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Division I
State of Washington

NO. 72913-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAREN MORALES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TANYA L. THORP

BRIEF OF RESPONDENT

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A. ISSUES

1. CrR 7.8(a) may be used by a trial court to correct clerical mistakes in judgments, orders or other parts of the record. Here, Morales was charged with Child Molestation in the First Degree and the jury was instructed on that crime. However, the jury was erroneously provided with a verdict form for Child Molestation in the Second Degree, a crime with which Morales had not been charged and on which the jury had not been instructed. The jury found Morales guilty using the erroneous verdict form. Has Morales failed to show that the trial court erred by using CrR 7.8(a) to correct the verdict form and enter judgment of guilty to Child Molestation in the First Degree?

2. Expert testimony is admissible only if the witness qualifies as an expert, the opinion is based on a theory generally accepted in the scientific community, and the expert testimony would be helpful to the trier of fact. Morales' expert, Dr. Yuille, was allowed to testify at length criticizing the detective's interview of the child victim, G.C. However, the trial court did not allow Dr. Yuille to testify that he had been unable to reach a conclusion as to the credibility of G.C.'s statement because the quality of the detective's interview was so poor. Has Morales failed to

show that the trial court abused its discretion by excluding Yuille's nonconclusion as being unhelpful to the trier of fact?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Daren Morales was charged by amended information with Rape of a Child in the First Degree (count I) and Child Molestation in the First Degree (count II). CP 6. Morales' niece G.C., born on July 8, 2001, was the charged victim in each count. Id.

After the evidence was taken, the jury was instructed on Rape of a Child in the First Degree and Child Molestation in the First Degree. CP 119, 123. No other crimes were presented to the jury. The jury returned a verdict of not guilty on count I, Rape of a Child in the First Degree. CP 130. The jury returned a verdict of guilty on count II, but the verdict form that had been provided to the jury erroneously referred to Child Molestation in the Second Degree, rather than the offense that had been charged and on which the jury had been instructed, Child Molestation in the First Degree. CP 131.

Based on the error on the verdict form for count II, Morales filed a motion for a new trial. CP 132-49. The trial court denied the motion and used CrR 7.8(a) to correct the clerical error on the verdict form. CP 165,

166; 8RP[1] 111. The court entered a judgement of guilty on count II, Child Molestation in the First Degree, and sentenced Morales to 55 months in custody. CP 172.

2. SUBSTANTIVE FACTS

Vanessa Medrano moved to the United States from the Philippines with her two daughters[2] in 2008. 3RP 87. In June of that year, Vanessa and her daughters moved into her father's house where her cousin Daren Morales was living in the basement. 3RP 89. Vanessa had known Morales in the Philippines where he had a wife and children. 3RP 90.

By 2012, Morales had moved out of the house, but Vanessa asked him to help take care of her daughters while she was at work. 3RP 93, 97. Morales did not have a job and he agreed to help with the girls. 3RP 79-80. Morales drove the girls to and from school and was around the house with them after school. 3RP 77. Vanessa's mother, Zenaida Soriano Medrano ("Ms. Soriano"), also lived in the house and helped with the girls while Vanessa was at work. 3RP 77. But there were times when Morales was alone with the girls. 3RP 80.

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[1] The verbatim report of proceedings will be referred to in this brief as follows: 1RP (9/17/14, 11/4/14, 11/5/14, 11/6/14, and 11/10/14); 2RP (11/12/14); 3RP (11/13/14); 4RP (11/17/14); 5RP (11/18/14); 6RP (11/19/14); 7RP (11/20/14); 8RP (11/21/14 and 11/24/14).

[2] Vanessa had two daughters. The older one was the charged victim, G.C. To avoid confusion, the younger daughter will be referred to as G.C.'s younger sister.

In January, 2013, Vanessa noticed that her older daughter, G.C., had become angry at Morales. 3RP 99. One night in April, 2013, Vanessa was home but was working in the kitchen and asked Morales to put the girls to bed. 3RP 103. Later, Vanessa opened the bedroom door and saw Morales leaning toward G.C. with his lips close to her. 3RP 104. Ms. Soriano was with Vanessa, and testified that she saw Morales on the bed with G.C. in a position such that it appeared he was about to kiss her. 3RP 82-83. Vanessa told Morales to leave the room. 3RP 83. The next day, Vanessa confronted Morales about what had happened in the bedroom. Morales cried, but he denied doing anything to G.C. 3RP 104-05, 107. He continued to look after Vanessa's daughters for a few more days, but only while Vanessa was not working so that she could observe him. 4RP 12. During those days she did not see anything concerning. 4RP 13. Later that same month, Morales returned to the Philippines. 3RP 107; 4RP 12.

