93116-0

Supreme Court No. (to be set)
Court of Appeals No. 46721-6-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
James Cochran
Appellant/Petitioner

Lewis County Superior Court Cause No. 13-1-00688-4
The Honorable Judge Richard Brosey

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner James Cochran, the appellant below, requests review of the decision of the Court of Appeals, Division II, referred to in Section II.

II. COURT OF APPEALS DECISION

James Cochran seeks review of the Court of Appeals unpublished opinion entered on April 12, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the court's nonstandard instruction comment on the evidence because it included an incomplete definition of "sexual contact"?

ISSUE 2: Did the state commit flagrant and ill-intentioned misconduct by arguing that jurors needed only a gut feeling in order to convict?

ISSUE 3: Did the trial judge undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Cochran's constitutional right to a jury trial by equating proof beyond a reasonable doubt with belief in "the truth" of the charge?

ISSUE 4: Did the admission of improper opinion testimony invade the province of the jury, in violation of Mr. Cochran's Sixth and Fourteenth Amendment right to a jury trial and to due process?

ISSUE 5: Was Mr. Cochran denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

ISSUE 6: Did the trial court improperly comment on the evidence by instructing jurors that "the term 'prolonged period of time' means more than a few weeks"?

IV. STATEMENT OF THE CASE

B.A. was six or seven years old when her mother moved the family in with James Cochran. B.A. didn't want to live at Mr. Cochran's, and she didn't like it when he kissed her mother. RP[1] 42, 74-75, 85, 110, 114, 151.

BA's mother wanted to marry Mr. Cochran. The couple argued about this over the course of their relationship. RP 40, 110, 113, 220-221.

At some point, B.A. got up in the night and saw Mr. Cochran watching pornography on television. RP 59-60, 71-73, 149. Two days later, B.A. told her mother that Mr. Cochran had raped her. RP 61.

She described what she'd seen on the television and claimed that Mr. Cochran had done the same things to her. RP 128, 150, 154. The family moved out of Mr. Cochran's house and returned to B.A.'s uncle, where she'd enjoyed living previously. RP 61.[2]

The state charged Mr. Cochran with rape of a child in the first degree and three counts of first-degree child molestation.[3] CP 31-34.

At trial, B.A. testified that Mr. Cochran touched her through her clothing on several occasions. RP 46, 48, 51. She also described an incident where she closed her eyes and Mr. Cochran had her guess what he

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[1] Citations to the transcripts in this case are to the trial, starting on July 16, 2014; those volumes contain sequentially numbered pages.

[2] B.A.'s mother, who faced deportation, was able to remain in the U.S. under the U-Visa program because she cooperated with the state in prosecuting Mr. Cochran. RP 19-21, 132, 151-152.

[3] The state also alleged several aggravating factors. The court declined to give an aggravated sentence. CP 30-35, 138-154; RP 302-303.

put into her mouth.[4] RP 54, 57. Three witnesses relayed to the jury statements B.A. had made describing the offenses. RP 88, 99-100, 160-165, 201-206. A police detective told the jury he'd reviewed all of B.A.'s statements and described them as "consistent." RP 165, 185. Defense counsel did not object. RP 165, 185.

The court instructed jurors that sexual contact "may occur through a person's clothing." CP 124. In addition, the court instructed the jury (for purpose of an aggravating factor) that a "'prolonged period of time' means more than a few weeks." CP 131. Finally, the court instructed jurors that they were satisfied beyond a reasonable doubt if they had "an abiding belief in the truth of the charge." CP 115.

> During closing, the prosecutor told the jury:
> 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.
> RP 267.

The jury convicted Mr. Cochran. The court sentenced him and he timely appealed. CP 138-154, 155. The Court of Appeals affirmed his conviction in an unpublished decision. Opinion, pp. 1, 16.

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[4] Her younger sister testified that she was there, and didn't see what Mr. Cochran put into B.A.'s mouth. RP 57, 78-80.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial court's incomplete definition of "sexual contact" commented on the evidence and relieved the state of its burden to prove the essential elements. This case presents significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

1. The court's instruction commented on the evidence.

The Washington constitution provides "Judges shall not charge juries with respect to matters of fact, nor comment thereon…" Art. IV, § 16. In this case, the court gave a nonstandard instruction that violated both of these rules. CP 124.

In keeping with the statutory definition, Washington's pattern instruction defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 45.07 (3d Ed); *see* RCW 9A.44.010. Here, the court added to this language, instructing jurors that "[s]exual contact may occur through a person's clothing." CP 124. This was an incomplete statement of the law, and was improper.

Where the evidence consists of touching through clothing, courts require "some additional evidence of sexual gratification." *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). When the court gave its nonstandard instruction here, it did not tell jurors of the requirement for "additional evidence." *Id.; see* CP 124.

The instruction here included a half-truth. *Id.* It highlighted the idea that touching through clothing *can* support a molestation charge, without clarifying that the state must prove sexual gratification through "additional evidence" when it relies on touching through clothing. *Id.*

Mr. Cochran denied molesting B.A. RP 224. The state's evidence consisted of B.A.'s testimony and statements that Mr. Cochran inappropriately touched her through her clothing. By emphasizing that "[s]exual contact may occur through a person's clothing," the court gave credence to the state's theory. CP 124.

