No. 335763

DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROY E. COOLEY,

Appellant

ON APPEAL FROM KITTITAS COUNTY SUPERIOR COURT
Honorable Frances P. Chemelewski

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. THE STATE'S ATTEMPT TO DENY THAT THE MOTHER GAVE AN OPINION ABOUT HER SON'S VERACITY SIMPLY IGNORES THE RECORD.

1. The fact that the mother only gradually came to hold her opinion, *ending* with a belief which she held with 100% certainty, only makes the constitutional violation worse.

The State seeks to minimize the devastatingly prejudicial impact of the mother's opinion testimony by characterizing the mother as "overly cautious." *Brief of Respondent ("BOR")*, at 14. Without citing to anything in the record, the State asserts that she "vacillated between doubting and believing her own son." *Id.* at 15. But that characterization is inaccurate. As the Online Etymology Dictionary states, the word vacillate comes from the Latin verb *vacillare*, which means "to sway to and fro," or to "waver between two opinions or courses."[1] But the mother did not testify that she went back and forth between believing and disbelieving.[2] On the contrary, the mother testified that her thinking underwent a steady one-way progression. Her initial reaction was of shock and disbelief; then she undertook what the prosecutor called a "fact-finding" mission in which she asked her son for confirmation and observed his demeanor; and she ended her mission with a 100% belief that

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[1] http://www.etymonline.com/index.php?term=vacillate.

[2] Even if the mother *had* testified that she went back and forth between believing and disbelieving, that would not have made any of such testimony admissible. Just as a witness cannot testify that in his opinion another witness was telling the truth, a witness also cannot testify that another witness is lying. Nor can giving multiple inadmissible opinions make any one of those opinions admissible.

her son was telling the truth. RP 195. Incredibly, the prosecution asserts that "the mother did not offer an opinion as to the credibility of her son" and that her testimony "can hardly be considered an opinion as to whether her son was telling the truth." *BOR*, at 14. But the record unequivocally shows that the mother testified that she went from complete surprise and not knowing what to think, to doing her own investigation into the matter, to the endpoint where she was 100% certain that her son was telling the truth.

First, by asking her a series of questions about her first reaction, the prosecutor deliberately elicited testimony about what the mother thought when her son first told her what Cooley had done:

> Q. Ms. Lowery, when your son told you that, ***what was your reaction***?
>
> A. I didn't believe it. I couldn't – I just –
>
> Q. *You didn't believe it?*
>
> A. No.
>
> [The trial judge tells the witness to keep her voice up and to get closer to the microphone]
>
> Q. (By Mr. Herion) *Why didn't you believe it?*
>
> A. I never thought I was going to hear that come out of my son's mouth. I didn't – it just took me completely by surprise. I didn't know what to think, really. That's --

RP 141 (emphasis added). The State cites to her first answer – "I didn't believe it" – but leaves out the immediate follow up where Lowery explained that what she meant by that "she didn't know what to think." RP 141. Similarly, moments later when the prosecutor asked Lowery why

she didn't ask her son more questions she replied: "My mind was spinning. I was – I didn't know how to deal with what I'd just heard." RP 142.

Next the prosecutor covered the topics of (1) her trip out to the defendant's house to ask him if her son's accusation was true; (2) the defendant's denial of the accusation; (3) her conversation with her son where she told him that his dad had denied it and her son's reaction to being told of the denial; and (5) her subsequent decision to report the matter to the police. RP 143-148.

The prosecutor then embarked on a series of questions regarding Lowery's beliefs and her reason for waiting before reporting the matter to the police. By asking these pointed questions the prosecutor made sure that the jury learned that Lowery waited until she "knew" that "what my son was saying was the truth," and that by the time she had her second conversation with her son she had made up her mind and she was "sure" that he was telling the truth:

> Q. ***Why did you wait***?
>
> A. Just trying to make sure that I wasn't going to mess up anybody's life.
>
> Q. Okay.
>
> A. Without being sure of –
>
> Q. ***Without being sure of what***?
>
> A. Yeah. ***Without knowing that*** what I was going – I don't know. That knowing that ***what my son was saying was the truth***. I was trying to –

Q. Well, at the point of the second conversation when you told [R.B.] what the defendant said –

A. Uh-huh.

Q. – ***did you believe him at that point?***

A. I did. I did when I saw him crying and stuff. That's what made me – I didn't want to believe it.

RP 149 (emphasis added).

