269 P.3d 207 (2012)(admission of evidence violated ER 404(b)); *State v. Hardy,* 133 Wn.2d 701, 712, 946 P.2d 1175 (1997) (admission of evidence violated ER 609(a)(1)); *State v. Bourgeois,* 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Instead, the test for admission of evidence is whether the defendant has

[4] Both Barry and the State cite multiple cases from other jurisdictions. *Compare United States v. Carroll,* 678 F.2d 1208, 1209-10 (4th Cir. 1982) ("non-testimonial behavior in the courtroom could not be taken as evidence of his guilt") *with State v. Brown,* 320 N.C. 179, 199, 358 S.E.2d 1, 15-16 (1987) (evidence is not only what they hear on the stand but what they witness in the courtroom). The cases from other jurisdictions are not particularly helpful. Most of these cases are distinguishable because like *Klok* and *Smith* they involve a prosecutor's comments on a defendant's demeanor. And there are cases on both sides of the issue of whether a defendant's demeanor constitutes evidence.

shown that the trial outcome would have been materially affected absent the error. *Gresham*, 173 Wn.2d at 433.

Applying the nonconstitutional error standard, we hold that the error was not prejudicial for two reasons. First, the record contains no reference to any behavior, comments, or other demeanor by Barry during trial.[5] As a result, we do not know what demeanor "evidence" the jury may have considered or whether his demeanor could have affected the verdict. Consequently, it is impossible to conclude that the improper jury instruction prejudiced Barry.

Second, without any information identifying what demeanor the jury may have considered, it is impossible to know whether that consideration was favorable or unfavorable to Barry. In the abstract, a defendant's demeanor is neutral. Depending on the demeanor, a jury could draw a negative inference or a positive inference from how the defendant acts during trial. As a result, merely stating that a jury may have considered a defendant's demeanor without any information about that demeanor cannot establish prejudice because that consideration may have favored the defendant.

We hold that the absence in the record of any description of Barry's demeanor precludes him from establishing that the trial court's instruction that allowed the jury to consider that demeanor prejudiced him. Accordingly, although we hold that the instruction was improper, the absence of prejudice precludes reversal on this basis.

We consider Barry's remaining arguments in the unpublished portion of this opinion. We affirm his conviction.

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[5] Barry points out that the trial court directed Barry and trial observers to sit stoically through trial. But nothing in the record indicates whether Barry followed that direction.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

CC was born in August 2002. His parents RC and GB divorced in 2010. The divorce was very contentious. CC was aware of a conflict between RC and Robert Barry, GB's father, and he witnessed a dispute between the two men that resulted in both men obtaining mutual restraining orders.

In February 2011, RC and his wife LL learned that CC had inappropriate sexual contact with CC's cousin. CC was eight years old at the time. RC questioned CC, and CC admitted that the behavior had happened and said that TT had taught it to him. TT was CC's friend, whom CC had not seen for nearly two years as he had moved away. CC later revealed that he had initiated the sexual contact with TT.

RC and LL took CC to see Jennifer Fisher, a mental health therapist. Fisher believed that CC had learned about sexual behavior from an adult, not TT. One evening before a therapy session, RC and LL sat with CC, reassured him that it was safe to talk to them, and encouraged him to be truthful with his therapist. CC responded, " 'It's there, but it's deep. It's there. It's deep.' " Report of Proceedings (RP) at 137. He mentioned Dennis, one of his mother's ex-boyfriends. However, CC quickly said it was not Dennis after RC talked to him about the seriousness of making such an accusation. RC then left the room while LL remained with CC. When RC returned, LL told CC to repeat what he had just told her. CC mouthed the words, "It's my papa," which was his name for Barry. RP at 138.

Fisher referred CC to Thomas Sherry, a therapist who specialized in working with children with inappropriate sexual acting out. CC disclosed to Sherry that he had had sexual contact with four people, one of whom was Barry. Sherry later testified that in his opinion, CC's disclosures were of real events in his life. CC repeated his allegations about Barry to Sasha Mangahas, a child forensic interviewer with the Kitsap County Prosecutor's Office Special Assault Unit.

The State charged Barry with first degree child molestation (domestic violence) committed against CC. Later, CC's younger brother disclosed that Barry also had molested him. By amended information, the State charged Barry with a second count of first degree child molestation (domestic violence) committed against CC's brother.

The trial court held a preliminary hearing to determine whether the boys' statements to their parents, therapists, and the forensic interviewer were admissible as child hearsay statements. It found that both boys' statements were reliable and therefore admissible as child hearsay, and entered detailed findings. Those statements were admitted at trial.

The jury found Barry guilty of count I (CC) and found that the special domestic violence allegation was proven. It could not reach a verdict on count II (CC's brother). Barry appeals.

ANALYSIS

Barry contends that the trial court erred in finding that CC's statements to his parents, therapists, and the forensic interviewer were admissible as child hearsay statements. We disagree, and hold that the trial court properly exercised its discretion in admitting this evidence.

We review for abuse of discretion a trial court's decision to admit child hearsay statements. *State v. Kennealy*, 151 Wn. App. 861, 879, 214 P.3d 200 (2009). A trial court

abuses its discretion when its ruling is manifestly unreasonable or is based on untenable grounds or reasons. *Kennealy*, 151 Wn. App. at 879.

