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STATE OF WASHINGTON  
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Supreme Court No. 95994-3  
(CoA No. 75677-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NOLEN,

Petitioner.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

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PETITION FOR REVIEW

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David L Donnan  
Attorney for Petitioner

MERYHEW LAW GROUP  
600 First Avenue, Suite 512  
Seattle, Washington 98104  
(206) 264-1590

**TABLE OF CONTENTS**

A. SUMMARY OF APPEAL..... 1

B. IDENTITY OF PETITIONER AND THE DECISION BELOW .... 1

C. ISSUES PRESENTED FOR REVIEW ..... 2

D. FACTS RELEVANT TO PETITION ..... 3

    1. Trial testimony ..... 3

    2. Procedural history. .... 7

E. ARGUMENT FOR REVIEW..... 8

    1. This Court should grant review because the Court of Appeals’ opinion affirming the admission of unduly prejudicial and marginally relevant evidence is inconsistent with the decisions of this Court and presents significant questions of constitutional law. .... 8

    2. This Court should grant review because the Court of Appeals’ opinion affirming admission testimony regarding a conversation between the appellant’s mother and his ex-wife was not sufficiently relevant and should have been excluded. .... 12

    3. This Court should review the Court of Appeals’ opinion and find the prosecutor’s argument in closing was an improper statement of personal opinion which prejudiced Mr. Nolen’s right to a fair trial. .... 13

F. CONCLUSION ..... 16

**TABLE OF AUTHORITIES**

**Washington Supreme Court**

State v. Allen, 182 Wn.2d 364, 341 P.3d 268 (2015)..... 15

State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956)..... 14

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 15

State v. Ish, 170 Wn.2d 189, 241 P.3d 389 (2010)..... 14

State v. Mack, 80 Wn.2d 19, 490 P.3d 1303 (1971) ..... 10

State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006)..... 15

State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011) ..... 15

**Constitutional Provisions**

Const. art. I, secs 3, 22..... 10

U.S. Const. amend. 14 ..... 10

**United States Supreme Court**

Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) ..... 10

Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) ..... 10

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) ..... 9

United State v. Solerno, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ..... 10

**Court Rules**

ER 401 ..... 8

ER 402 ..... 8

ER 403 ..... 8

RAP 13.3..... 1

RAP 13.4..... 1

**Courts of Other Jurisdictions**

People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899) ..... 14

**A. SUMMARY OF APPEAL**

Almost ten years after it allegedly occurred, Christopher Tory Nolen was accused of the sexual abuse of his daughter A.N. At trial, the defense challenged the credibility of A.N. and her mother, based on the inconsistencies in their stories and the apparent embellishment of their narrative over time to encourage the prosecution. Although it was not certain why A.N. might have initially told this ballooning story, the evidence suggested jealousy and resentment as a primary motive following her parents' divorce, stoked by her mother's antipathy toward Mr. Nolen. The jury's evaluation of these claims was severely compromised, however, by the admission of irrelevant and prejudicial evidence, and the improper closing argument of the prosecutor. The Court of Appeals opinion affirming Mr. Nolen's conviction is inconsistent with the decisions of this Court and presents significant questions of constitutional law.

**B. IDENTITY OF PETITIONER AND THE DECISION BELOW**

The petitioner, Christopher Nolen, through the undersigned attorney, David L. Donnan, requests this Court grant review pursuant to RAP 13.3 and RAP 13.4(b)(1), (2) and (3), of the unpublished decision of the Court of Appeals, Division Two, in *State v. Nolen*, No. 75677-0-I, filed April 16, 2018, which affirmed in part and reversed in part; and the subsequent order denying reconsideration dated May 18, 2018. A copy of the opinion and

order denying reconsideration are attached hereto as Appendix A and B respectively.

**C. ISSUES PRESENTED FOR REVIEW**

1. Due Process and the Rules of Evidence bar evidence whose probative value is outweighed by its prejudicial effect. The trial court admitted considerable prejudicial victim impact evidence whose minimal probative value was far outweighed by its tendency to distract the and confuse the jury. Is the Court of Appeals opinion affirming the trial court's abuse of discretion and compromise Mr. Nolen's right to a fair trial inconsistent with the decisions of this Court and present a significant question of constitutional law?