The nonstandard instruction favored conviction. By emphasizing that the jury *could* convict based on touching through clothing, the court tipped the balance in favor of a guilty verdict. CP 124. Had the court given a fairer instruction, making clear that conviction requires "additional evidence" of sexual gratification when the state relies on contact through a person's clothing, the problem would have been ameliorated.[5] *Id.*

The court's instructions favored the prosecution, and improperly commented on the evidence. Such comments are presumed prejudicial.[6] *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). A comment on

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[5] Having instructed jurors about touch through clothing, the court was obligated to provide the "additional evidence" language. *Id.;* CP 124. However, the court had no obligation to add to the pattern instruction in the first place. *See State v. Veliz*, 76 Wn. App. 775, 779, 888 P.2d 189 (1995).

[6] A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). From the record, it appears that neither the court nor defense counsel noticed that the state's proposed instruction differed from the standard instruction proposed by Mr. Cochran. RP 228-238.

the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*

This is a higher standard than that normally applied to constitutional errors. *Id.* Here, the record does not affirmatively show an absence of prejudice. The comment went directly to the contested facts at trial: whether or not Mr. Cochran inappropriately touched B.A. through her clothes, acting for the purpose of sexual gratification.

The judicial comment infringed Mr. Cochran's right to a fair trial, free of improper influence, and a decision by an impartial jury. *Id.* His child molestation convictions must be reversed and the charges remanded for a new trial. *Id.*

2. The court's instruction relieved the state of its burden to prove "sexual contact."

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Here, the court's nonstandard instruction relieved the state of its burden to prove "sexual contact." CP 124. Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The instructions in this case did not make the requirements for conviction manifestly clear.

As noted, the state must produce "additional evidence" of sexual gratification when it relies on touch through clothing to prove molestation.

Powell, 62 Wn. App. at 917. The instructions here did not make clear the state's burden of providing some "additional evidence." *Id.;* CP 124.

Instead, the instructions misrepresented the "sexual contact" element. The nonstandard language allowed for conviction based on a showing that Mr. Cochran touched B.A. through her clothing, without any "additional evidence" of sexual gratification. *Id.;* CP 124.

If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. U.S. Const. Amend. XIV; *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). The instructions in this case can be construed to allow conviction based on touching through clothing, without additional evidence of sexual gratification. Because of this, the convictions violate due process. *Id.*

Such an error requires reversal unless the state shows beyond a reasonable doubt that it did not contribute to the verdicts. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This requires proof that the element is supported by uncontroverted evidence. *Id.* Here, the error went to the very heart of the case. Mr. Cochran denied touching B.A. inappropriately. RP 224. The court's instructions allowed conviction based on touching through clothing, unaccompanied by additional evidence of sexual gratification. CP 124.

The court's instructions failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.[7] This re-

[7] This created a manifest error affecting Mr. Cochran's right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). The court should review the error even

lieved the state of its burden to prove an intentional assault. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

3. The Supreme Court should accept review under RAP 13.4(b)(3) and (4).

The trial court's instruction defining "sexual contact" provided an incomplete statement of the law. It amounted to a comment on the evidence and relieved the state of its burden to prove an element of the offense. This case presents significant constitutional issues that are of substantial public interest. The Supreme Court should accept review. RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the prosecutor committed flagrant and ill-intentioned misconduct requiring reversal. This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, the prosecutor improperly told jurors that the law allowed conviction "if you feel it in your mind, in your gut…" RP 267.[8] A

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if it does not qualify under RAP 2.5(a)(3). *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). The Rules of Appellate procedure require courts to decide cases on their merits "except in compelling circumstances where justice demands…" RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

[8] Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* That is the case here. In addition, Mr. Cochran argues that counsel was ineffective for failing to object.

prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. The prosecutor's arguments in this case emphasized the jury's feelings rather than "probative evidence and sound reason." *Id.;* RP 267. This violated due process. U.S. Const. Amend. XIV.

According to the prosecutor, the reasonable doubt standard boiled down to "feel[ing] it" in the mind or gut. RP 267. Such a feeling, the prosecutor argued, satisfied the requirement of an abiding belief in the truth of the charge:

> 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.
>
> RP 267.[9]

This is not true. A juror's verdict may not rest on the juror's gut feelings.[10] *Id.* A verdict must result from rational thought and deliberation. *Id.*

Like an inappropriate puzzle analogy or a comparison to everyday decision-making, the prosecutor's argument that about gut feelings trivialized the presumption of innocence and undermined the burden of proof. *See, e.g., State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010).

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[9] The prosecutor's reliance on Instruction No. 2's "truth" language presented further problems as argued elsewhere in this brief.