After Morales left for the Philippines, Vanessa discovered a Skype message from G.C. to Morales that she found disturbing. 3RP 107-08. The next day Vanessa asked G.C. about the message, and G.C. was initially angry at her mother. 4RP 22-23. After Vanessa told G.C. that she loved her and would support her, both mother and daughter cried. 4RP 24-26. Vanessa asked G.C. about three times if Morales had touched her

breast, before G.C. admitted that he had. 4RP 35. G.C. also told Vanessa that Morales had tried to penetrate her but that her younger sister had walked into the room. 4RP 36.

After the conversation, Vanessa told nobody about it and did not call the police because she didn't want to embarrass her daughter and was trying to gain her trust. 4RP 28-29. Instead, Vanessa took her daughter to see a counselor, Claire DeLeon.[3] 4RP 30-31. Ms. DeLeon had been meeting with G.C. and her mother Vanessa together to provide family counseling relating to G.C.'s anger issues at home. 4RP 65. Ms. DeLeon was trained in providing services to child victims of sexual assault; she had completed a 30-hour course at Harborview Medical Center, and updated that with once per month training, also through Harborview. 4RP 62-63. Near the end of one session in June 2013, Vanessa looked toward G.C. and asked her permission to disclose to the counselor what she had told her. 4RP 67. G.C. then left the room and Vanessa tearfully told Ms. DeLeon what she had heard from G.C. 4RP 70-71. Ms. DeLeon then had a few more sessions with Vanessa and G.C. before she accompanied them to the police department to report the abuse.[4] 4RP 74-79.

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[3] G.C. had started seeing a counselor in September, 2012, when she was being bullied at school. 4RP 33.

[4] Although a mandatory reporter, Ms. DeLeon testified that she did not believe it was necessary to report the abuse at the first disclosure because she knew Morales was in the Philippines and she felt G.C. was not in danger. 4RP 77-78.

Ms. DeLeon, Vanessa Medrano, and G.C. were met in the lobby of the Seattle Police Department's south precinct on July 26, 2013, by patrol officer Sylvia Parker. 7RP 95-97. Parker spoke to the three together, gathering general information, before she met alone with G.C. in a conference room. 7RP 98-99. G.C. then told Officer Parker that Morales had sexually assaulted her in April, 2013, while she was asleep in her bedroom. 7RP 109. G.C. said she was lying on her bed when he touched her on her breasts and on her genitals. 7RP 109, 112. Morales asked her to take her clothes off. 7RP 111-12. G.C. also told Parker that Morales had licked her body on that occasion. 7RP 110. G.C. said that Morales told her he had a gun and threatened to kill her family if she didn't do what he wanted her to do. 7RP 112. She also told Parker that her uncle had touched her in a similar way on a second occasion but that incident had been interrupted by her mother. 7RP 110.

Detective Roger Ishimitsu was assigned to follow-up on Officer Parker's report. 6RP 11. Det. Ishimitsu is s 20-year law enforcement veteran and is assigned to the department's Sexual Assault and Child Sexual Abuse Unit. 6RP 6-7. He has special training in sexual assault investigations and child-interviewing. 6RP 8. Department protocol is to have a child-interview specialist interview victims between four and 11 years old, but detectives interview children 12 or older. 6RP 8-10.

Because G.C. was 12 at that time, Ishimitsu conducted the interview of G.C. 6RP 15. Ishimitsu interviewed G.C. without her mother or anyone else present. 6RP 18.

G.C.'s younger sister testified that one night after Morales had put her and G.C. to bed, she saw Morales take off his clothes and touch G.C. under her clothes. 6RP 107-09. G.C.'s younger sister testified that Morales was touching her stomach and "further down." 6RP 110.

G.C. testified that one night when she was in sixth or seventh grade Morales had told her to get undressed and he had then undressed himself. 7RP 14-18. She took her shirt off but she had a tank top on underneath. Id. Her uncle tried to get her to touch his penis. Id. She refused and ran out of the room and locked herself in the bathroom. Id. She didn't tell her mother because she thought she might be blamed. 7RP 19.