2. The claim that the trial prosecutor did not solicit testimony from the mother about what she believed is belied by the record which shows that the prosecutor repeatedly asked questions designed to elicit belief testimony.

Incredibly, on appeal the State asserts that "the prosecutor did not solicit testimony from the mother about what she "believed." *BOR*, at 15. This assertion flies in the face of the record which shows the prosecutor repeatedly asked the mother what she believed. In fact, the prosecutor's exact questions were:

[W]hen your son told you that, what was your reaction?

You didn't believe it?

Why didn't you believe it?

Why did you wait?

Without being sure of what?

[D]id you believe him at that point?

RP 141, 149.

Cooley's defense counsel conducted a fairly short cross-examination (RP 153-176), and then the prosecutor conducted a redirect examination (RP 177-195). At the very end of his redirect examination,

the prosecutor again questioned Lowery as to *why* she waited before she finally reported her son's accusation to the police. In this redirect examination the very last testimony that the prosecutor elicited from the mother was that she waited until she was 100% sure that what her son said the defendant did was really happened:

> Q. Ms. Lowery –
>
> A. Yes.
>
> Q. – did you want to report to law enforcement what your son reported to you?
>
> A. No.
>
> Q. Why not?
>
> A. I didn't want to ruin somebody's life without being ***a hundred percent sure that it had happened.***

RP 195 (emphasis added).

3. The State's alternate argument that the error was harmless ignores the case law, the record, and the legal standard for determining whether a constitutional error was harmless.

The State confuses the test for ascertaining whether an unobjected to constitutional error was "manifest" error with the test for determining whether that error was harmless. The Supreme Court has made it very clear that these are separate questions:

> A constitutional error is manifest if the appellant can show actual prejudice, i.e., there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" [Citations]. If an error of constitutional magnitude is manifest, it may nevertheless be harmless. [Citation]. The burden of showing an error is harmless remains with the

> prosecution. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (establishing State's burden to show harmless error beyond a reasonable doubt). FN2.
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> ---
>
> 2. To elaborate on the distinction between a manifest error and a harmless error, a manifest error is "so obvious on the record that the error warrants appellate review. [*State v.*] *O'Hara*, 167 Wn.2d [91] at 100, 217 P.3d 756) [2009)]. It is the defendant's burden to identify this type of error, ***but it is not the defendant's burden to also show that the error was harmful. Once the error is addressed on its merits, the State bears the burden to prove the error was harmless under the Chapman standard.***

State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011) (emphasis added). *Accord O'Hara*, 167 Wn.2d at 99-100; *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Scott,* 110 Wn.2d 662, 668, 757 P.2d 492 (1988).

> As noted in both *McFarland* and *Scott* a harmless error analysis occurs after the court determines the error is a manifest constitutional error. [Citations]. The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, ***the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.***

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) (emphasis added).[3]

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[3] In the present case, it is totally "obvious on the record that the error warrants review." This is *not* a case where there was merely an implication that the witness was expressing an opinion as to the veracity of another witness (and also an opinion as to the guilt of the defendant). It was explicit. She testified that she did not want to report the matter "without knowing that [her] son was telling the truth," and that she waited until she was "a hundred percent sure that it happened." RP 149, 195.

Confusing these two questions, the State argues that the mother's opinion "certainly cannot reasonably be argued to be the testimony which convinced the jury." *BOR,* at 16. But Cooley does not have to show that it *is* what convinced the jury. The State has to demonstrate beyond a reasonable doubt that it is *not* what convinced the jury.

The State avoids even mentioning the *Chapman* harmless error standard. But *Chapman* requires the State, as "the beneficiary of a constitutional error," to prove beyond a reasonable doubt that to prove that the mother's opinion testimony "did not contribute to the verdict obtained." *Chapman,* 386 U.S. at 24. The State makes no effort to show that it has met that test. This is understandable since the trial prosecutor exploited the error in closing argument by reminding the jurors that when the mother observed her son's demeanor when she spoke to him, her maternal "instinct" told her that she he was telling the truth. RP 759-760.