[10] Indeed, the court instructed jurors not to let their "emotions overcome [their] rational thought process," and not to reach a decision based on "sympathy, prejudice, or personal preference." CP 114. These general proscriptions do not cure the misconduct, however. The prosecutor did not urge jurors to decide based on sympathy, prejudice, or personal preference, and was careful not to use the word "emotion." RP 267. Jurors would not have understood the general instruction to prevent guilty verdicts based on a gut feeling.

Prosecutorial misconduct prejudices the accused if there is a substantial likelihood that it affected the verdict. *Glasmann*, 175 Wn.2d at 704. In this case, there is such a likelihood. A prosecutor's misstatement of the burden of proof creates "great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

Here, the trial boiled down to a credibility contest. The state's argument focused jurors on feelings rather than reason. Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight. *Glasmann*, 175 Wn.2d at 706. In this case, the prosecutor made it palatable for jurors to convict if they had a gut feeling that Mr. Cochran was guilty.[11] RP 267.

The requirement that juries base verdicts on reason and evidence has been a cornerstone of Washington law for more than a century. *See, e.g., Edwards v. State*, 2 Wash. 291, 308, 26 P. 258 (1891). By violating this basic precept, the state here committed misconduct that is flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704. The Supreme Court should accept review and hold that the prosecutor's flagrant and ill-intentioned misconduct prejudiced Mr. Cochran. This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

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[11] The resulting deliberative process was so upsetting to one juror that she cried for two days and couldn't sleep. CP 136.

C. The Supreme Court should accept review and hold that the court's "reasonable doubt" instruction improperly focused jurors on a search for "the truth." This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 120, 286 P.3d 402 (2012). But over Mr. Cochran's's objection,[12] the court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge*." CP 115 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 115.[13] This violated due process and the constitutional right to a jury trial. U.S. Const. Amend. VI, XIV.

The problem was compounded by the prosecutor's misconduct. Rather than simply reiterating the improper instruction, the prosecutor went further in her closing argument, equating an abiding belief in the

[12] RP 232-237; CP 42, 81.

[13] Mr. Cochran does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Cochran objects to the instruction's focus on "the truth." CP 115.

truth of the charge with a gut feeling about the truth of the charge. RP 267. This magnified the error.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 115.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor's misconduct. The prohibited language used here reached the jury in the form of an instruction from the court. CP 115. Jurors were obligated to follow the instruction. CP 115.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[14] *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of

[14] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

proof, confused the jury's role, and denied Mr. Cochran his constitutional right to a jury trial.[15] The Supreme Court should accept review and reverse Mr. Cochran's convictions. This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

D. The Supreme Court should accept review and hold that the improper admission of opinion testimony invaded the province of the jury and violated Mr. Cochran's Sixth and Fourteenth Amendment rights to a jury trial and to due process. This case presents significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

At trial, the state hoped to show that B.A.'s statements "were all consistent." RP (7/15/14) 108. In fact, they were not all the same. For example, when speaking to Principal Roberts, B.A. did not mention the "game" she described in other statements. RP 97. She told him Mr. Cochran had hurt her "inside," something she did not say to her mother or police. RP 98. She sometimes described the object placed in her mouth as hard; other times as soft. RP (7/11/14) 25, 46; RP 45, 56, 144-145.

Despite these inconsistencies, Detective Hughes testified that he'd reviewed all of B.A.'s statements and observed her testimony, and that "all of those statements [have] been consistent." RP 185. Defense counsel did not object. RP 185.

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[15] U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

Testimony providing an "explicit or nearly explicit" opinion on the credibility of an alleged victim invades the exclusive province of the jury and violates an accused person's right to a jury trial.[16] *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds,* 165 Wn.2d 870, 204 P.3d 916 (2009). In this case, Detective Hughes' opinion that B.A.'s statements and testimony were consistent comprised a "nearly explicit" opinion that she was credible. *Id.*

No witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331. Furthermore, a law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." *Id.* Because Detective Hughes is a police officer, his opinion carried such an aura of reliability. *Id.*

Courts assess the propriety of opinion testimony by examining the type of witness, the nature of the testimony, the charges and the defense, and the other evidence before the jury. *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). In this case, these factors establish that Detective Hughes' testimony violated Mr. Cochran's jury trial right.[17]

The jury was likely to view Detective Hughes as authoritative, because he is a police officer. *Id.* His opinion related directly to the primary

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[16] U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.

[17] The testimony created manifest error affecting Mr. Cochran's right to a jury trial. *King*, 167 Wn.2d at 332. It may be reviewed for the first time on appeal. RAP 2.5(a)(3).

issue at trial—B.A.'s credibility—and bolstered her testimony by encouraging jurors to disregard inconsistencies in her statements. Mr. Cochran denied committing the charges;[18] thus, acquittal depended on any doubts the jury had as to B.A.'s accusations. No physical evidence or independent witnesses supported the charges; only B.A.'s younger sister added circumstantial evidence supporting B.A.'s statements on count one. RP 76-86; RP 204. For all these reasons, Detective Hughes' improper opinion testimony violated Mr. Cochran's right to a jury trial. *Id.*

Detective Hughes' opinion that B.A.'s statements were consistent invaded the province of the jury and infringed Mr. Cochran's constitutional right to a jury trial. *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014). Mr. Cochran's convictions must be reversed and the case remanded with instructions to exclude such testimony on retrial. *Id.*

The Supreme Court should accept review and hold that the convictions were entered in violation of Mr. Cochran's Sixth and Fourteenth Amendment rights to a jury trial and to due process. *Id.* This case presents significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

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[18] RP 224.

