No. 46721-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES COCHRAN,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITES iv

I. ISSUES 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 6

A. THE ADDITIONAL LANGUAGE IN JURY INSTRUCTION NUMBER ELEVEN WAS A CORRECT STATEMENT OF THE LAW AND NOT AN IMPOROPER COMMENT ON THE EVIDENCE; THEREFORE THE TRIAL COURT DID NOT ERROR WHEN IT GAVE INSTRUCTION ELEVEN 6

1. Standard Of Review 6

2. Instruction Eleven Was Not An Improper Comment On The Evidence 7

3. Instruction Eleven Was Not Erroneous And Did Not Relieve The State Of Its Burden Of Proof 11

B. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR DURING HER CLOSING ARGUMENT 12

1. Standard Of Review 13

2. The Deputy Prosecutor Did Not Commit Error When Discussing Abiding Belief During Her Closing Argument 13

3. If There Was Error, It Was Not Flagrant 18

C. THE COURT'S REASONABLE DOUBT INSTRUCTION, JURY INSTRUCTION NUMBER TWO, CORRECTLY STATED THE LEGAL STANDARD 20

1. Standard Of Review....20

2. The Definition Of Intimate Contact Was An Accurate Statement of Law....20

D. COCHRAN CANNOT RAISE THE ISSUE OF DETECTIVE HUGHES' TESTIMONY STATING BA'S STATEMENTS TO VARIOUS PEOPLE WERE CONSISTENT BECAUSE HE DID NOT OBJECT BELOW AND IT IS NOT A MANIFEST CONSITUTIONAL ERROR....23

1. Standard Of Review....24

2. Cochran Did Not Object To Detective Hughes' Testimony That BA's Statements Were Consistent And He Cannot Show The Alleged Error Is Manifest....24

E. COCHRAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS....29

1. Standard Of Review....29

2. Cochran's Attorney Was Not Ineffective During Her Representation Of Cochran Throughout The Jury Trial....30

a. Cochran's attorney was not ineffective for failing to object to Detective Hughes' testimony that he believed BA's statements and testimony were all consistent....31

b. Cochran's attorney was not ineffective for failing to object to the deputy prosecutor's remarks about abiding belief during closing arguments....32

F. THE STATE CONCEDES THAT JURY INSTRUCTION EIGHTEEN WAS AN IMPROPER COMMENT ON THE EVIDENCE BUT COCHRAN WAS NOT PREJUDICED BY THE FAULTY INSTRUCTION 33

IV. CONCLUSION.....35

TABLE OF AUTHORITIES

Washington Cases

Bell v. State, 147 Wn.2d 166, 52 P.3d 503 (2002).....21

Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wn.2d 685, 220 P.2d 665 (1950).....7

Martin v. Kidiviler, 71 Wn.2d 47, 426 P.2d 489 (1967).....7

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997).....7

State v. Belgrade, 110 Wn.2d 504, 755 P.2d 174 (1988) 13, 18

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007).....20, 22

State v. Blake, 172 Wn. App. 515, 298 P.3d 769 (2012) 26

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007 (1998).....14

State v. Brush, Washington State Supreme Court Case No. 90479-1, Slip. Op. 8, 34, 35

State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) 11

State v. Castro, 141 Wn. App. 485, 170 P.3d 78 (2007).....6

State v. Ciskie, 110 Wn.2d 263, 751 1165 (1988) 8

State v. Davenport, 100 Wn.2d 757, 675 P.2d 2113 (1984) 16, 18

State v. Edwards, 169 Wn. App. 561, 280 P.3d 1152 (2012).....24

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 22, 23

State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006).....19, 21, 33

State v. Fedorov, 181 Wn. App. 187, 324 P.3d 784 (2014) 23

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).....12

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006)..13, 14, 18

State v. Griffin, 100 Wn.2d 417, 670 P.2d 265 (1983) 21

State v. Hanson, 59 Wn. App. 651, 800 P.2d 1124 (1990) 21

State v. Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003) 30, 31, 32, 33

State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009) 26

State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003) 13

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010) 13

State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011) 15

State v. King, 167 Wn.2d 324, 219 P.3d 642 (2009).....25, 26

State v. Kwan Fai Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) 13

State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) 22

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006) 7

State v. Lewis, 156 Wn. App. 230, 233 P.3d 891 (2010) 14

State v. McCreven, 170 Wn. App. 444, 284 P.3d 793 (2012) 6

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 24, 25, 29, 30

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006) 14

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 14, 18

State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995) 31

State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009) 24, 25, 26

State v. Pintle, 127 Wn.2d 628, 904 P.2d 245 (1995), *cert denied* 518 U.S. 1026 (1996).....22