On appeal, the State attempts to repudiate the argument that the trial prosecutor made in the court below. The trial prosecutor emphasized that the mother could "fact-check" the truth of her son's statement by observing his reaction to the news that his dad denied the accusation: "She is – call it fact checking, She's looking at her son as a mother looking at his reaction." RP 759. He tells the jury that "as a mother" she can tell from her son's crying that he is telling the truth.

But on appeal, the State now argues that the mother's opinion was essentially worthless and of very little probative value because she is just a mother: "The mother's testimony . . . should not be expected to be given

much credence by jurors even if she had offered an opinion for the simple reason: she is the child's mother." *BOR*, at 16-17.

Thus the State has taken diametrically opposed positions. In the trial court the State told the jury her opinion was important because "as a mother" she knows how to "fact check" her son's statement, and on appeal the State tells this Court that the jury probably didn't give much credence to her testimony for the "simple reason [that] she is the child's mother." The State cannot have it both ways.

The State's new position conflicts with *State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007) where Division Two recognized that a mother's opinion that her child was telling the truth about having been sexually molested was found to be especially prejudicial precisely because she was the child's mother. "[T]he error in admitting [the mother's opinion] deprived [the defendant] of his right to have the jury determine [the child's] credibility based on its knowledge and experience *without regard to the mother's practice of judging* [the child's] veracity by the child's smile." *Id.* at 96. In the present case, the mother's opinion testimony deprived the jury of judging the child's credibility "without regard to the mother's" fact-checking technique of "judging [the child's] veracity by the child's" crying. *Id.* In *Sutherby* the Court of Appeals concluded, "The error affected the jury deliberations and was not harmless." *Sutherby*, at 96. The same conclusion is inescapable here.[4]

[4] Of all the cases involving improper opinions, this case is clearly the most egregious. There has never been a case where the witness stated that she held her opinion with
(Footnote continued next page)

The State argues that Lowery "was not offering the jury her point blank opinion about her son's veracity;" instead she was simply testifying as to the point [in time] when she finally believed him enough to make a police report." *BOR*, at 17. Apparently the State is arguing that the trial prosecutor was not trying to convince the jury that it should give credence to the mother's opinion; he was merely trying to get the jury to understand *why* the mother delayed making a police report. But the prosecutor's motive for eliciting the mother's opinion testimony is simply irrelevant. No matter what his motive was, he elicited an improper opinion that violated the defendant's right for a jury to decide who was telling the truth.[5]

There are several cases which have explicitly held that the elicitation of this same type of improper opinion testimony constituted manifest constitutional error and that the error was not shown to be harmless. In *State v. King*, 167 Wn.2d 324, 219 P.3d 642 (2009) the Supreme Court reviewed the Court of Appeals' refusal to consider such a

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absolute certainty. Here the mother said by the time she reported she was "sure," she waited until she "knew" it was true, until she was 100% sure. In *State v. Dunn*, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005) the witness said only that he believed sexual abuse was "probable" and yet the Court found this was constitutional error and presumed to be prejudicial.

[5] The State also argues that the mother's testimony "stands in stark contrast to a police officer or a physician offering an opinion as to whether a witness is telling the truth," because a police officer is likely to be viewed by jurors as more objective than a mother. *BOR* at 17. But the *Sutherby* Court recognized that at least in the context of evaluation of a child, a mother's opinion is far more powerful, and therefore much more prejudicial, than that of a police officer: "In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense." *Sutherby*, 138 Wn. App. at 95.

claim because it was raised for the first time on appeal. The Supreme Court held that the Court of Appeals "erred when it failed to engage in manifest constitutional error analysis." *Id.* at 332.[6]

In *State v. Barr*, 123 Wn. App. 373, 98 P.3d 518 (2004), while reviewing a rape conviction this Court considered a claim, raised for the first time on appeal, that an officer's testimony constituted an impermissible opinion. This Court found that its admission was manifest error, rejecting the State's arguments that the opinion was admissible:

> The State maintains that the testimony here was not improper because the officer did not testify that Mr. Barr was being deceptive, but, rather, the officer's testimony consisted of observations of Mr. Barr's behavior indicating that there were signs that Mr. Barr was being deceptive. This is a distinction without a difference. The officer's testimony was clearly designed to give the officer's opinion as to whether Mr. Barr had committed the offense.