2. The right to a fair trial is ensured by excluding irrelevant evidence or evidence which compromises other fundamental rights. Evidence of Mr. Nolen's mother's banter with his ex-wife failed to make any element of the offense more less likely and undoubtedly distracted the jury from its task. Is the Court of Appeals opinion affirming the trial court's abuse of discretion in admitting this irrelevant and prejudicial testimony inconsistent with the decisions of this Court and the constitutional right to counsel and fair trial?

3. The government prosecutor has a special duty to seek justice and avoid improper influences on the finder of fact. Where the prosecutor personally vouches for the reliability of her witnesses she crosses this line

into improper argument. Is the Court of Appeals' opinion finding such argument proper inconsistent with the opinions of this Court and the constitutional right to a fair trial?

4. The right to a fair trial may be eroded by a series of errors which together compromise the fact-finding process. Here the introduction of inflammatory and irrelevant evidence, and the prosecutor's apparent vouching for her witness, distracted the jury from its constitutional function. Is the Court of Appeals opinion inconsistent with the decisions of this Court and the constitutional right to a fair trial?

#### **D. FACTS RELEVANT TO PETITION**

**1. Trial testimony.** Christopher Tory Nolen and his wife Tina moved to Arlington, Washington in 2004 with their eight-year-old daughter A.N. and their younger son C.N.<sup>1</sup> RP 621-42, 663. While living in Arlington, and both parents were working, the children would often go to the Boys and Girls Club after school. RP 425-26, 623. A.N. was particularly active in the Club and went on to work as a junior staff member and eventually as a camp or program counselor. RP 419.

The Nolens separated in 2006 and Mr. Nolen returned to his home in Arkansas. RP 671. Although they tried to reconcile, they finalized their divorce in 2009. RP 621, 624-25, 665. After the separation, A.N. remained

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<sup>1</sup> Because several the witnesses share the same surname, the family's familiar references are used for clarity.

with her mother and graduated from Granite Falls High School in 2014. RP 420. Mr. Nolen visited occasionally and eventually remarried. RP 671.

In her senior year of high school, A.N. was nominated for a youth of the year award by the Boys and Girls Club. RP 452. The nomination process involved interviews and a culminating speech with a substantial scholarship award for the winner. RP 452-54, 675. The boy who won the award gave a speech about overcoming physical and emotional abuse at the hands of his father. RP 454, 676-77. Tina reported that she and A.N. were upset or frustrated afterward because her speech had been more topical, discussing her love for the Boys and Girls Club. RP 677, 693.

It was after returning home that evening that A.N. told Tina she too had been abused by her father. RP 455-58. Granite Falls Police Officer Chad Wells contacted A.N. a few days later and described her as withdrawn, tearful and reluctant to talk. RP 462, 580-90. When Officer Wells determined the alleged conduct did not occur within Granite Falls, he stopped so that other officers could complete the interviews. RP 590-91.

Arlington Police Department Detective Lisa Teter subsequently interviewed A.N. RP 717-22. Detective Teter described A.N. as very shy



and thought she never became comfortable during the 45-minute interview.

RP 724-26. A.N. described her memory as faded. RP 733, 737-40.<sup>2</sup>

In May 2015, A.N. was interviewed again by Arlington Police. Detective Mike Sargent who used his specific training in interview techniques with children to prompt A.N. to provide a more elaborate and detailed story. RP 769-70.

Ultimately, A.N. testified at trial to a series of incidents occurring in the Arlington home and another isolated incident when Mr. Nolen visited several years later. RP 436- 42. The jury found Mr. Nolen not guilty of this later allegation. CP 73. The jury also rejected the charge surrounding what A.N. described as the first incident. RP 428-31; CP 77.

In between, A.N. testified vaguely to what she thought might be three incidents in the master bedroom during which “he would begin touching me with his hand at first and then would have me – grab my hand and have me do that to him,” i.e., “the same thing with my hand again on his penis.” RP 442-43. A.N. also described two incidents in her own bedroom, one like the incidents in the master bedroom (RP 432-34), and another in which he allegedly came in late at night “and he did the same thing with him his hand inside my vagina, but there was no him putting

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<sup>2</sup> Shortly after the interview, Detective Teter left police work and the case languished for almost a year until Tina prevailed on the prosecutor’s office and discovered an error in their records. RP 696-97.

your hand on his penis that time.” RP 444-45. A.N. said she did not tell her mother at the time because she did not understand what happened until she was older. RP 450-54.