G.C. testified that on another occasion her mother was in the kitchen and asked Morales to put her and her younger sister to bed. 7RP 20. After her younger sister had fallen asleep, Morales leaned into G.C. and put his hand under her shirt and touched her breasts. 7RP 22-23. He rubbed her breasts under her shirt for a couple minutes. 7RP 24. After rubbing her breasts he moved his hand down over her stomach and rubbed her vagina with his finger. 7RP 24-25. He rubbed her vagina for a couple minutes. 7RP 25. He stopped touching her when he heard her mother

coming. 7RP 26-27. Morales was on top of her when her mother came in. 7RP 26. Her mother told him to go home. 7RP 27. Her mother then sat on the bed and tried to talk to her but she pretended to be asleep. Id. She didn't want to answer questions. Id.

Morales did not testify at trial.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY USING CrR 7.8(a) TO CORRECT A CLERICAL ERROR IN THE VERDICT FORM.

The verdict form erroneously provided to the jury allowed the jury to write in "guilty" or "not guilty" to "the crime of Child Molestation in the Second Degree as charged in Count II." In fact, Child Molestation in the First Degree was charged in count II, and the jury had been instructed only on that crime, not on Child Molestation in the Second Degree. Morales himself had proposed a verdict form for Child Molestation in the First Degree on count II. After the jury found Morales guilty on count II using the erroneous verdict form, the trial court cited CrR 7.8(a) to correct the obvious clerical error and sentenced Morales for Child Molestation in the First Degree. Now Morales seeks to take advantage of the clerical error by asking that his conviction be vacated. His argument should be rejected.

A court may correct a clerical mistake or scrivener's error at any time:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

CrR 7.8(a). A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence. State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011) (citing State v. Priest, 100 Wn. App. 451, 456, 997 P.2d 452 (2000)). If the mistake is not clerical in nature, however, then it is characterized as judicial and the trial court cannot use CrR 7.8(a) to amend the record. Id. (citing Presidential Est. Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). An intentional act by the court cannot be a clerical error. State v. Klump, 80 Wn. App. 391, 396, 909 P.2d 317 (1996) (citing In re Marriage of Getz, 57 Wn. App. 602, 604, 789 P.2d 331 (1990)). Here, the trial court corrected a clerical error.

It was clearly not the intention of the trial court to provide a verdict form for a crime that was not charged and on which the jury was not instructed. Morales was charged with two crimes. Count I charged Morales with Rape of a Child in the First Degree, alleging that he had

sexual intercourse with G.C., who was under 12 during the entire charged time period. CP 6. Count II charged Morales with Child Molestation in the First Degree, alleging that he had sexual contact with G.C. during the same period. CP 6. At the completion of the presentation of evidence, the jury was provided "to convict" instructions for Rape of a Child in the First Degree and Child Molestation in the First Degree. CP 119, 123. The elements of these two crimes were also defined for the jury. CP 116, 120. No lesser included offenses were requested by either party. No other crimes were defined for the jury; no other "two convict" instructions were provided to the jury.

In denying Morales motion for a new trial based on the verdict form, the trial court said:

> The only instruction that the jurors received was the to-convict instruction on child molestation in the first degree... The verdict form is drafted by counsel, presented to the court and provided to the jury. The only blank they fill in is their finding. They were properly instructed in the totality of the instructions as to what they would have to find beyond a reasonable doubt for conviction of child molestation in the first degree. There was notably no objection at the time. There's absolutely nothing before me to find that somehow the jurors were confused under the complete set of instructions. The only crime they could have convicted on was child molestation in the first degree. It was the only crime for which they were given the elements and the standards to find. I do believe this is a clerical mistake...

8RP 110-11.

The use of CrR 7.8(a) to correct an erroneous verdict form was upheld under similar circumstances by this Court in State v. Imhoff, 78 Wn. App. 349, 898 P2d 852 (1995). In Imhoff, the State charged the defendant with one count of *attempted* possession of marijuana with intent to manufacture or deliver. Id. at 350. The verdict form provided to the jury was for the completed offense of possession of marijuana with intent to manufacture or deliver. Id. After Imhoff was found guilty by use of the erroneous verdict form, the trial court used CrR 7.8(a) to correct the clerical error and entered judgment on the charged crime. Id. On appeal, Imhoff argued that the jury had found him guilty of a crime with which he had not been charged. This Court held that the trial court did not abuse its discretion in determining the error to have been clerical and correcting it pursuant to CrR 7.8(a). Id. at 352. The "to convict" instruction required the jury to find each of the elements of *attempted* possession with intent in order to return a guilty verdict. Id. at 351. The court stated:

> Based on the instructions, the only crime the jury could have possibly convicted Imhoff of was attempt to possess a controlled substance with intent to manufacture or deliver. The jury is presumed to follow the court's instructions.