State v. Powell, 62 Wn. App. 91, 816 P.2d 86 (1991).....9

State v. Price, 33 Wn. App. 472, 655 P.2d 1191 (1982) *review denied,* 99 Wn.2d 1010 (1983) 22

State v. Redmond, 150 Wn.2d 489, 78 P.3d 1001 (2003) 21

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004).....30

State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).....13

State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010) 11

State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046 (1991).....33

State v. Tanzymore, 54 Wn.2d 290, 786 P.2d 277 (1959).....22

State v. Thorgerson, 152 Wn.2d 438, 258 P.3d 43 (2011).....13

State v. Tili, 139 Wn.1d 107, 985 P.2d 365 (1999) 8

State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007).....15

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011) 14

State v. Webb, 162 Wn. App. 195, 252 P.3d 424 (2011) 21

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001).....8

Other State Cases

Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1 (Pa. 2008)...12

State v. Fauci, 282 Conn. 23, 917 A.2d 978 (2007).....12

State v. Leutschaft, 759 N.W.2d 414 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009) 12

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) 30, 31

Washington Statutes

RCW 9.94A.535(3)(g) 34

RCW 9A.04.110(25) 8

Constitutional Provisions

Washington Constitution, Article 1, § 21 26

Washington Constitution, Article 1, § 22 26

Washington Constitution, Article 4, § 16 .....7, 8

U.S. Constitution, Amendment VI 26

U.S. Constitution, Amendment XIV 26

Other Rules or Authorities

RAP 2.5(a) 24

WPIC 1.02 .....15, 28

WPIC 4.01 .....16, 19, 21, 22, 33

WPIC 45.01 8

WPIC 300.16 34

American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010).....12

National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010).....12

Webster’s Third New International Dictionary of the English Language (2002 ed.) 17

I. ISSUES

A. Did the trial court err when it gave the State's proposed jury instruction defining sexual contact?

B. Did the deputy prosecutor commit prosecutorial error during her closing argument that deprived Cochran of his right to a fair trial?

C. Did the trial court's instruction on reasonable doubt misstate the correct legal standard for reasonable doubt?

D. Did Detective Hughes impermissibly give opinion testimony regarding the credibility of BA?

E. Did Cochran receive ineffective assistance from his trial counsel?

F. Did the trial court improperly comment on the evidence, and thereby relieve the State of its burden, when it gave the standard WPIC for pattern of abuse over a prolonged period of time?

II. STATEMENT OF THE CASE

FA[1] entered into a relationship with Cochran and after two months of dating moved herself and her two children, BA and AA, in with Cochran. RP 109-112, 221. FA lived with Cochran for almost two years, from the time BA was seven to eight years of age. RP 89, 110, 223. BA was born on September 18, 2003. RP 38. FA and Cochran talked about marriage. RP 113. FA believed Cochran was a good man. RP 113. FA trusted Cochran and allowed him to watch

[1] Due to the nature of this case, sexual abuse of a child, the State will use initials for the victim, her mother and sister in its briefing.

her daughters while she worked at a local Mexican restaurant in the afternoon and evenings. RP 42, 110, 113.

FA noticed that at first BA was a little jealous of FA's relationship with Cochran, but the jealousy seemed to go away. RP 114-15. BA admitted she did not like Cochran at first because when he would kiss her mom she felt that he was not the right guy for FA and BA did not like it. RP 42. BA eventually started to like Cochran and had a good relationship with him. RP 42. Cochran treated BA different than her sister. RP 43. BA would not get in trouble for the same things that AA would get in trouble for. RP 43.

Cochran began to touch BA inappropriately. RP 44-46. When BA was seven, Cochran was in the living room, in his underwear and he had BA turn off the lamp. RP 44-45. Cochran then picked up BA, grabbed her waist, pulled down her tights, put her on top of him and Cochran moved back and forth underneath BA. RP 44-45. BA felt Cochran take something out of his underwear, he moved up and down on the part of her body where she goes pee, and when she got up her underwear was wet. RP 44-45. BA also described what was in Cochran's lap as squishy and that she felt uncomfortable. RP 45, 47.

BA described the second time Cochran touched her was when she was eight years old. RP 48. This time Cochran was wearing a tank top and underwear. RP 49. Cochran did not pull anything out of his underwear but kept moving up and down which did not feel good and felt weird. RP 50. Cochran stopped when BA said she needed to use the bathroom. RP 50.