RCW 9A.44.120, the child hearsay exception, provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
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> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: *Provided*, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

Because CC was under the age of 10 and testified at trial, the only question here is whether his statements had sufficient indicia of reliability under RCW 9A.44.120(1).

In determining whether a child's statements are reliable, the trial court must consider the nine reliability factors first set out in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984): (1) whether there is an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statement, (4) the spontaneity of the statements, (5) the timing of the statements and the relationship between the declarant and the witness, (6) whether the statements contained express assertions about past fact, (7) whether the declarant's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested that the declarant misrepresented the defendant's involvement. *See Kennealy*, 151

Wn. App. at 880. The reliability assessment is based on an evaluation of all the factors, and no single factor is determinative. *Kennealy*, 151 Wn. App. at 881. But the factors must be substantially met to establish reliability. *Kennealy*, 151 Wn. App. at 881.

Barry argues that factors (1), (2), and (4) show that CC's hearsay statements were unreliable. But we conclude that consideration of these and the remaining factors supported the trial court's finding of reliability.

1. Motive To Lie

Barry contends that CC had a motive to lie because his parents had been in a contentious divorce and he knew there was animosity between CC's father and Barry, and CC wanted to please his father. The trial court found:

> Neither BC nor CC has an apparent motive to lie. There is evidence that the parents of BC and CC do not get along and their relationship can be described as acrimonious. The counselors of BC and CC have indicated that the discord between the parents of BC and CC understandably causes them stress. While one could argue an inference that somehow the inability of the adults to get along could be a cause for these allegations, there is no evidence that this is the case. A connection (based on the evidence and not a mere inference) has not been made regarding the marriage dissolution discord and the allegations of the boys regarding their grandfather.

CP at 145. The record supports this finding. While there was testimony that CC wanted both parents' approval, there was no evidence that he would gain anything by accusing Barry. The trial court correctly observed that absent such evidence, this factor weighs in favor of reliability.

2. General Character of Declarant

Barry contends that the trial court erred in finding that the general character factor was neutral when there was evidence that CC "demonstrated a willingness to lie about this situation" by repeatedly changing his story with regard to the sexual contact. Br. of Appellant at 12. The

trial court found that "[t]he general character of BC and CC is neutral in this case. There is no evidence regarding the two boys and any reputation for lying." CP at 145.

When assessing a child's character, we consider whether the child has a "reputation for truthfulness." *Kennealy*, 151 Wn. App. at 881. While there was evidence that CC lied about who taught him this sexual behavior, we consider CC's statements in context. While there was undisputed evidence that he lied, CC testified that he was scared to tell the truth because Barry had threatened to separate him from his family if he ever said anything about the sexual contact. Because CC's false statements can be explained by Barry's threats, in our view this evidence does not show that CC had a reputation for not telling the truth. Further, no evidence was presented in the child hearsay hearing regarding CC's general "reputation" regarding truthfulness. We agree that this factor is neutral.

3. Statements Heard By More Than One Person

CC repeated his statements to his father, two therapists, and a sexual assault unit child interviewer. The trial court did not make a written finding but did reference this factor in its oral decision. This factor weighs in favor of reliability.

4. Spontaneity of Statements

The trial court found that CC's statements were not spontaneous as they were the product of inquiry. Barry points out that this factor weighs in favor of exclusion. Br. of Appellant at 13. e agree. However, this is the only factor that supports exclusion of the statements.

5. Timing and Relationship between Declarant and Witness

The trial court found based on the counselors' testimony that the intervention of counseling between the event and CC's reporting of it did not affect the statement. Barry does not contest this finding. We further note that CC made his statements to family members and

therapists in a clinical setting, further supporting the trial court's finding. *Kennealy*, 151 Wn. App. at 884.

6. Express Assertions about Past Fact

The trial court found that CC made express assertions of past facts. Barry does not contest this finding.

7. Availability of Cross-Examination

The trial court found that through cross-examination, the defense would have the ability to establish any lack of knowledge by CC Barry does not contest this finding. Further, our Supreme Court has held that this factor does not apply when the child testifies. *State v. Woods,* 154 Wn.2d 613, 624, 114 P.3d 1174 (2005).

8. Possibility of Faulty Recollection

The trial court found that "CC acknowledged both in court and out-of-court that there was sexual contact between himself and the defendant." CP at 146. In its oral decision, the trial court stated that "I have no concerns about [CC's] ability to recall." RP at 406. Barry does not contest this finding. This factor weighs in favor of reliability.

9. Circumstances Conducive to Reliability

The trial court did not make a finding on this factor and Barry does not address it on appeal.

In summary, the trial court properly considered the *Ryan* reliability factors. This consideration demonstrated that the factors were substantially met and therefore that CC's hearsay statements had sufficient indicia of reliability under RCW 9A.44.120(1). We hold that

the trial court did not abuse its discretion in admitting CC's hearsay statements. Accordingly, we affirm Barry's conviction.

MAXA, J.

We concur:

JOHANSON, A.C.J.

BJORGEN, J.