Id. at 351.

The reasoning and holding in Imhoff control here. Because of the charging and jury instructions, the only crime the jury could have possibly

convicted Morales of was Child Molestation in the First Degree. State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1988) (Under Article 1, section 22 of the Washington State Constitution an accused person cannot be tried for an offense not charged.).

In upholding the trial court's use of CrR 7.8(a) to correct the jury verdict the Imhoff court also found that the defendant had not been prejudiced. Imhoff, at 352. Here, Morales clearly was not prejudiced since the corrected verdict form was the same as the verdict form he had himself proposed.

Morales asks this Court to reject the trial court's use of CrR 7.8(a) and vacate his conviction for Child Molestation in the First Degree because, he argues, the jury may have intended to find him guilty of the less serious offense of Child Molestation in the Second Degree. Morales cites case authority that addresses inconsistent jury verdicts and argues that courts must "refrain from second guessing the jury where lenity provides a plausible explanation for the inconsistency." Brief of Appellant at 16 (quoting State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004)). Morales' argument fails. The law relating to inconsistent jury verdicts concerns verdicts that appear to be logically inconsistent between multiple general verdicts for charged offenses, or between a general verdict and a special verdict. See Goins, supra; State v. McNeal, 145

Wn.2d 352, 37 P.2d 280 (2002). In such instances, when there are irrational inconsistencies in jury outcomes for *charged* offenses, the courts will not overturn a guilty verdict that is supported by sufficient evidence. Goins, at 737. But that rationale doesn't apply here because the Morales jury returned a verdict on an erroneous verdict form for a crime that had not been charged and on which the jury had not been instructed. Such a guilty verdict to an uncharged offense is unlawful. Pelkey, supra. This is not a case of inconsistent verdicts.

Morales also relies on State v. Rooth, 129 Wn. App. 761, 121 P.3d 755 (2205). Rooth is inapposite because it did not involve a simple clerical error to a verdict form as in Imhoff; Rooth involved errors in two "to convict" instructions that conflicted with the charging language in the information.

Rooth was charged by information with two counts of unlawful possession of a firearm in the first degree. Count I identified the firearm as a .9 mm handgun; count II identified the firearm as a .22 caliber handgun. Rooth, at 769. The separate "to convict" instructions for counts I and II reversed the identification of the charged firearm, referring to the ".22 caliber as charged in Count I" and "the 9 mm as charged in count II." Id. During closing argument both the prosecutor and Rooth's attorney "switched the guns," referring to "the .22 caliber as charged in count I and

the 9 mm as charged in count II." Id. The prosecutor, in closing, conceded that the State had failed to present sufficient evidence to convict for possession of the .22 caliber handgun. Id. The jury returned verdict forms indicating not guilty as to count I and guilty as to count II. Rooth, at 770-71. The verdict forms did not include references to the particular firearms. Id. The trial court imposed sentence on count II, and Rooth appealed that there was insufficient evidence to support the conviction on count II since the State had conceded that it had not proven possession of the .22 caliber handgun (charged in the information as count II, but mistakenly referred to in the "to convict" instruction for count I). Id.

Division Two rejected the State's argument that the errors at trial could be corrected with CrR 7.8(a). The court reasoned that "[t]o accomplish what the State desires requires that the two verdicts be changed; such a change is referred to as impeaching the verdict." Id. at 771. The court held that: "Juror motives, the effect the evidence had on the jurors, the weight given to the evidence by particular jurors, and the jurors' intentions and beliefs are all factors inhering in the jury's thought processes in arriving at its verdict and, therefore, inhere in the verdict itself." Id. at 771-72 (quoting Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 768-69, 818 P.2d 1337 (1991)).