BA described another time when she was eight years old and Cochran got on top of her while she was trying to fall asleep. RP 51-52. Cochran was too heavy and it made BA's stomach hurt. RP 52. Cochran moved, sliding up and down on top of BA, wearing just his underwear and BA was in a shirt and pants. RP 52. Cochran took something squishy out of his underwear. RP 52-53. BA could feel the squishy thing around her vagina. RP 52-53.

One time Cochran played a game with BA and AA called "guess what's in your mouth," which was supposed to be like a guessing game. RP 54, 78-79. BA said that she and AA thought it was one of those fun ones where you would just guess what the object was, like a stuffed animal, so they grabbed a couple of toys and sat down. RP 54. BA had her new sleeping blindfold on and Cochran told AA to turn around so she could not see what was going on. RP 54, 58, 79. Cochran's pants were off and he covered himself

with a blanket. RP 58, 79. Cochran first put a towel in BA's mouth. RP 54. BA described the second thing Cochran placed in her mouth as, "something really disgusting and squishy. It was like dripping. It was really disgusting. Smelled really bad." RP 54. BA thought it was disgusting, that she felt like vomiting and she needed to drink water and brush her teeth. RP 54. After putting the thing in BA's mouth, BA heard Cochran pull up his pants, do his belt and also saw him pulling up his pants. RP 56. Cochran told BA the second thing he placed in her mouth was the remote control. RP 59. BA was sure the second thing that went in her mouth was not the remote control. RP 56.

BA also walked in on Cochran watching a pornographic movie called, "The Best Sex Ever" and saw a guy putting his penis in a girls mouth. RP 60. After seeing the pornographic images on the television BA realized what Cochran had been doing to her. RP 203.

BA's sister told their mom what had happened, and BA told her mom the rest of the story. RP 61. FA did not report it to police because she was very sad. RP 129. FA stayed in the house with Cochran after learning of the inappropriate behavior. RP 130. Cochran asked BA for forgiveness and said it would not happen anymore. RP 130. FA ended up moving back into her brother's house. RP 61, 131. BA was happy to move back in with Rueben

because she did not want to live there anymore. RP 61. About two months after moving out of Cochran's house FA reported what had happened to BA's school. RP 131. BA was called to the principal's office and told Mr. Roberts, the principal, about what had happened. RP 62, 87, 89-91. Mr. Roberts described the experience as the most graphic and explicit thing a child had ever said to him. RP 100.

The State charged Cochran, by second amended information, with Count I: Rape of a Child in the First Degree, Count II-IV: Child Molestation in the Second Degree. CP 31-34. The State also alleged the aggravating factors of an ongoing pattern of abuse over a prolonged period of time and that Cochran abused his position of trust. *Id.* Cochran elected to have his case tried to a jury. See RP. Cochran testified on his own behalf. RP 219-27. Cochran denied ever touching BA inappropriately. RP 224. Cochran also denied FA ever speaking to him about an allegation that he touched BA inappropriately. RP 224. The jury convicted Cochran as charged, including the aggravating factors. RP 288-90. The trial court declined State's invitation to sentence Cochran to an exceptional sentence and instead gave him a sentence within the standard range. CP 139-42. Cochran timely appeals his conviction.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE ADDITIONAL LANGUAGE IN JURY INSTRUCTION NUMBER ELEVEN WAS A CORRECT STATEMENT OF THE LAW AND NOT AN IMPOROPER COMMENT ON THE EVIDENCE; THEREFORE THE TRIAL COURT DID NOT ERROR WHEN IT GAVE INSTRUCTION ELEVEN.

Cochran claims that jury instruction number 11, which includes language in addition to the standard WPIC language, is an improper comment on the evidence and lessoned the State's burden, therefore reversal of the convictions is required under the Washington State Constitution. Brief of Appellant 8-12. Jury instruction number 11 was a correct statement of the law. There was no error and this Court should affirm Cochran's convictions.

1. Standard Of Review

Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012).

2. Instruction Eleven Was Not An Improper Comment On The Evidence.

The Washington State Constitution prohibits judges from charging juries with respect to matters of fact. Const. art. 4, § 16. "The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as the court's opinion of the evidence submitted." *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 665 (1950). Further, "a court cannot instruct the jury that matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An instruction which assumes a fact for the jury's determination constitutes a prohibited comment upon the evidence. *Martin v. Kidiviler*, 71 Wn.2d 47, 51, 426 P.2d 489 (1967).