In his defense, Mr. Nolen presented the testimony of his brother Michael, a cardiovascular surgeon from Little Rock, Arkansas. RP 786. Michael testified that Mr. Nolen lived with his family after the separation in the summer of 2006. RP 787. Michael has two children of his own and had no reservations about Tory with his children. RP 787.

Mr. Nolen’s mother, Elizabeth “Kay” Nolen, testified about the family relationships. She described several visits with A.N. in Arkansas and Washington as well as a family trip to Disney World in 2006. RP 802-03. The families got along well together when they visited, but she described Tina as particularly tense during the 2006 trip. RP 804-07. Kay also testified that she did not observe any inappropriate behavior between Mr. Nolen and the children. RP 830-31, 836.

Erica Whorton testified she is Mr. Nolen’s daughter from an earlier relationship. Kay Nolen and her husband Earl raised Erica. RP 797-98. She was 22 years old and had graduated from college. RP 842-44. Although she acknowledged she resented her father for not being around as she was growing up, she testified they became closer over time. RP 847-51.

**2. Procedural history.** Mr. Nolen was charged in Snohomish County Superior Court by a five-count amended information with two counts each of rape of a child and child molestation alleged to have occurred between 2004 and 2008, and one count of rape of child alleged to have occurred in 2009 and 2012. CP 115-16.

Following the presentation of evidence, arguments of counsel and instruction from the court, the jury returned a verdict finding Mr. Nolen not guilty of the allegations in Count 1 and Count 5, but guilty of Counts 2, 3, and 4. CP 73-77; RP 946-50. Judge Lucas sentenced Mr. Nolen to confinement for 130 months to life.<sup>3</sup>

On appeal, Mr. Nolen argued the trial court abused its discretion by admitting minimally probative evidence which was highly prejudicial and compromised his ability to receive a fair trial. This was exacerbated by the prosecutor's impermissible comment on the credibility of the complaining witness during closing argument. The Court of Appeals' opinion finding no error was inconsistent with the decisions of this Court and implicates significant constitutional issues which warrant further review. RAP 13.

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<sup>3</sup> Judge Lucas also imposed community custody conditions that limited Mr. Nolen's access to computers and internet and required urinalysis and Breathalyzer testing without finding a nexus to the offense. CP 51-54; RP 964-69. The Court of Appeals concurred that there is no evidence that using a computer or accessing the internet, the requiring breath tests. Slip op at 11-12. Mr. Nolen does not challenge the court's ability to bar the consumption of controlled substances without a lawful prescription and to monitor compliance using urinalysis.

## **E. ARGUMENT FOR REVIEW**

### **1. This Court should grant review because the Court of Appeals' opinion affirming the admission of unduly prejudicial and marginally relevant evidence is inconsistent with the decisions of this Court and presents significant questions of constitutional law.**

Mr. Nolen moved to exclude evidence of the impact of the alleged offenses on A.N. in the form of evidence describing how she may have suffered as a result. CP 110-11. The evidence was not relevant to the issues at trial, i.e., determining whether the State had proven the elements of the crimes alleged beyond a reasonable doubt. ER 401, ER 403. Therefore, the negligible probative value was overwhelmed by the testimony regarding A.N.'s emotional challenges, notwithstanding their potential sources.

ER 402 provides that "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations .... Evidence which is not relevant is not admissible." ER 401 defines "relevant evidence" as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence.” ER 403’s concern for unfair prejudice “speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilty on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). The problems that arise are “commonly, though not necessarily, an emotional one.” Id. Moreover, evidence which invokes undue sympathy will tend to mislead or confuse the jury.

Extensive testimony about the counseling A.N. engaged in, and the basic tools she needed to cope with her challenges was inflammatory to the extent that it served to invoke undue sympathy without a connection to the elements of the offense. A.N. subsequently testified she felt “almost drowning” and “it was overwhelming” RP 456. Her resulting involvement in counseling to address the impact of the alleged abuse was substantial, seeing her first counselor for five or six times before the insurance ran out. RP 463-64, 476. A second counselor provided more support which included teaching A.N. self-soothing techniques to assist her in talking about her allegations. RP 470-71. She also described keeping rocks in her pocket to remind her of her strength and courage. RP 471. She would completely “shut down” when people tried to get her to talk about the incidents. RP 472. Counseling prepared A.N. to give a more detailed interview. RP 473.