Barr, 123 Wn. App. at 383.

This Court held that error was manifest constitutional error because the credibility of the victim (who said she was raped) and the defendant (who said she was not) was the crux of the case. *Id* at 381. The same is true in this case. In *Barr* the police officer endorsed the credibility of the alleged victim by testifying that the defendant was lying. In this case the mother bolstered the credibility of the alleged victim by testifying that she was 100% certain he was telling the truth. In *Barr* this Court held that the State had failed to show that the error was harmless beyond a

[6] The Supreme Court found it unnecessary to decide whether the error was harmless because it reversed King's conviction on other grounds. *Id.* at 333.

reasonable doubt. Similarly, this Court should hold that the error in this case was not harmless.

Appellant Cooley submits that the error in this case is not harmless under *either* the contribution test or the overwhelming untainted evidence test. In *Barr* this Court applied the overwhelming untainted evidence test because the Washington Supreme Court adopted that test in *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Appellant Cooley respectfully submits that this is not the proper test because the U.S. Supreme Court held that the federal constitution requires the use of the contribution test. *Chapman*, 386 U.S. at 84. The two tests are significantly different because the overwhelming evidence test uses an error-stripping approach which the U.S. Supreme Court has repeatedly held to be improper. Under the *Guloy* test, an appellate court considers what a hypothetically reasonable jury would have decided if the error had never been committed at all. But this approach permits an appellate court to eviscerate the constitutional right to a jury trial.

In *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court held that *Chapman* requires that harmless error analysis be conducted by asking what the "actual jury" hearing this case may have based its verdict on, and does not permit the analysis to rest on a prediction of how a "reasonable jury" would probably decide the case "in a trial that occurred without the error":

> Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have

> upon a reasonable jury, but rather what effect it had upon the verdict at hand. *See Chapman, supra,* 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on "verdict obtained"). Harmless error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt,* 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict surely would have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered — no matter how inescapable the findings to support that verdict might be — would violate the jury trial guarantee.

Sullivan, 508 U.S. at 279.

"The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . ." *Id. Accord Kotteakos v. United States*, 328 U.S. 750, 763-64 (1946).[7] Therefore, to permit harmless error analysis to rest upon speculation as to what "any reasonable jury" would do at an error-free retrial would be to permit appellate judges to deny defendants their constitutional right to have a jury determine their guilt.[8]

Appellant respectfully submits that under *either* test, the State cannot carry its burden of proving the error in this case was harmless. The evidence in this case was *not* overwhelming. There was no physical or

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[7] "[I]t is not the appellate court's function to determine guilt or innocence . . . Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. . . ."

[8] Recently, one justice of the Washington Supreme Court recognized that harmless error analysis in Washington remains confusing, inconsistent and arbitrary, and that it conflicted with the *Chapman* contribution test. *State v. Coristine,* 177 Wn.2d 370, 387, 390-91, 300 P.3d 400 (2013) (citation omitted) (Gonzalez, J., concurring). The majority opinion simply indicated that the briefing was inadequate to allow the Court to consider the merits of the overwhelming evidence test. *Id.* at 380-81.

medical evidence to corroborate the child's accusation. It was simply the word of a 7 year old child, who was testifying about events that he said happened when he was 5 years old, against the word of an adult defendant. The child was shown to be unreliable when he insisted that his drawing of what the prosecutor said was a penis was in fact a drawing of a cactus. RP 112, 113. And as Professor Reisberg testified, there were explicit signs that the child had been coached, and the child gave conflicting versions of his accusation, stating first that the defendant put his penis in the child's mouth, but then telling a child interviewer that he put his own penis into the defendant's mouth. RP 481, 505

Under the contribution test, clearly it cannot be said that the mother's opinion did not contribute to the verdict, because the trial prosecutor deliberately elicited her opinion and then in closing argument he urged the jurors to rely upon it.