An appellate court will consider an error claimed for the first time on appeal regarding a jury instruction if the claimed erroneous "instruction invades a fundamental right of the accused." *Becker*, 132 Wn.2d at 64. A judicial comment on the evidence is presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). It is the State's burden to show, absent the record affirmatively showing no prejudice could have resulted, that the defendant was not prejudiced. *Levy*, 156 Wn.2d at 723.

A jury instruction is not an impermissible comment on the evidence by the trial judge when it does nothing more than accurately state the law pertaining to an issue. *State v. Brush,* Washington State Supreme Court Case No. 90479-1, Slip. Op. page 6-7, *citing State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). Adding the phrase "including a finger" to the definition of object in WPIC 45.01 did not violate Const. art. 4, § 6, as the instruction informed the jury of "the appropriate rule of law to the fact of this case" without indication how the court felt about the victim's testimony. *State v. Tili*, 139 Wn.1d 107, 127, 985 P.2d 365 (1999). A jury instruction that defined the word "threat" in accordance with former RCW 9A.04.110(25) does not violate Const. art. 4, § 16 as the instruction is an accurate statement of the law and does not convey an attitude towards the merits of the case. *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 1165 (1988).

The standard WPIC for defining sexual contact states, "Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party *[or a third party]*." WPIC 45.07. The jury instruction in this case added the sentence, "Sexual contact **may** occur through a person's clothing." CP 124 (emphasis added). This statement comes

primarily from *State v. Powell,* where Division Three discusses a sufficiency of evidence claim in regards to a child molestation charge. *State v. Powell*, 62 Wn. App. 91, 916-18, 816 P.2d 86 (1991). In *Powell* the Court discusses that sexual contact may occur through a person's clothing. *Powell*, 62 Wn.2d at 917. The Court further discusses that when the contact occurs through clothing the courts have required additional evidence of sexual gratification. *Id.*

Jury instruction 11 accurately stated the law because sexual contact may occur through a person's clothing. The sentence prior to this statement states that it must be done for the purpose of gratifying sexual desires of either party. This is accurate and not a comment on the evidence. Cochran did not object to the instruction, as he objected and argued over another jury instruction, presumably because he recognized it is an accurate statement of the law. RP 232-237. The trial court did not instruct that the rubbing which occurred in this case was sexual contact, nor did the trial court state that sexual contact does occur through a person's clothing. The instruction stated sexual contact **may** occur through clothing, and that sexual contact must be done for the purpose of sexual gratification. This is not an unconstitutional improper comment on the

evidence because it simply gives the jury the legal standard for which to evaluate the evidence presented.

If this Court finds the instruction to be an improper comment on the evidence, reversal is not required because Cochran was not prejudiced. Cochran argues without the additional statement there must be additional evidence of sexual gratification, this was an improper comment on the evidence. Brief of Appellant 8-10. Cochran was not prejudiced because had additional language been added to the jury instruction, the jury still would have found him guilty of three counts of Child Molestation in the Third Degree as charged.

Cochran was wearing only his underwear each time he inappropriately touched BA. RP 44-45, 49, 52. Cochran pulled down BA's pants or tights to gain access to her vaginal area, although she was still wearing underwear. RP 44-45. Cochran placed BA on his lap or lay on top of her. RP 44-45, 51-52. Cochran thrust his hips in a motion that is commonly used to have sexual intercourse, moving up and down against BA's vaginal area. RP 44-45, 50, 52. During at least one of the encounters, BA's underwear was wet after the encounter. RP 44-45. There was more than ample additional evidence that sexual contact was for the purposes of Cochran's sexual gratification. For these reasons, this Court should affirm.

3. Instruction Eleven Was Not Erroneous And Did Not Relieve The State Of Its Burden Of Proof.

Cochran argues that Instruction 11, defining sexual contact, reduced the State's burden of proof and tipped the scale in favor of conviction. Brief of Appellant 8-12. As argued above, Instruction 11 is not an improper statement of the law. Further, Instruction 11 did not reduce the State's burden of proof.

The State is required to prove every essential element of the crime charged beyond a reasonable doubt. *State v. Sibert,* 168 Wn.2d 306, 311, 230 P.3d 142 (2010), *citing State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). A jury instruction that relieves the State of its burden to prove every element of the crime charged requires automatic reversal. *Sibert*, 168 Wn.2d at 312 (internal citation omitted).

As argued above, the definition of sexual contact did not omit an element and therefore did not reduce the State's burden. This Court should affirm Cochran's conviction.

B. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR DURING HER CLOSING ARGUMENT.