E. The Supreme Court should accept review and hold that Mr. Cochran was deprived of his Sixth and Fourteenth Amendment rights to the effective assistance of counsel. This case presents significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The right to counsel includes the right to the effective assistance of counsel.[19] U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

1. Defense counsel shouldn't have let Detective Hughes convey his opinion that B.A. was credible.

Despite the clear inconsistencies in B.A.'s statements—which defense counsel elicited on cross-examination—counsel allowed Detective Hughes to give his opinion that "all of those statements [have] been consistent." RP 185. Counsel's failure to object to this improper opinion testimony deprived Mr. Cochran of the effective assistance of counsel.

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[19] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

Improper opinion testimony on an alleged victim's credibility violates the constitutional right to a jury trial, as outlined above. *Sutherby*, 138 Wn. App. at 617. Defense counsel should have objected to the improper testimony on constitutional grounds.

Testimony on witness credibility is also inadmissible under ER 701, which limits the subjects of lay opinion testimony. ER 701; *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Counsel should have objected to the improper testimony as an inadmissible opinion under ER 701. Without a valid tactical reason, failure to object to improper opinion testimony constitutes deficient performance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). Here, counsel had no strategic reason to allow the testimony.

In fact, the defense strategy hinged on pointing out inconsistencies in B.A.'s statements, undermining her credibility. Detective Hughes' improper opinion—that the statements were "consistent" despite their differences—undid counsel's efforts to cast doubt on B.A.'s accusations.

Counsel's deficient performance prejudiced Mr. Cochran, because there is a reasonable probability that it affected the verdict. *Kyllo*, 166 Wn.2d at 862. Absent Detective Hughes' testimony, jurors would have reached their own conclusions as to B.A.'s consistency and credibility.

Detective Hughes' testimony was especially damaging, because the jury likely viewed his opinion with "a special aura of reliability." *King*, 167 Wn.2d at 331. By allowing Detective Hughes to substitute his judgment for the jury's, counsel aided the state in obtaining a conviction.

Defense counsel provided ineffective assistance by failing to object to testimony providing an improper opinion of Mr. Cochran's guilt. *Hendrickson*, 138 Wn. App. at 833. Ineffective assistance of counsel requires reversal of Mr. Cochran's conviction. *Kyllo*, 166 Wn.2d at 871.

2. Defense counsel should have objected to the prosecutor's misconduct in closing.

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: "At a minimum, an attorney… should request a bench conference… where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Here, defense counsel did not even take this minimum step.

The prosecutor encouraged jurors to convict based on their gut feelings rather than reason and evidence. RP 267. Counsel should have objected to this misconduct. At a minimum, counsel should have requested a sidebar to lodge an objection. *Id.* There is a reasonable probability that counsel's failure to object prejudiced Mr. Cochran. The prosecutor trivialized the reasonable doubt standard and unfairly urged the jury to convict for improper reasons. The state's version of events was hotly contested; its evidence was far from overwhelming. Had counsel objected, there is a reasonable probability that the verdicts would have been more favorable to Mr. Cochran. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance. *Id.* Mr. Cochran's convictions must be reversed and the case remanded for a new trial. *Id.*

3. The Supreme Court should accept review.

Defense counsel provided ineffective assistance by failing to object to inadmissible opinion testimony and by failing to object to prosecutorial misconduct. The Supreme Court should accept review and reverse Mr. Cochran's convictions. This case presents significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

F. The Supreme Court should accept review and hold that the trial judge improperly commented on the evidence and relieved the state of its burden to prove a pattern of abuse over a prolonged period of time. This case presents a significant question of constitutional law that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

The trial court told jurors that the phrase "'prolonged period of time' means more than a few weeks." CP 131. Our Supreme Court has held that this instruction is an improper comment on the evidence.[20] *State v. Brush*, 183 Wn.2d 550, 556-60, 353 P.3d 213 (2015). The error is presumed prejudicial. *Id.,* at 559. The state must "meet the high burden of showing from the record that 'no prejudice could have resulted.'" *Id.,* at 559-60. The Supreme Court should accept review and strike the aggravating factor.[21] This case presents a significant question of constitutional law

[20] It also violates due process and the right to a jury determination of facts that can be used to increase the penalty. U.S. Const. Amend. VI, XIV.

[21] The sentencing court did not impose an exceptional sentence. CP 135-136. Mr. Cochran includes his challenge to this aggravating factor to forestall reliance on it at any future sentencing hearing.

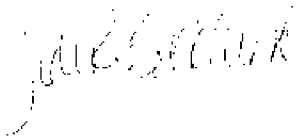
that is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

VI. CONCLUSION

The Supreme Court should accept review, reverse Mr. Cochran's convictions, and remand the case for a new trial. In the alternative, the court should strike the "pattern of abuse" aggravating factor.