Here, as in *Sutherby*, under either harmless error test the State has *not* shown that the error was harmless. *See Sutherby*, 138 Wn. App. at 96.

B. THE JURY WAS TOLD THAT AN UNIDENTIFIED JUDGE BELIEVED THAT THERE WAS ENOUGH EVIDENCE TO CHARGE A FELONY.

Over defense counsel's objection, the prosecution was permitted to elicit testimony that before a felony charge can be filed some judge must first approve that filing decision. On appeal, the prosecution attempts to defuse this error with three arguments, each of which is invalid.

First, the prosecution argues that "there was no judicial comment at all. *The trial judge* made no comment at all during the officer's

testimony . . ." *BOR*, at 21 (italics added). The State is correct: *the trial judge* did not say anything. But the State does not and cannot deny that the officer was permitted to testify that before a felony charge can be filed that charging decision had to be approved by *some unidentified judge.* The State would have this Court believe that as long as it was *some other* judge and not *the trial judge*, that solves everything. The State cites no case law to support this argument and there is none.

There are only two Superior Court judges in Kittitas County. One of them was the trial judge in this case (the Honorable Francis Chmelewski). The other is the Honorable Scott Sparks. Thus Officer Salinas' testimony conveyed to the jury that *either* Judge Chmelewski or Judge Sparks approved the filing of the felony charge of rape of a child. The State would have this Court believe that if the jury had been told that Chmelewski made this decision, that would have been a violation of article 4, ¶16, but that because the jury was effectively told merely that it *might* have been Judge Chmelewski or it might have been the other Superior Court judge, there was no improper judicial comment on the evidence. Such a construction of the scope of article 4, §16 is nonsensical. Regardless of *which* judge approved the filing of the charge against Cooley, the jury was told that *a judge* approved it. Thus, "a" judicial comment on the evidence was made.

It bears repeating that it is *not* the defendant's burden to prove that he was prejudiced by Officer Salinas' testimony. On the contrary, it is the State's burden to affirmatively prove that he could not have been

prejudiced by it. *See, e.g., State v. Bogner*, 62 Wn.2d 247, 256, 382 P.2d 254 (1963) ("we cannot say that it affirmatively appears that the jury could not have been influenced by the comments of the trial judge"). Thus the State must prove that it is not possible that the jurors viewed Officer Salinas' testimony as establishing that some judge approved the filing of the charge against Cooley. The State has not even tried to carry this burden.

Second, the State argues that since the trial judge never actually *said* anything himself no judicial comment on the evidence was made. Thus the State would have this Court believe that if a police officer says, "Judge Chmelewski told me there was enough to file a felony," that there is no impermissible comment on the evidence because the officer spoke those words, not the judge himself. But no case is cited to support this argument and like the first contention it has no merit. In fact, the State itself cites case law which demonstrates that a verbal statement by the judge is not necessary; and that words or actions that merely imply that the judge holds a certain personal view regarding the evidence is sufficient to violate the Constitution.

The State quotes from *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) as follows: "A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely implied." If a judge's statements "allowed the jury to infer" that the judge either believed or disbelieved some of the evidence" then there has been a violation of article 4, §16. It doesn't matter whether the

inference arises from a verbal statement or from some nonverbal action, such as a smile or a grimace. *State v. Jacobson*, 78 Wn.2d 491, 477 P.2d 1 (1970) (constitution prohibits "words *or actions*" which have the effect of conveying a judge's personal opinion). For example:

> In the case of *State v. Coella,* 3 Wash. 99, 28 P. 28 [(1891)], we held that the conduct of the trial judge in reading a newspaper while the defendant was on the stand, and engaging in a pleasant conversation with a witness for the state whom the defendant was trying to impeach, constituted a comment upon the weight of the testimony.

State v. Vaughn, 167 Wash. 420, 425, 9 P.2d 355 (1932).