Cochran claims the deputy prosecutor committed prosecutorial error (misconduct)[2] during her closing argument when she discussed what it meant to have an abiding belief. Brief of Appellant 12-15. Cochran's argument is without merit. The deputy prosecutor did not commit prosecutorial error during her closing argument. If any error occurred it is harmless, as there was no objection and a curative instruction would have fixed the alleged error.

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[2] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor Did Not Commit Error When Discussing Abiding Belief During Her Closing Argument.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Thorgerson,* 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).

In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007 (1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial error when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit error during closing argument by minimizing or misstating the law

regarding the burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

Cochran asserts the deputy prosecutor committed error by misstating the law by arguing the jury could rely on knowledge in the gut to find an abiding belief and determine the State's charges. Brief of Appellant 12-15. Cochran argues the deputy prosecutor's statements trivialized the presumption of innocence and undermined the burden of proof as if it were an inappropriate puzzle analogy or a comparison to everyday decision making. Brief of Appellant 14. Cochran's argument fails.

Jurors are instructed they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law

as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

The second instruction to the jury states:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 115, *citing* WPIC 4.01. The deputy prosecutor discussed instruction two and offered the following regarding reasonable doubt and abiding belief:

> Let's talk a little bit about reasonable doubt. That's another definition that's going to be in your packet. A reasonable doubt is one that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If you have an abiding belief -- if you feel it in your mind, in your gut, if you have an abiding belief to the truth of the charge, you are satisfied beyond a reasonable doubt.

> That's what the law says. The law doesn't say you can't have any doubt, because I think the law can predict that we're all human. And if you're human you're going to have doubt in any case, in any trial, no matter what the evidence is. You're going to have some doubt. But what the law says, that's okay, it's okay for you to have some doubt, but it has to be beyond a reasonable doubt. So do you have some doubt about the deportation? Maybe. But is that reasonable? As a reasonable person, is it reasonable to believe that considering that happened over a year after this was reported?

RP 267. In context, this is not a misstatement of the law or asking the jurors to decide the case based upon evidence that was not presented. Belief is not defined in the instructions, so we look to its plain meaning. Belief is defined as, "a state or habit of mind in which trust, confidence or reliance is placed in some person or thing: FAITH." Webster's Third New International Dictionary of the English Language, 200 (2002 ed.). Common sense tells us a belief is based upon one's evaluation of the information one has received on a given matter and that evaluation necessarily includes how one feels, whether in one's mind, heart, or gut, about that information. That is the trust, confidence or reliance, otherwise stated as faith, in the matter.

The jury heard the case and they are able to make the credibility determinations based upon what they witnessed at the

trial: the testimony and demeanor of witnesses and evidence presented. CP 113. The argument by the deputy prosecutor, in context, did not misstate the law, reduce State's burden or ask the jury to consider facts outside the evidence presented and is therefore not error.

3. If There Was Error, It Was Not Flagrant.

The State does not concede that any of the statements made by the deputy prosecutor were improper. Arguendo, if this Court was to find any or all of the statements improper and in error, the State argues any such error was harmless error. Cochran has the burden of showing the misconduct was prejudicial considering the context of the entire record. *Gregory*, 158 Wn.2d at 809. The context of the record includes the instructions that are given to the jury and evidence addressed in the argument. *Monday*, 171 Wn. 2d at 675. Because Cochran's trial counsel did not object to the statements of the deputy prosecutor, Cochran must show that a curative instruction would not be sufficient to eliminate the prejudice his client allegedly suffered due to the deputy prosecutor's improper statements. *Belgrade*, 110 Wn.2d at 507. The question becomes, when evaluating the entire record, "is there a substantial likelihood that the

prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial?" *Davenport*, 100 Wn.2d at 762-63.

Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). Here, the trial court correctly instructed the jury on reasonable doubt and the jury was provided multiple copies of the jury instructions to reference back to during deliberations. WPIC 4.01; RP 239; CP 115. The jury therefore, applied the correct standard for reasonable doubt and there was no prejudice.

Cochran further argues this case came down to a credibility contest and the State's argument focused jurors on their feelings rather than reason. Brief of Appellant 14. All trials deal with credibility of the witnesses, which is rightfully in the sole province of the jury. The deputy prosecutor's argument did not tell the jurors to focus solely on their feelings and disregard reason. The deputy prosecutor discussed what is reasonable doubt and how to determine if it is reasonable. The deputy prosecutor also mentioned that the jury must consider what is in their mind. Further, the State presented consistent testimony from AA, BA, FA, Mr. Roberts, Dr. Hall, and Detective Hughes regarding the events surrounding Cochran's rape and molestation of BA. This was not just a "he said she said" case.