Respectfully submitted May 9, 2016.

BACKLUND AND MISTRY



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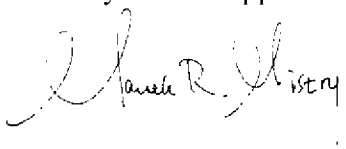

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

James Cochran, DOC #375911
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

and I sent an electronic copy to

Lewis County Prosecuting Attorney
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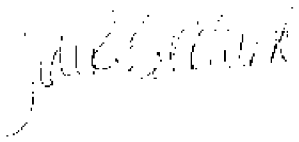
through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Olympia, Washington on May 9, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

April 12, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES ALLEN COCHRAN, Appellant.	No. 46721-6-II UNPUBLISHED OPINION

JOHANSON, J. — A jury found James Allen Cochran guilty of one count of first degree child rape and three counts of first degree child molestation. Finding no reversible error, we reject Cochran's arguments that (1) the trial court improperly commented on the evidence, (2) the State committed prosecutorial misconduct, (3) the trial court's "reasonable doubt" instruction improperly focused the jury on a search for "the truth," (4) the State elicited improper opinion testimony, and (5) he received ineffective assistance of counsel. In addition, Cochran's arguments relating to juror misconduct in his statement of additional grounds (SAG) also lack merit. Thus, we affirm his convictions.

FACTS

When B.A.[1] was seven and eight years old, she lived with her mother, F.A., her sister, A.A., and F.A.'s boyfriend, Cochran. F.A. worked and frequently left her children under Cochran's care and supervision during the day. It was during these periods of supervision that Cochran inappropriately touched B.A., which resulted in the child rape and molestation charges involving B.A.

B.A. explained that the first time Cochran molested her, she was seven years old, which she knew because it was close to her eighth birthday. B.A. was sitting on the couch with Cochran. B.A. said that Cochran was moving up and down on her "private parts." 1 Report of Proceedings (RP) at 46. Cochran touched B.A. through her clothing. B.A. also recalled the second and third incident in some detail and described them as similar to the first incident. Cochran again touched her through her clothing.

On a later date, Cochran told B.A. and A.A. that he wanted to play a game called "'guess what's in your mouth.'" 1 RP at 54. Cochran first put one of B.A.'s stuffed animals into her mouth. He then put a second, unidentified object into B.A.'s mouth. Cochran told B.A. that the second object he put into her mouth was a remote control, but B.A. was certain that it was not. A day or two later, B.A. inadvertently witnessed Cochran watching pornography. B.A. described

[1] *See* Division Two General Order 2011-1 ("in all opinions, orders and rulings in sex crime cases, this Court shall use initials or pseudonyms in place of the names of all witnesses known to have been under the age of 18 at the time of any event in the case"). Also, because of the nature of this case, some confidentiality is appropriate. Accordingly, the name of the mother will not be used in the body of this opinion.

having seen a man and a woman engaged in oral sex on the screen. Because of what she saw, B.A. thought she knew what Cochran had put into her mouth the second time.

This incident prompted B.A. to report to her mother what Cochran had done. As a result, F.A. and her children moved out of Cochran's home and a short while later, F.A. reported what had happened to B.A.'s school. B.A. disclosed the instances of Cochran's abuse to her principal, David Roberts. And Roberts reported B.A.'s disclosures to Child Protective Services. B.A. then made the same disclosures to Detective Rick Hughes and Dr. Deborah Hall, the physician who conducted B.A.'s physical examination.

The State charged Cochran with one count of first degree child rape and three counts of first degree child molestation. Along with each charged crime, the State further alleged that Cochran committed the offenses as part of an ongoing pattern of sexual abuse manifested by multiple incidents over a "prolonged period of time." Clerk's Papers (CP) at 31-34.

At trial, in addition to B.A., the State called Detective Hughes, Roberts, and Dr. Hall as witnesses, each of whom testified regarding the disclosures that B.A. made. Detective Hughes described B.A.'s disclosures as "consistent," "graphic," and "articulate." 2 RP at 160. During Detective Hughes's direct testimony, the following exchange occurred:

> [THE STATE]: . . . did you review Dr. Hall's report in this case?
> [DETECTIVE HUGHES]: Yes. . . . I did review her report. Her report was consistent with everybody else's reports.
> [THE STATE]: Did you review Principal Roberts' report?
> [DETECTIVE HUGHES]: I did.
> [THE STATE]: And you have reviewed your taped interview with [B.A.]?
> [DETECTIVE HUGHES]: Yes.
> [THE STATE]: And did you observe [B.A.] testify here in court?
> [DETECTIVE HUGHES]: Yes.
> [THE STATE]: And have all those statements been consistent?
> [DETECTIVE HUGHES]: Yes, they have.