In the present case, the personal attitude of a judge was more than merely implied; Officer Salinas testified that "it's up to the Court whether enough – there's enough to . . . charge a felony." RP 677. Thus the jury was expressly told that some judge decided "there was enough" to charge Cooley. Since the *only* evidence of Cooley's guilt came from the child, RB, this also means that the jury was effectively told that some judge believed the child. In this respect this case is similar to *Bogner*, *supra.* There the trial judge said the trial was about whether the robbery was committed by the defendant. Defense counsel responded that there were two issues: whether there had been a robbery, and if so who committed it. The trial judge then asked, "Don't you think we are getting a little ridiculous, or aren't we?" The Supreme Court held that this remark implied that the judge believed that it was undeniable that a robbery had occurred, and therefore the Constitution was violated.

Finally, the State asserts that Cooley's contention "that the

testimony was deliberately sought by the (trial) prosecutor . . . is badly flawed." *BOR*, at 21. The State argues that "as anyone knows" sometimes events . . . occur in trial that were not planned or expected." *Id.* According to the State, that is what happened in this case, because Officer Salinas' testimony was of an "aberrant nature." *Id.*

But the record belies the State's contention. The questions asked by the trial prosecutor show that he deliberately sought to elicit testimony on the subject of who files charges. And when he didn't get the answer he wanted, he kept asking. Here are the questions the prosecutor asked:

Q. As to felonies, who ultimately files the charge?

Q. Yeah , [who] physically gets in and files a felony?

RP 677. The subject of who files felony charges was irrelevant. And yet the prosecutor deliberately brought it up. The State now argues on appeal that the prejudicial and inadmissible testimony of Officer Salinas "cannot be attributed to the Court or the prosecutor . . ." *BOR*, at 21. But the record shows clearly that it *is* properly attributable to both the prosecutor – who initiated this line of inquiry by asking for testimony on this subject – and to the trial judge, who incorrectly overruled the relevance objection.

C. PROSECUTORIAL MISCONDUCT

1. The State makes no attempt to defend the trial prosecutor's statement to the jury that "you have to believe" that the mother coached her son in order to "go on the defense theory" that Cooley was innocent.

After describing the defense contention that the mother coached her son on what to say, the prosecutor told the jurors "you have to believe"

the defense theory that the mother coached her son into giving a false accusation. RP 750. Cooley has cited several cases that hold that such an argument is improper because it shifts the burden of proof away from the State and to the defendant. *Brief of Appellant*, at 44. The State has not disputed the fact that this argument was improper. Instead, the State has simply ignored this issue altogether.

2. The prosecutor improperly asked a witness to confirm that criminal defense attorneys routinely argue that a child who reports sexual abuse has been coached. The State makes no attempt to defend this conduct.

The trial prosecutor impugned the credibility of all criminal defense attorneys when he questioned Professor Reisberg about the supposed scholarly observation that criminal defense attorneys "routinely argue that children's reports [of sexual abuse] are the product of adult influence." RP 479. Prosecutorial insinuations that criminal defense attorneys are unethical, and questions concerning the "routine" practices of criminal defense attorneys are both irrelevant and highly prejudicial. *State v. Young*, 76 Conn. App. 392, 404, 819 A.2d 884 (2003).

The State has made no attempt to defend the trial prosecutor's question about the "routine" defense tactic of arguing adult coaching, and has chosen instead to ignore the issue.

3. The prosecutor argued to the jury that Cooley wasted a "great opportunity to prove" his innocence by failing to offer "good evidence" that he didn't fit the description given by the child. *State v. Fleming*, which condemned this type of argument, is not distinguishable.

Appellant asserts that the State engaged in misconduct by arguing

to the jury that Cooley had a "great opportunity, literally, to prove (inaudible) pull down your pants and show the officer" that his pubic area was shaved. RP 765. The State argued that if he really had been shaved this would have been "good evidence." RP 765. This argument impermissibly shifted the burden of proof to Cooley by suggesting that since he didn't present evidence of his innocence that shows he is guilty.