Even if the jury questioned BA, the jury would have also had to disbelieve that the game AA described ever took place if Cochran's version of events were to be believed. RP 78-79, 225. There is not a substantial likelihood the deputy prosecutor's error affected the outcome of the jury verdict. This Court should affirm Cochran's convictions.

C. THE COURT'S REASONABLE DOUBT INSTRUCTION, JURY INSTRUCTION NUMBER TWO, CORRECTLY STATED THE LEGAL STANDARD.

Cochran's assertion that jury instruction number two, defining reasonable doubt, was an inaccurate statement of the law is incorrect. *See* CP 115. Cochran's argument that the instruction improperly requires the jury to focus on a search for the truth has been rejected by the Division One and this Court should reject Cochran's argument and affirm his conviction.

1. Standard Of Review.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.*

2. The Definition Of Intimate Contact Was An Accurate Statement of Law.

A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue

her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond,* 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 208, *citing State v. Hanson,* 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990). Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin,* 100 Wn.2d 417, 420, 670 P.2d 265 (1983). Juries are presumed to follow the jury instructions provided to them by the trial court. *Ervin*, 158 Wn.2d at 756.

The court gave the standard jury instruction defining reasonable doubt. CP 115; WPIC 4.01. The defense objected to the portion of the instruction which read "if, from such consideration, you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt." RP 233, 237-38. Cochran argued to the

trial court that the abiding belief language was improper, did not equate to reasonable doubt and diminished the State's burden of proof. RP 233. The instruction the trial court gave has been repeatedly approved by courts as a correct statement of the law. *State v. Pintle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert denied* 518 U.S. 1026 (1996), *State v. Price*, 33 Wn. App. 472, 475-76, 655 P.2d 1191 (1982) *review denied,* 99 Wn.2d 1010 (1983), *State v. Lane*, 56 Wn. App. 286, 299-300, 786 P.2d 277 (1989), *State v. Tanzymore*, 54 Wn.2d 290, 291, 786 P.2d 277 (1959). The Supreme Court approved WPIC 4.01 and specifically directed trial courts to use that instruction when instructing jurors on the State's burden of proof. *Bennett*, 161 Wn.2d at 318. WPIC 4.01 includes the challenged abiding belief language used by the trial court here.

Cochran now argues he is not challenging the "abiding belief" language but rather the focus on "the truth." Brief of Appellant 16, fn 12. Cochran relies on an argument the court held was improper in *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). There, the prosecutor's argument equated the burden of proof with a jury's duty to "speak the truth" or determine what happened. Cochran argues his case has a similar issue because the deputy prosecutor compounded the problem with the alleged erroneous jury instruction

by stating, "If you have an abiding belief - - if you feel it in your mind, in your gut, if you have an abiding belief to the truth of the charge, you are satisfied beyond a reasonable doubt." See RP 267.

Division One of the Court of Appeals recently considered that same argument. See *State v. Fedorov*, 181 Wn. App. 187, 324 P.3d 784 (2014). In *Fedorov,* the court concluded that the abiding belief language was not the equivalent of the improper "speak the truth" remarks made by the deputy prosecutor in *Emery,* during closing arguments. *Fedorov*, 181 Wn. App. at 200; *Emery*, 174 Wn.2d at 751. Rather, taken in the context of the entire instructions, the instructions informed the jury that its job was to determine whether the State had proved the charge beyond a reasonable doubt. *Id*. at 200. The court should continue to find the reasonable doubt instruction, including the abiding belief language, is a correct statement of the law, and that it does not lower the State's burden of proof

D. COCHRAN CANNOT RAISE THE ISSUE OF DETECTIVE HUGHES' TESTIMONY STATING BA'S STATEMENTS TO VARIOUS PEOPLE WERE CONSISTENT BECAUSE HE DID NOT OBJECT BELOW AND IT IS NOT A MANIFEST CONSITUTIONAL ERROR.

Cochran argues, for the first time on appeal, that Detective Hughes' testimony asserting BA's statements were consistent was

improper opinion testimony and requires this Court to reverse Cochran's convictions. Brief of Appellant 18-20. The alleged error is not a manifest constitutional error and therefore, Cochran cannot raise this issue for the first time on appeal.

1. Standard of review

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. Cochran Did Not Object To Detective Hughes' Testimony That BA's Statements Were Consistent And He Cannot Show The Alleged Error Is Manifest.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id., citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted)*.