2 RP at 185. Defense counsel did not object to this testimony.

After the State and the defense rested, the parties and the trial court discussed the jury instructions. Over Cochran's objection, the trial court gave 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3d ed. 2008) (WPIC), a version of the "reasonable doubt" instruction that included the language that if the jury had "an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP at 115. The trial court also gave the two following instructions, one defining "sexual contact" and one defining "prolonged period of time" for purposes of the sentencing aggravator:

> 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.
> Sexual contact may occur through a person's clothing.

CP at 124.

> An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

CP at 131.

In closing argument, without objection from defense counsel, the prosecutor told the jury,

> 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.

3 RP at 267. The jury found Cochran guilty as charged and answered "yes" to two special verdict forms, including the sentencing aggravator that Cochran had committed a pattern of sexual abuse over a "prolonged period of time." 3 RP at 288-290. Despite the special verdicts, the trial court sentenced Cochran within the standard range. Cochran appeals.

ANALYSIS

I. JUDICIAL COMMENT ON THE EVIDENCE

Cochran argues that the trial court improperly commented on the evidence and thereby relieved the State of its burden to prove sexual contact. We conclude that the instruction defining sexual contact was not an improper judicial comment on the evidence because (1) it was an accurate statement of the law, (2) Cochran was not entitled to additional language in the instruction, and (3) the instruction did not resolve a contested factual issue for the jury.

The Washington State Constitution does not allow judges to "charge juries with respect to matters of fact, nor comment thereon." WASH. CONST. art. IV, § 16. Instead, they "'shall declare the law.'" *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting WASH. CONST. art. IV, § 16). A judge is prohibited by article IV, section 16 from "'conveying to the jury his or her personal attitudes toward the merits of the case'" or instructing a jury that "'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "'A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.'" *Brush*, 183 Wn.2d at 557 (quoting *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)). Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

Brush is instructive regarding the type of instruction that constitutes an improper comment on the evidence. There, a jury instruction informed a jury that sexual abuse for a "'prolonged period of time'" meant "'more than a few weeks.'" 183 Wn.2d at 558 (internal quotation marks omitted) (quoting 11A WPIC 300.17, at 719). The *Brush* court concluded that this instruction is

an improper judicial comment on the evidence because the instruction was based on an inaccurate interpretation of the law and because the evidence established that the abuse at issue occurred over a two-month period, it likely affected the jury's finding on the issue. 183 Wn.2d at 559. Consequently, the trial court's instruction there resolved a contested factual issue. *Brush*, 183 Wn.2d at 559.

Here, Cochran does not contend that the trial court's "sexual contact" instruction as given is an inaccurate statement or interpretation of the law. Rather Cochran argues that the trial court's "sexual contact" instruction was an improper judicial comment on the evidence because it did not *further* instruct the jury that additional evidence of sexual gratification is required when a child molestation charge is based on inappropriate touching through clothing.

In support of this proposition, Cochran relies on *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991). Cochran argues that the trial court's "nonstandard" instruction relieved the State of its burden to prove sexual contact because the instruction informed the jury that it could convict without proof of some additional evidence of sexual gratification, which in Cochran's view is an element of the crime. But Cochran's argument is unpersuasive because, as other divisions of this court have already determined, the *Powell* court did not hold that a jury must be instructed separately that it must find additional evidence of sexual gratification when allegedly inappropriate touching occurs over clothing. *State v. Veliz*, 76 Wn. App. 775, 778-79, 888 P.2d 189 (1995).

In *Veliz*, Division One of this court recognized that *Powell* involved a situation where the trial court was asked to determine whether, as a matter of law, there was sufficient evidence to establish each element of the crime beyond a reasonable doubt, not whether the court had properly instructed the jury. 76 Wn. App. at 778. Rather, the *Powell* analysis suggests that additional

evidence of sexual gratification is sometimes required to survive a claim of insufficiency of the evidence when touching occurs over clothing, but this does not mean that a defendant charged with child molestation is entitled to a separate sexual contact instruction requiring a jury to find that such additional evidence exists. *Veliz*, 76 Wn. App. at 778-79.

Instead, the *Veliz* court concluded that the trial court in a child molestation case properly instructs the jury where it states that sexual contact may occur through clothing but does not inform the jury that additional evidence of sexual gratification is required when that is the case. 76 Wn. App. at 779. So, to the extent that Cochran argues that the trial court improperly commented on the evidence by not further instructing the jury regarding sexual contact in this manner, his argument fails.

Nor did the trial court improperly resolve the contested factual issue of sexual gratification. This is true because the trial court's sexual contact instruction, even absent the language Cochran argues should have been included in the sexual contact instruction, still required the jury to find that the touching was done for purposes of sexual gratification, whether the touching occurred over clothing or not.

We hold that the trial court's sexual contact instruction accurately stated the law and therefore did not constitute an improper judicial comment on the evidence, did not relieve the State

of its burden to prove each element of the charged crime, and did not resolve for the jury whether Cochran acted for purposes of sexual gratification.[2]

II. Prosecutorial Misconduct

Cochran argues for the first time on appeal that the prosecutor committed misconduct in closing argument by minimizing the State's burden of proof when it urged the jury to convict him if they had a "gut feeling" that Cochran was guilty. Br. of Appellant at 14. We conclude that Cochran cannot demonstrate that those comments were flagrant, ill intentioned, and incurable by instruction. Thus, Cochran failed to preserve this alleged error for our review.