Appellant Cooley has cited to *State v. Fleming,* 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). The State argues that *Fleming* is not on point because "[f]irst, and very important, Mr. Cooley testified at trial, unlike the co-defendants in Fleming." *BOR*, at 26. But a defendant has *both* a right to testify (or not to testify) *and* a right to insist that the State carry its burden of proving guilt beyond a reasonable doubt. A defendant who exercises his right to testify does not, thereby, forfeit his constitutional right to demand that the State bear the burden of proof. The State also argues that *Fleming* is different: in *Fleming* the State argued that the defendant should have presented evidence *to the jury*, and in this case the State argued that the defendant should have presented evidence *to the arresting officer*. But the defendant is not obligated to present evidence to *either*. A defendant is free to decide when and where to remain silent. He cannot be penalized for failing to present evidence to an officer because he has no obligation to present evidence of his innocence to anyone.

4. **When the prosecutor asked Cooley to confirm that he had no idea where this allegation was coming from, he engaged in exactly the same type of improper conduct that the Court condemned in *Boehning*.**

The State argues that the questioning of defendant Cooley was different from the questioning condemned in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). The State claims that in this case the prosecution was merely "clarifying that R.B. had no incentive to lie." *BOR*, at 25. But there was no need for any "clarification."

This line of questioning came up when the prosecutor questioned Cooley about statements that he made when he was arrested by Deputy Whitsett. Cooley testified that prior to his arrest he did not know that any accusation had been made against him. Although Lowery testified that she had gone out to Cooley's home and told him about R.B.'s accusation, Cooley denied this. RP 536, 637 He testified that no such consideration had ever taken place. RP 536, 637. So on the day when Deputy Whitsett came to his house and arrested him, Cooley had no idea what he was being arrested for until Whitsett told him. The prosecutor asked him to confirm that he "had no idea where this allegation came from." RP 637. And Cooley did confirm that, stating simply that he had "no idea." RP 637. But Cooley never told Whitsett that he thought R.B. had some reason to lie, and thus the prosecutor was not "clarifying" anything Cooley said to Whitsett. Instead, the prosecutor was trying to get Cooley to offer up a reason why R.B. might lie, but Cooley did not oblige him. Cooley said simply, "No idea." RP 637. Thus it was the prosecutor, not Cooley, who

brought up the subject of Cooley's inability to offer any reason why the child would lie. This is precisely the type of misconduct which caused the Court of Appeals to reverse the defendant's conviction in *Boehning*.

5. The State speculates that the court reporter has inaccurately transcribed the trial prosecutor's closing argument remarks.

The court reporter's trial transcript is quite clear. It shows that the prosecutor said, "I believe her testimony – you know, That's just for you." RP 751. The State argues that in all likelihood the prosecutor actually said, "I believe her testimony **was** – you know, 'That's just for you. You don't show that to people.'" The State asserts that the transcript *should be corrected* by "inserting proper quotation marks and other punctuation," and argues that if this correction is made then "[o]ne could conclude that there are words missing," such as the word "was." *BOR* at 23.

Appellant submits that it is *improper* to assume that the Court reporter got it wrong. Further, it is improper to urge this Court to "correct" the verbatim report of proceedings so that it says what prosecutors on appeal now claim was really said. If the State had wanted to correct the transcript, there is an appellate rule which specifically affords them a procedural mechanism for obtaining such a correction. RAP 9.5(c). But the State has never invoked that rule and has never sought such relief. Accordingly, the transcript must be read as it is. And as it stands, the transcript shows that the prosecutor said, "I believe her testimony."

The transcript cannot be changed to fit the prosecution's appellate

arguments. But while it cannot be argued that the court reporter *mistranscribed* the prosecutor's words, it is possible that the trial prosecutor *misspoke.* It may well be that the trial prosecutor *intended* to include to the word "was," and that what he *meant* to say was: "I believe her testimony was." But even assuming that is what he *meant* to say, that doesn't cure the problem. He *said*, "I believe her testimony." So the jury heard, "I believe her testimony." And therefore impermissible vouching actually occurred.

6. The State argues that none of the prosecutorial misconduct can be characterized as flagrant because none of the misconduct was intentional. But the Supreme Court has held that misconduct need not be intentional in order to be flagrant.