Rooth is easily distinguishable from Imhoff. Rooth involved two counts with errors in the "to convict" instructions that reflected conflicts with the charged counts. This conflict could have confused the jury such that it cannot be said that the verdict was correct. Imhoff, by contrast, simply involved an obvious error to a verdict form for a single count; there could be no confusion as to the jury's verdict. Significantly, Rooth acknowledged that CrR 7.8(a) might apply if the errors had been to the verdict forms instead of the "to convict" instructions: "Perhaps if the verdict forms had identified the firearm, i.e., the .22 caliber handgun or the 9 mm handgun, there would be a basis to address clerical error." Rooth, at 771. Also, Imhoff explicitly distinguished application of CrR 7.8(a) to an erroneous verdict form as opposed to an error in jury instructions or a charging document. Imhoff, at 351. "There is no parallel. The miswording of the verdict form did not cause Imhoff to be unaware of the charge he was facing, nor did it misinstruct the jury as to what charge he was being tried for." Id. Imhoff controls here.

Morales' reliance on State v. Walker-Williams, 167 Wn.2d 889, 225 P.3d 913 (2010), is also unpersuasive. First, Walker-Williams does not even involve CrR 7.8. In each of the three consolidated cases, five-year firearm enhancement sentences were imposed on the defendants where the juries had been instructed and asked to find by special verdict

only whether the defendants were armed with a deadly weapon. Id. at 892. Consistent with Blakely v. Washington, 542 U.S. 296, 318, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), our supreme court held that despite the evidence being clear that the weapon used was a firearm, a court may not impose the five-year firearm enhancement when only the deadly weapon enhancement had been submitted to the jury.

> In the cases before us, the juries were given special verdict forms for a deadly weapon enhancement, and they returned answers in the affirmative. The fact that the State provided notice in the information to each of the defendants that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding.

Id. at 899 (emphasis added). The court held that the failure to submit a sentencing factor to a jury for a finding violates a defendant's right to a jury trial under both the federal and state constitutions. Id. at 897. This holding in no way implicates Imhoff or the case at bar, where the defendant was sentenced for the crime he had been charged with, and on which the jury had been properly instructed, but the verdict form contained a clerical error.

Here, Morales was charged with Child Molestation in the First Degree and the jury was properly instructed on that offense. The trial court did not intend to provide the jury with a verdict form that referred to

Child Molestation in the Second Degree, and did not abuse its discretion by using CrR 7.8(a) to correct the clerical error.

2. THE TRIAL COURT DID NOT ERR IN LIMITING THE TESTIMONY OF THE DEFENSE EXPERT.

Morales claims that the trial court erred by precluding his expert from testifying that he had been unable to reach a conclusion as to the credibility of G.C.'s statement to a detective because the interview was of such poor quality. Morales' argument is without merit. The trial court properly ruled that such a nonconclusion by the expert was not helpful to the trier of fact. Moreover, the determination of a witness's credibility is the exclusive province of the jury and inappropriate for opinion testimony.

a. Relevant Facts.

In discovery, Morales produced a report by his proposed expert witness, Dr. John C. Yuille. CP 48-55. In addition to a discussion of his qualifications, his work on the case, and his conclusions, the report included two sections, entitled "General Considerations When Interviewing Children" (report, pages 2-3, CP 49-50) and "Evaluating the Credibility of a Child's Allegation" (report, pages 3-6, CP 50-53), respectively.

The first section discusses the proper approach and techniques to be used when interviewing children (e.g., no leading questions, allowing

the child time and opportunity to fully describe the incident, using age-appropriate language), and identifies the "Step-wise Interview" method developed by Dr. Yuille.

The second section, which would become the subject of the State's motion in limine, discusses a method employed by Dr. Yuille called "Statement Analysis" or "Statement Validity Analysis," to evaluate the credibility of a child's statement. "Credibility," according to Yuille's formulation, "refers to the degree to which an allegation has the features of an actual experience." CP 50. "The assessment aspects of Statement Analysis consist of two stages: 1) An evaluation of the content of the child's statement; and 2) an assessment of all other aspects of the evidence in the case." CP 51. Assessing a child's credibility by Statement Analysis involves evaluating the statement for 24 criteria, five of which must be present for a statement to be deemed credible. CP 52.

Regarding his work on this case, Dr. Yuille evaluated the audio recorded interview of G.C. conducted by Detective Ishimitsu and opined:

> [The detective] explained the interview rules to the child and used a leading question to get her to promise to tell the truth. The child then stated that her uncle had touched her. The rest of the interview is of poor quality: the officer displayed no structure or plan for the interview; his questions were narrow and often leading. The child was never given an opportunity to tell her version of events.