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333.

An error is manifest if the appellant can show actual prejudice. *O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id. (citations omitted)*. No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id*.

Generally, a witness may not give an opinion while testifying regarding the veracity or guilt of a defendant. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is "such testimony is unfairly prejudicial to the defendant

because it invades the exclusive province of the jury." *Id.* (internal quotations and citations omitted).

A law enforcement officer's testimony can carry a "special aura of reliability" and therefore may be especially prejudicial to the defendant. *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, "(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Id.* at 332-33.

If the testimony is improper opinion testimony, then it must be determined if the defendant was prejudiced by the testimony. *O'Hara* 167 Wn.2d at 99. "Important to determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012). If the jury is properly instructed, this eliminates the possibility of prejudice. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236

(2009). Cochran did not object to the following testimony from Detective Hughes:

> Q And did you review -- during your investigation and in preparation for trial, did you review Dr. Hall's report in this case?
>
> A Yes. After the interview was conducted the next day, we referred her up to the clinic and then the report is sent to us usually days later, and I don't recall the exact date we received it. And that's, hence my report date, why it's written later. Once I get everything put together, I sit down and write a report and I keep notes in a file as to what I'm doing. I did review her report. Her report was consistent with everybody else's reports.
>
> Q Did you review Principal Roberts' report?
>
> A I did.
>
> Q And you have reviewed your taped interview with [BA]?
>
> A Yes.
>
> Q And did you observe [BA] testify here in court?
>
> A Yes.
>
> Q And have all of those statements been consistent?
>
> A Yes, they have.

RP 185. Cochran simply states in a footnote this testimony created a manifest error affecting Cochran's right to a jury trial and it may be reviewed for the first time on appeal. Brief of Appellant 19, fn 16. Cochran does not perform any type of analysis as to how this is a

manifest constitutional error. In particular, Cochran does not show that he was prejudiced by the Detective Hughes' testimony.

There must be a showing that the error is manifest, and that Cochran was actually prejudiced by the error. Cochran has failed to meet this burden. There is no prejudice, and therefore, the error is not manifest and cannot be raised for the first time on appeal.

There is no prejudice because the jury heard the testimony of BA, Dr. Hall, Mr. Roberts, FA and Detective Hughes. RP 38-74, 87-100, 108-53, 155-85, 188-217. The jury heard any slight variation there may have been in BA's version of the events as she related them to the different adults she spoke to and her testimony in court. The jury is instructed that they are the sole determiners of credibility of the witnesses. CP 113; WPIC 1.02. The jury observed each of the witnesses testify, heard what each witness related BA had said to them, and was able to compare and contrast those statements with each other.

There is no reasonable probability that Detective Hughes' opinion that BA's statements to the individuals and her testimony were consistent affected the outcome of the trial. The error is not manifest, Cochran cannot raise this issue for the first time on appeal and this Court should affirm Cochran's conviction.

E. COCHRAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Cochran's attorney provided competent and effective legal counsel throughout the course of his representation. Cochran asserts his trial counsel was ineffective for failing to object to Detecitve Hughes' statement that BA's statements and testimony were consistent and for failing to object to the deputy prosecutor's statements regarding abiding belief during closing arguments. Brief of Appellant 20-23. Cochran's attorney was not ineffective in any of the areas of her representation of Cochran. If Cochran's attorney was deficient in any way, Cochran cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland,* 127 Wn.2d at 335 (citations omitted).

2. Cochran's Attorney Was Not Ineffective During Her Representation Of Cochran Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Cochran must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335.

Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003).

Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

a. Cochran's attorney was not ineffective for failing to object to Detective Hughes' testimony that he believed BA's statements and testimony were all consistent.

Failure to object to testimony will constitute ineffective assistance of counsel only in "egregious circumstances" or testimony central to the State's case. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). If trial counsel's failure to object could have been a legitimate trial tactic, counsel is not ineffective and the ineffective assistance claim fails. *Neidigh*, 78 Wn. App. at 77.

In this case, Cochran's attorney may have wanted to avoid calling attention to Detective Hughes' assertion that BA was consistent in the statements she had been giving. RP 185. Further, if the statements were truly not consistent, the jury heard them all, and Cochran's attorney would be free to argue to the jury Hughes was biased because he could not even admit inconsistencies

everyone heard.[3] It was a legitimate trial tactic to let the statement go and not object to draw attention to Detective Hughes' testimony.