The State repeatedly argues that Cooley has not preserved his prosecutorial misconduct claims because there were no objections raised by Cooley's trial counsel, and absent an objection the issue cannot be raised on direct appeal unless the misconduct is "flagrant and ill-intentioned." *BOR*, at 27. But as the Supreme Court has said twice in recent years, when deciding whether a claim of prosecutorial misconduct has been waived appellate courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery,* 174 Wn.2d 741, 762, 278 P.3d 653 (2012). *Accord State v. Lindsay,* 180 Wn.2d 423, 430 n.2, 326 P.2d 125 (2014).

The State apparently would have this Court believe that if there

had been objections raised, the trial judge could have eliminated all unfair prejudice by giving curative instructions. In this case, that means that the State believes all problems could have been solved if the trial judge had been given the opportunity to tell the jury something like this:

> Now, the State has argued that in order to acquit the defendant you have to believe that the mother coached her son. That is not true however, the defendant does not have to prove that, and in fact the defendant does not have to prove anything at all.
>
> The State has also argued that in child sex cases defense attorneys routinely argue that the child was coached. But I am instructing you that that argument is improper, that what defense attorneys routinely do is irrelevant, and that you are forbidden to consider that argument, and I forbid you to think badly of Mr. Cooley's defense attorney.
>
> The prosecution has argued that the defendant's failure to pull down his pants and display his shaved pubic area to the arresting officer shows that he must be guilty, because why else would he forego the opportunity to present such great evidence. But that is also an improper argument, and I forbid you to consider it.
>
> And the prosecution has drawn your attention to Mr. Cooley's failure to offer an explanation as to why the child RB would lie, and I forbid you to consider that argument also.
>
> And finally, the prosecutor has told you that he believes what Randi Lowery has testified to, and that was improper so I forbid you to consider that as well.

As the Supreme Court said in *State v. Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012):

> [T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.

This is such a case. When prosecutorial misconduct is pervasive, its

improper effects cannot be dispelled simply by instructions to the jury to forget. There is a limit to what a jury can forget, and the trial prosecutor in this case went well beyond it.

D. INEFFECTIVE ASSISTANCE: FAILURE TO OBJECT TO PROSECUTORIAL MISCONDUCT.

Even if this Court were to conclude that some or all of the prosecutorial misconduct claims were waived by counsel's failure to object, that would still leave the claim that those same failures to object constituted ineffective assistance of counsel. The State argues that Cooley has failed to prove that the failure to object constituted deficient conduct. But the State fails to identify any conceivable objectively reasonable strategic reason as to why trial counsel might decide it would be better to let the misconduct go unchallenged. What possible strategic reason could there ever be for allowing the State to shift the burden of proof, vouch for a witness, and denigrate defense counsel?

The State falls back on the assertion that Cooley has failed to establish prejudice. In *Strickland v. Washington,* 466 U.S. 668, 695 (1984) the Court framed the prejudice inquiry this way:

> [T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

The defendant need *not* show that the probability of a reasonable doubt is more likely than not. *Id.* at 694. The defendant need only show that trial counsel's errors are sufficient to undermine confidence in the verdict that was returned. *Id.* The State has made no attempt to argue that there was

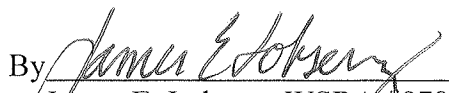
overwhelming evidence of guilt in this case, and even if the State had made such an argument the record would not support it because (1) there is no physical evidence to confirm what the child said; (2) the child did not make the accusation until roughly two years after the abuse allegedly happened; (3) while the State tried to get the child to say that he had drawn a picture of the defendant's penis the child testified that instead that he had drawn a real cactus; (4) the mother did not report the alleged abuse to police until long after the date when the child allegedly disclosed to her; (5) the mother only made the police report after she had made her own criminal complaint against the defendant for stalking, and then she dropped that complaint without any explanation; and (6) there was expert testimony that there were indications that the child had been coached on what to say.

II. CONCLUSION

For the reasons stated above, appellant Cooley asks this Court to reverse his conviction and to order a new trial.

Respectfully submitted this 23rd day of August, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By 
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 23rd day of August, 2016.

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