If a defendant fails to object to misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In *State v. Curtiss*, 161 Wn. App. 673, 702, 250 P.3d 496 (2011), under similar circumstances, we concluded that the State's remarks urging the jury to "trust its gut" and references to the jury's heart—to which there was no objection—were not improper misconduct. *Curtiss*, 161 Wn. App. at 702. We held further that, in any event, Curtiss had not shown prejudice

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[2] Cochran also argues that the trial court improperly commented on the evidence by instructing the jury that "'prolonged period of time'" means "'more than a few weeks.'" Br. of Appellant at 25. We agree. But Cochran recognizes that the trial court did not impose an exceptional sentence and admits that he raises the issue only to prevent reliance on this aggravating factor at any future sentencing hearing. Because we affirm his convictions, we need not address this issue because Cochran will not be resentenced.

because the jury had been instructed to reach a decision "'based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.'" *Curtiss*, 161 Wn. App. at 702. Finally, the court held that Curtiss failed to show that the alleged errors to which she had not objected could not have been cured by an additional instruction. *Curtiss*, 161 Wn. App. at 702.

This same reasoning applies here, because, as in *Curtiss*, there was no objection by defense counsel and the jury was properly instructed. The prosecutor argued that

> [i]f 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.

3 RP at 267 (emphasis added). This single brief comment came in the middle of a lengthy discussion of the reasonable doubt standard. That discussion included a reminder from the prosecutor that a reasonable doubt is one that would exist in the mind of a reasonable person after fully, fairly, and carefully considering the evidence. And the jury was given an instruction that accurately reflected the State's burden of proof. As in *Curtiss*, the trial court instructed the jury to reach its decision based on facts and law and not on sympathy, prejudice, or personal preference. We presume the jury follows the court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

Consequently, even if the prosecutor's remarks were improper, we conclude that Cochran cannot demonstrate enduring prejudice resulting from this brief comment. Nor has Cochran made any appreciable showing that the alleged prejudice could not have been cured by an additional instruction. The trial court could have cured any misunderstanding the jury may have had as it

pertains to the proper standard, which was accurately defined in the instructions they received. We hold that Cochran failed to preserve his prosecutorial misconduct argument.

III. Reasonable Doubt Instruction

Cochran argues that the trial court's jury instruction defining reasonable doubt improperly focused the jury on a "search for the truth." Br. of Appellant at 15. Cochran's argument fails.

We review challenged jury instructions de novo, evaluating them in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), our Supreme Court directed trial courts to exclusively use WPIC 4.01 to instruct juries on the burden of proof and the definition of reasonable doubt. In *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015), the Supreme Court recently reaffirmed that WPIC 4.01 was the proper instruction and "the correct legal instruction on reasonable doubt." Here, the trial court's reasonable doubt jury instruction was identical to WPIC 4.01 which provides in relevant part,

> 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, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP at 115. The trial court included the optional language defining "abiding belief" over Cochran's objection. This "abiding belief in the truth" language specifically has been approved by our Supreme Court. *State v. Pirtle*, 127 Wn.2d 628, 657-58, 904 P.2d 245 (1995).

Cochran, acknowledging that our courts have held that the phrase "abiding belief in the truth" passes constitutional muster, admits that he does not challenge the use of that phrase. Rather, he challenges what he calls the instruction's focus on "the truth." He cites *Emery*, 174

Wn.2d at 760, arguing that the "belief in the truth" language is similar to the impermissible "speak the truth" remarks made by the State during closing argument in that case.

But as the State points out, Division One of this court has previously rejected the specific argument that Cochran makes here, that this "belief in the truth" language encourages the jury to undertake an impermissible search for the truth. *State v. Fedorov*, 181 Wn. App. 187, 199-200, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014). Instead, the "belief in the truth" phrase in the jury instruction "accurately informs the jury its 'job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.'" *Fedorov*, 181 Wn. App. at 200 (quoting *Emery*, 174 Wn.2d at 760).

We hold that the trial court's reasonable doubt instruction, identical to WPIC 4.01, accurately defined reasonable doubt and clearly communicated the State's burden of proof. Accordingly, Cochran's argument fails.

IV. OPINION TESTIMONY

Cochran contends that Detective Hughes's statements that B.A.'s disclosures were consistent is improper opinion testimony that invaded the province of the jury because it bolstered B.A.'s credibility. We hold that Cochran failed to preserve this error for review because he cannot establish that the alleged error is "manifest error."