This testimony illustrates the danger of admitting minimally probative and unfairly prejudicial evidence; because it compromises an accused person's right to a fair trial which is a fundamental part of due process of law. United State v. Solerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, secs 3, 22. This includes the right to be tried only for the offense charged, not extraneous matters such as these. State v. Mack, 80 Wn.2d 19, 21, 490 P.3d 1303 (1971).

Mr. Nolen timely moved to exclude evidence of the impact of the alleged offenses on A.N. because the evidence was not relevant to proving the elements of the alleged crimes. The erroneous admission of such evidence also violates due process when it works to deprive an accused person of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) (introduction of improper evidence deprives defendants of due process where "the evidence is so extremely unfair that its admission violates fundamental conceptions of justice"). In Mr. Nolen's case, the prejudicial impact of the victim impact testimony far exceeded what was necessary to tell the prosecution's story and it served to distract the jury from its central function of weighing the credibility of the witnesses.

Mr. Nolen asks this Court to review the opinion of the Court of Appeals because the testimony of A.N. about her general state of emotional well-being and the practices or techniques she had been taught in counseling was so minimally relevant given its inflammatory and emotional nature that it risked distracting the jury. While the reliability of A.N. 's allegations were called into question, the evidence which can be admitted in response to bolster her credibility still remains constrained by ER 403. Where the result is a significant degree of prejudice to fact-finder's ability to thoughtfully weigh the evidence, suppression is the necessary remedy. See e.g. Dowling, 493 U.S. at 352.

In its opinion, the Court concluded "testimony about the impact of the abuse and the techniques she learned from counseling was relevant to why A.N. disclosed more information about the abuse of over time." Slip op at 6. The testimony regarding events and circumstances, far removed from the alleged conduct the jury was tasked to decide occurred, had very limited relevance. At the same time, the emotional nature of the testimony inevitably gave it an oversized place in the jury's deliberations. This was not appropriate exercise of discretion given the evidence was only tangentially relevant in explaining the timing of the events. This was not sufficient probative value given the raw and personal nature of the testimony with the corresponding risks of invoking undue sympathy. RP

456, 463-64, 476. Mr. Nolen asks this Court to grant review and find the evidence was improperly admitted and that he is entitled to relief.

**2. This Court should grant review because the Court of Appeals' opinion affirming admission testimony regarding a conversation between the appellant's mother and his ex-wife was not sufficiently relevant and should have been excluded.**

Mr. Nolen further asks this Court to review the Court of Appeals' opinion finding the trial court did not abuse its discretion in permitting cross examination regarding an exchange between Mr. Nolen's ex-wife and his mother. RP 839-40. The testimony was concerning both because of its implications on Mr. Nolen's Sixth Amendment right to counsel, but also because it injected a degree of animus into the proceedings that was not necessary to the jury's evaluation of the evidence. See State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). Furthermore, the Court of Appeals' opinion does not consider the full scope of the objectionable evidence because the opinion examines only a portion of the relevant examination. Cf Slip op. at 7 and Appellant's Opening Brief at 18.

Mr. Nolen sought to exclude the evidence both because of the burden it placed on his Sixth Amendment rights, but also because the irrelevant testimony itself threatened to his right to a fair trial. Id.; State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The emotional and personal nature of the testimony similarly risked unfair prejudice because



it "appeals to the jury's sympathies, provokes its instinct to punish, or triggers other mainsprings of human action." Carson v. Fine, 123 Wn.2d 206, 222-23, 867 P.2d 610 (1994). Evidence which the prosecution used to paint Mr. Nolen's mother as overbearing was neither material to proof of an essential element, nor relevant for any other material purpose, and therefore, any probative value was greatly outweighed by its prejudicial effect. Smith, 106 Wn.2d at 776.

Mr. Nolen requests this Court review the Court of Appeals opinion because it is inconsistent with the decisions of this Court and presents significant questions of constitutional concern.