CP 54. Dr. Yuille's ultimate opinions were phrased as follows:

> In effect, the officer provided the child with his version of the alleged event and asked her to confirm or disconfirm his version. He never asks her to tell him what happened.
>
> It is not possible to assess the credibility of the child's allegation based upon such a poor quality interview. Credibility assessment requires the child's version of the event and she was never given an opportunity to provide her version.

CP 55.

The State filed a pretrial motion to exclude or limit the testimony of Dr. Yuille. After an offer of proof made by the testimony of Dr. Yuille, the trial court entered an order allowing but limiting Yuille's trial testimony.

> I will permit Dr. Yuille to testify based upon his August 19, 2014 report as to what he was specifically asked to do, the materials he reviewed, the Step-Wise Interview Program. Everything involving evaluating the credibility of a child's allegations, starting on Page 3 and ending on Page 6 is excluded.
>
> I would note that he did not do most of what he outlines in this section in this particular case because he was unable to do so, therefore, its applicability and relevance is nil. As well, credibility being a term of art is misleading even with an explanation from the doctor remains misleading. It is inconsistent with jury instructions as to their determination of credibility. There is nothing to say that inconsistencies and statements require expertise. There are inconsistent statements made by pretty much every witness that has ever testified, and no expert is necessary for the jury to identify an inconsistent statement.
>
> You may discuss his qualifications, and he may discuss and testify to his evaluation of the interview of GC

and his conclusion about Detective Ishimitsu's interview technique.

He will not be allowed to testify about his conclusion. It is not possible to assess the credibility of a child's allegation based upon such a poor-quality interview. He was not able to complete the testing that he himself required, the second level, as he indicated, because of the poor-quality interview. A nonconclusion is not helpful to the trier of fact.

RP 169-70.

At trial, after establishing his credentials, Morales' attorney elicited a number of opinions from Dr. Yuille, including:

- Memory is a reconstructive process, which allows for the possibility of memories changing over time due to interpretation or the subject gaining information about an event from some outside source. RP 30-31.
- A person may have a memory of an event that never occurred, a phenomenon called a "created memory." RP 31. The subject is not aware that the event did not actually occur. RP 35.
- In an investigative interview it is important to use "open, broad, questions." RP 36.

Dr. Yuille testified that he developed the "Step-wise" approach to conducting child interviews. RP 38. He testified that the Step-wise approach has been adopted by law enforcement agencies in every province in Canada, a number of states in the U.S., and in other locations around the

world. RP 41. Yuille testified that when he assesses child interviews he approaches the task in two ways: he uses the Step-wise approach in looking at the "quality of the interview," and a method called Statement Validity Analysis. RP 44. Over the State's objections, Dr. Yuille was allowed to discuss where and when Statement Validity Analysis was developed. RP 45-46. The court then sustained the State's objection to a question about research and field testing related to Statement Validity Analysis. RP 46. In the ensuing discussion outside the presence of the jury, Judge Thorp explained and clarified her rulings on the limitations to Dr. Yuille's testimony.

> My order said that Dr. Yuille could testify about the research he did in creating his Step-Wise Protocol, which includes the two steps which Dr. Yuille has already testified to.
>
> My ruling said that he would have a limited ability to testify about Subpart 2, Statement Analysis, because that is not admitted before the jury and its relevance is limited as such.
>
> The question of whether getting into the details of the research and the field-testing of Statement Validity Analysis is sustained because the jury will not hear about it. It did not get applied to this case. It doesn't have relevance because there was no conclusion for that.
>
> I overruled the objections about Dr. Yuille's involvement with formulating the Step-Wise Protocol which includes as Step 2 Statement Validity Analysis, what his involvement is.
>
> The jury will not hear the nonconclusion even though it was alluded to in opening. The jury will not hear any analysis about GC's statements done by Dr. Yuille because there is no conclusion. So testimony, much less

> extensive testimony, about the level and degree of research and field-testing is not relevant. I was very clear in my ruling [ ] last week that any testimony from these pages [of Dr. Yuille's report] would be limited at most and solely for the purpose of explaining the Step-Wise Protocol in its entirety.
>
> Statement Analysis is a component of Step-Wise Protocol Guidelines and was only admissible under my ruling for that purpose.

RP 50-51.

The court made it clear that Dr. Yuille was allowed to testify about the hazards of a poorly done child interview in general, and give his opinion that the interview in this case was poor.