Arguendo, if it was deficient for Cochran's attorney to fail to object to the testimony, Cochran suffered no prejudice from the alleged error given the evidence presented in this case as argued in the section above. Further, there is not a reasonable probability that but for failing to object to Detective Hughes' testimony that he believed BA's statements had been consistent the outcome of the trial would have been different. See *Horton*, 116 Wn. App. at 921-22. Trial counsel was not ineffective.

b. Cochran's attorney was not ineffective for failing to object to the deputy prosecutor's remarks about abiding belief during closing arguments.

Cochran claims his trial counsel was ineffective for failing to object to the deputy prosecutor's alleged prosecutorial error during closing argument. Brief of Appellant 22-23. As argued in the above section, there was no error committed by the deputy prosecutor, which is further evidenced by Cochran's trial counsel's failure to object to the deputy prosecutor's argument. Trial counsel's failure to

[3] The State is not admitting there are inconsistencies, this statement is for the sake of argument, that if there were inconsistencies, trial counsel was free to argue Detective Hughes was clearly biased because he could not acknowledge something that all of the jury had clearly heard during the pendency of the trial.

object to the remarks at the time they were made "'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046 (1991).

There is not a reasonable probability that but for failing to object to the deputy prosecutor's argument that the outcome of the trial would have been different. See *Horton*, 116 Wn. App. at 921-22. The deputy prosecutor correctly defined abiding belief, which did not trivialize the burden of proof. RP 267. The jury was properly instructed, and they are presumed to follow the instruction as given to them by the trial court. *Ervin*, 158 Wn.2d at 756; WPIC 4.01; RP 239; CP 115. Therefore, the jury applied the correct standard for reasonable doubt. Cochran was not denied effective assistance of counsel because he cannot show he suffered any prejudice. This Court should affirm Cochran's convictions.

F. THE STATE CONCEDES THAT JURY INSTRUCTION EIGHTEEN WAS AN IMPROPER COMMENT ON THE EVIDENCE BUT COCHRAN WAS NOT PREJUDICED BY THE FAULTY INSTRUCTION.

Cochran asserts that jury instruction 18, which defines an ongoing pattern of abuse, was an improper comment on the evidence and relieved the State of its burden of proving the

aggravating factor of multiple incidents of over a prolonged period of time pursuant to RCW 9.94A.535(3)(g). The trial court's instruction 18 was the standard WPIC instruction. WPIC 300.16; CP 131. This instruction was found to be a comment on the evidence by the Washington State Supreme Court on July 2, 2015 in *State v. Brush,* Supreme Court Case No. 90479-1. The Supreme Court stated, "[w]e hold that the instruction constituted an improper comment on the evidence because it resolved a contested factual issue for the jury." *Brush*, Slip Op. at 9.

Therefore, the only analysis required is to determine if the State can show Cochran was not prejudiced by the faulty jury instruction, as it is presumed to be prejudicial. *Id.* at at 10. The first instance of inappropriate touching happened when BA was only seven years old. RP 48. The second time Cochran molested BA she was eight years old. RP 48-49. Third, when BA was eight years old there was another instance of molestation. RP 51. Finally, there was the time when Cochran put his penis in BA's mouth. RP 55. This is more than a few weeks period of time. In *Brush* the Court stated, "[t]he abuse occurred over a time period that was just longer than a few weeks, and a straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met

the given definition of a 'prolonged period of time.'" *Brush*, Slip Op. at 10. Therefore, the Court in *Brush* held the State did not show no prejudice could have resulted. *Id.* That is not the case here. No prejudice could have resulted and the aggravating finding should stand.

IV. CONCLUSION

The additional language contained in jury instruction number eleven was a correct statement of the law and was not an improper comment on the evidence. Instruction eleven did not relieve the State of its burden to prove all of the essential elements of the crimes charged beyond a reasonable doubt. The deputy prosecuting attorney did not commit error during closing arguments. The trial court did not error in giving the standard reasonable doubt jury instruction. Any issue with Detective Hughes' opinion testimony regarding BA's consistency is not a manifest constitutional error and cannot be raised for the first time on appeal. Cochran's trial counsel was effective in her representation of Cochran throughout the trial. Finally, while jury instruction eighteen was an improper comment on

the evidence, Cochran was not prejudiced by the faulty instruction. This Court should affirm Cochran's convictions.

RESPECTFULLY submitted this 14th day of July, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. JAMES COCHRAN, Appellant.	No. 46721-6-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 14, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi Backland, attorney for appellant, at the following email address: backlundmistry@gmail.com.

DATED this 14th day of July, 2015, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

July 14, 2015 - 3:09 PM

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