It is improper for a witness to give an opinion regarding the veracity of another witness. *State v. Demery*, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001). "'[O]pinion testimony'" is "'[t]estimony based on one's belief or idea rather than on direct knowledge of facts at issue.'" *Demery*, 144 Wn.2d at 760 (second alteration in original) (quoting BLACK'S LAW DICTIONARY 1486 (7th ed.1999)); *see State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Important

to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed. *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

But where there is no objection to allegedly improper witness testimony before the trial court, a party seeking to raise the issue on appeal must demonstrate that the error is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 935. "Manifest" error requires a showing of actual prejudice. *Kirkman*, 159 Wn.2d at 935. "'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). In the context of improper opinion testimony, "manifest error" requires an explicit or almost explicit statement by a witness that the witness believed the accusing victim. *Kirkman*, 159 Wn.2d at 936. We preview the merits of the claimed constitutional error to determine whether the argument is likely to succeed. *State v Nguyen*, 165 Wn.2d 428, 433-34, 197 P.3d 673 (2008).

In *Kirkman*, our Supreme Court considered whether a doctor had provided improper opinion testimony when he testified at trial that nothing in his physical examination made him doubt (or confirm) what a sexual abuse victim said and that the victim's report of sexual touching was clear and consistent. 159 Wn.2d at 929-30. The court reasoned that a witness or a victim may "clearly and consistently" provide an account that is false and, therefore, the doctor's statements did not constitute an opinion on the victim's credibility. *Kirkman*, 159 Wn.2d at 930. Accordingly, the *Kirkman* court held that the alleged error was not a manifest error of constitutional magnitude. 159 Wn.2d at 930.

Here, the facts are analogous to those in *Kirkman*. The State asked Detective Hughes whether he had reviewed the reports from the other individuals to whom B.A. made disclosures and whether he had reviewed his own interview. When he said that he had, the State asked Detective Hughes whether those reports were consistent regarding the disclosures. Detective Hughes testified that they were consistent. He also referred to B.A. as "consistent," "graphic," and "articulate." 2 RP at 160. But Detective Hughes did not state or even imply that B.A. was truthful or that he believed her. He simply testified that her disclosures had been consistent. As our Supreme Court noted, a victim or witness may make consistent and clear disclosures that are patently false. *Kirkman*, 159 Wn.2d at 930. Thus, Detective Hughes's statements about B.A.'s consistent statements do not equate to an opinion regarding B.A.'s credibility.

We hold that Detective Hughes did not provide improper opinion testimony and, therefore, Cochran fails to show any error, including manifest error affecting a constitutional right. Accordingly, Cochran failed to preserve this error for our review.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Cochran contends that he received ineffective assistance of counsel because counsel failed to object to both the alleged improper opinion testimony and the alleged prosecutorial misconduct in closing argument. We disagree.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice; failure to show either prong defeats this claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362. To establish prejudice, a defendant must show that

but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

An appellate court reviews an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions. *Strickland*, 466 U.S. at 689; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

To show ineffective assistance by failing to object, Cochran must show (1) that failure to object fell below an objective standard of reasonableness, (2) that the objection would likely have been sustained if raised, and (3) that the result of the trial would have been different if the evidence had not been admitted. *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007).

As explained above, Cochran fails to establish that Detective Hughes provided improper opinion testimony. His statements were not opinions that unfairly bolstered B.A.'s credibility. Therefore, because there was no improper testimony, any objection defense counsel may have made to that testimony would not have succeeded. Consequently, Cochran cannot show that counsel's performance was deficient. Thus, Cochran's argument fails.

Regarding Cochran's argument that counsel was ineffective for failing to object to the alleged prosecutorial misconduct about the jury's "gut feeling" and burden shifting in the State's closing, Cochran again cannot show deficient performance resulting in prejudice. As explained, even if the prosecutor's comments were improper, Cochran fails to establish the prejudice prong because the prosecutor explained that the jury must fully consider the evidence and the trial court instructed the jury to reach its decision based on facts and law and not on sympathy, prejudice, or

personal preference. Consequently, we hold that Cochran's ineffective assistance of counsel argument fails.

VI. Statement of Additional Grounds

In a SAG, Cochran appears to argue that there was potential juror misconduct during his trial. First, Cochran contends that one of the jurors waved at one of F.A.'s family members during the trial. Cochran admits that he does not know what kind of relationship the two individuals had, but implies that it could have had some kind of effect on the rest of the jury. We decline to review this alleged error because there is nothing in the record to suggest that it occurred. *State v McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Second, Cochran appears to argue that an additional instance of juror misconduct occurred when two jurors outside the court building "were talking and pointing at [Cochran] and [his] family" and "were or were not talking about the case." SAG at 1. Regarding this issue, the trial court did make a brief record. There was a short colloquy where the trial court discussed the allegation, asked court staff whether they saw or heard anything, and attempted to identify the jurors involved. No party had seen or heard the alleged exchange and the trial proceeded. We also decline to reach the merits of this claimed error because Cochran fails to identify the nature and occurrence of the alleged error and the record is not sufficiently developed for our review. RAP 10.10(c).

We affirm Cochran's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

JOHANSON, J.

We concur:

WORSWICK, P.J.

LEE, J.

BACKLUND & MISTRY

May 09, 2016 - 11:28 AM

Transmittal Letter

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Court of Appeals Case Number: 46721-6

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Comments:

No Comments were entered.

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