> There is nothing that limits Dr. Yuille's testimony that a poor child interview affects memory, ability to recall, that there's no cure for it, and that is based on created memories.

RP 56.

> Dr. Yuille can testify that the ramifications of a poor interview are contamination that cannot be corrected in subsequent interviews. My understanding is Dr. Yuille cannot reach that conclusion in regards to [GC] much less any conclusion in regards to that.
>
> But there is no dispute that Dr. Yuiile can testify that he cannot cure a bad interview, that a bad interview occurred here, and that based upon memory there is no way to know. But he cannot testify that GC's memories were -- that he can conclude that they were in fact impermissibly tainted because he said so himself, that he could not do so.

RP 56-57.

The court also held that Morales could elicit testimony from Dr. Yuille regarding the 24 criteria that are associated with Statement Validity Analysis, and that he could identify what was missing from C.G.'s statement so long as it didn't address credibility, truth, or validity. RP 58-59.

When testimony resumed, Morales elicited the following from Dr. Yuille:

- Statement Validity Analysis involves the assessment of 24 criteria, five of which must be present for a statement to be considered consistent with memories. RP 65. Those five key criteria are: overall coherence; spontaneity; an appropriate amount of detail considering the age of the child and the nature of the event that occurred; that the statement of the incident has context relating to other everyday experiences; and, that the statement includes a description of the interaction, i.e., "who did what to who." RP 66.
- Detective Ishimitsu's interview of G.C. was "a poor quality interview of a child" because it had no structure or organization, and, "most importantly," it was "characterized by the use of leading and suggestive questions." RP 68-69.
- Leading questions are "problematic" because they supply information to the witness and create a risk of changing the

witness's memory because of the incorporation of the supplied information. RP 70-71.

- Once contamination of a memory by a leading question occurs it cannot be reversed or cured. RP 71.
- Dr. Yuille identified several questions by Det. Ishimitsu to G.C. that were in his opinion leading. RP 73-74.
- He opined that Det. Ishimitsu did not give G.C. a sufficient opportunity to provide her own version of events. RP 75-76.
- The defense interview that was conducted after Det. Ishimitsu's interview was of high quality, but that later high-quality interview could not cure any problems of contaminated memories that may have occurred in the first poor-quality interview by the detective. RP 77-78.

b. The Trial Court Did Not Err By Excluding Dr. Yuille's Nonconclusion As Being Unhelpful To The Trier Of Fact.

A trial court's decision to exclude expert testimony is reviewed for an abuse of discretion. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004) (citing State v. Swan, 114 Wn.2d 613, 655, 790 P.2d 610 (1990)). Admissibility of expert testimony depends on whether "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert

testimony would be helpful to the trier of fact." Swan, 114 Wn.2d at 655 (quoting State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)). A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, the trial court found that the first two prongs of the ER 702 test were satisfied, thus only the third issue, helpfulness of the excluded testimony to the jury, is at issue. In State v. Willis, supra, a case factually similar to the case at bar, the supreme court upheld the trial court's exclusion of the same type of testimony by the same expert, Dr. Yuille. In Willis, the defendant was convicted of two counts of first degree rape of a child for his offenses against five-year-old C.O.B., the daughter of Willis's girlfriend. Willis, 114 Wn.2d at 257-58. During the course of the investigation C.O.B. was interviewed multiple times. Id. at 258-59. The defense sought to have Dr. Yuille testify on the potential effect of the interview techniques used on C.B.'s memory. Id. at 259.

> Dr. Yuille, the defense's expert, is a professor at the University of British Columbia. He has developed a system for interviewing children called the "Step Way Protocol," that, according to him, is followed in five states and numerous countries. He offered to testify on the potential effect of the interview techniques used on C.B.'s memory.

Id. at 259. The State moved to exclude Dr. Yuille's testimony under Evidence Rule (ER) 702, arguing that it would not be helpful to the jury and was precluded by the supreme court's holding in Swan. Id. at 260.

In Willis, the supreme court began by clarifying that its holding in Swan was not a bar to all expert testimony on child interview techniques and suggestibility. Willis, at 261. Rather, a case by case inquiry pursuant to ER 702 is required. Id. at 262. The court did state, however, "we hew to our conclusion in Swan that the general principle that younger children are more susceptible to suggestion is 'well within the understanding of the jury.'" Willis, at 261 (quoting Swan, 114 Wn.2d at 656). The Willis court characterized Yuille's proposed testimony, based on an offer of proof, as follows:

> Based upon the near-verbatim report of Farrell's (a child interview specialist for the King County Prosecutor's Office) first interview with C.B., Dr. Yuille provided a critique of the interview. He opined that the interview was poorly done for several reasons, including the use of leading questions, the failure to follow up on inconsistencies, and the failure of the child to provide details not supplied by the interviewer. Additionally, Dr. Yuille criticized Farrell for not assessing C.B.'s ability to describe some past event that was not related to the abuse. He noted the importance of such a step for the purpose of determining how much detail and of what quality of detail the child is capable of independently recollecting.

Willis, at 262-63. The court noted that although Yuille's proposed testimony was generally negative concerning the victim interview, "Dr. Yuille did not offer to testify that [the victim's] memory or ability to independently recall the events were compromised because of the interviewing techniques utilized." Willis, at 263. The supreme court held that the trial court did not abuse its discretion in excluding Dr. Yuille's testimony because it would have been unhelpful to the trier of fact. Id. at 260, 264.

Whereas in Willis Dr. Yuille's proposed testimony was entirely excluded, in the case at bar the trial court allowed Yuille to testify but excluded a limited portion of what was proffered as being unhelpful to the trier of fact. Much of the allowed testimony was of the kind that Willis found to have been properly excluded. Here, despite Yuille being unable to offer an opinion as to whether the detective's interview technique had actually impacted the victim's statement, the trial court allowed him to testify extensively, criticizing the detective's interview as being of "poor quality" for the use of leading questions, lack of structure, and for not giving G.C. an opportunity to give her version of events.

Here, the trial court precluded the proposed testimony that Dr. Yuille had been unable to apply his Statement Validity Analysis approach to assess the credibility of G.C.'s statement because the

detective's interview was of such "poor quality." The court ruled that "a nonconclusion is not helpful to the trier of fact." RP 170. The court's ruling was entirely consistent with the precedent from Willis.

The proposed testimony was properly excluded as unhelpful to the jury because of Dr. Yuille's inability to render an opinion based on his Statement Validity Analysis, but there was an additional valid basis for the exclusion. The court excluded everything from Yuille's report section "Evaluating the Credibility of a Child's Allegation." The court ruled: "Everything involving evaluating the credibility of a child's allegations, starting on Page 3 and ending on Page 6 is excluded.... As well, credibility being a term of art is misleading even with an explanation from the doctor remains misleading. It is inconsistent with jury instructions as to their determination of credibility." RP 169-70. Even had Dr. Yuille reached an opinion as to the credibility of the victim's statement, such opinion would have been inadmissible as it would have invaded the province of the jury. The supreme court has held that "there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d

1278 (2001)). The jury in this case was properly instructed: "You are the sole judges of the credibility of each witness," and given the factors they should consider in weighing a witness's testimony. CP 106.

The trial court was, frankly, generous to Morales in admitting much of Dr. Yuille's testimony, which shows the court's application of discretion. It was not an abuse of discretion for the trial court to determine that evidence of an expert's inability to reach a conclusion was unhelpful to the trier of fact. It certainly cannot be said that no reasonable court would have done so.

c. Any Error By The Trial Court In Excluding Dr. Yuille's Opinion Was Harmless.

Even if the trial court erred by not allowing Dr. Yuille to testify to his nonconclusion, that he had been unable to form an opinion as to G.C.'s credibility because the quality of the detective's interview was so poor, the error was harmless. A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Here, there is no reasonable probability that the jury verdict would have been different had such worthless testimony been admitted.

The jury, presumed to follow the court's instructions, was instructed that they were the sole judges of the credibility of each witness and provided instruction on how to assess and weigh the testimony of each witness. CP 106. In accordance with the standard WPIC 1.02, the jury was told:

> In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 106. The jury, applying the tools provided by the court, found Morales guilty of Child Molestation in the First Degree despite some inconsistencies in G.C.'s statements regarding the molestations. Hearing Dr. Yuille's opinion that he had been unable to assess G.C.'s credibility would have been immaterial to the jurors' sworn obligation to perform that assessment themselves.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Morales' judgment and sentence.

DATED this 10 day of February, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Mick Woynarowski, containing a copy of the Brief of Respondent, in STATE V. DAREN M. MORALES, Cause No. 72913-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date : Feb. 10, 2016

Done in Seattle, Washington