**3. This Court should review the Court of Appeals' opinion and find the prosecutor's argument in closing was an improper statement of personal opinion which prejudiced Mr. Nolen's right to a fair trial.**

The deputy prosecuting attorney in closing argument sought to support the credibility of her complaining witness by posing a question that was left for the jury to determine, i.e. whether the testimony was scripted, and then answered the question on her own, "I don't think so." RP 880. Such a statement, delivered in the first person, was a clear expression of her personal opinion regarding the evidence. See State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). This is a direct statement which was far more specific, and therefore, prejudicial than a more general statement regarding the "ring of truth." Id.

This Court has made clear that a prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasi-judicial capacity in a search for justice. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Case, at 71. Thus, a prosecutor must function within appropriate boundaries while zealously seeking justice. Id. Those boundaries include a prohibition against improper vouching as where the prosecutor expresses his or her personal belief as to the veracity of the witness. State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). “It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness.” Warren, 165 Wn.2d at 30. As this Court has noted, whether a witness has testified truthfully is entirely for the jury to determine. Ish, 170 Wn.2d at 196.

Improper argument in closing may be so significant that reversal is required where the prosecutor’s conduct was both improper and prejudicial. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). The Court must

consider the prosecutor's conduct and the prejudice that resulted therefrom by looking at the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given to the jury. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). This Court has made clear that an improper argument is prejudicial if there is a substantial likelihood it affected the verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

As noted already, this occurs when a prosecutor improperly vouches for a witness by expressing a personal belief in the veracity of a witness or arguing that evidence not presented at trial supports the witness's testimony. Thorgerson, 172 Wn.2d at 443. Prejudice occurs when it is clear and unmistakable that counsel is not arguing an inference from the evidence State v. McKenzie, 157 Wn.2d 44, 134 P.3d 221 (2006).

Here the prosecutor's improper argument was plainly inappropriate and a separate jury instruction could not have cured the resulting prejudice. See Emery, 174 Wn.2d at 760-61. The improper argument resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" Id. at 761; Thorgerson, 172 Wn.2d at 455. In Mr. Nolen's case, the prosecutor's argument, answering her own rhetorical question, was therefore both improper and prejudicial to the extent that it put the prosecutor's own personal stamp of approval on the sufficiency on the

evidence. Because the prosecutor's statement vouched directly for the sufficiency of charge, its impact on the right to a fair determination of the evidence was both direct and material. See Allen, 182 Wn.2d at 373; Thorgerson, 172 Wn.2d at 443. Mr. Nolen's asks the Court to take review of the Court of Appeals' opinion because it is inconsistent with the decisions of this Court and presents significant questions of constitutional law.

**F. CONCLUSION**

Mr. Nolen requests this Court grant review and reverse his convictions. The matter should then be remanded further proceedings as appropriate.

DATED this 15<sup>th</sup> day of June 2018.

Respectfully submitted,

s/ David L. Donnan

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David L. Donnan (WSBA 19271)  
MERYHEW LAW GROUP  
600 First Avenue, Suite 512  
Seattle, WA 98104-2237  
(206) 264-1590  
[david@meryhewlaw.com](mailto:david@meryhewlaw.com)

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,	)	
	)	No. 75677-0-1
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
CHRISTOPHER T. NOLEN,	)	
	)	
Appellant.	)	FILED: April 16, 2018

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APPELWICK, J. — Nolen was convicted of three counts of first degree child molestation for acts against his daughter. The trial court allowed victim impact evidence and testimony that Nolen’s mother had tried to intimidate the victim’s mother. Nolen argues that the trial court abused its discretion, asserting that in both cases the prejudicial effect outweighed the probative value. He also claims the prosecutor made an impermissible comment on the credibility of the complaining witness during closing argument. We find no error on these issues. Finally, Nolen challenges conditions of community custody, arguing that they are unauthorized and not reasonably related to his offenses. We accept the State’s concession that two conditions are not related to the crimes and must be stricken or clarified. We affirm in part, reverse in part, and remand.

## FACTS

Around 2004, Christopher Nolen and his then wife, Tina Nolen, moved to Arlington, Washington with their two children.<sup>1</sup> Their daughter, A.N., who was about eight, and younger son, C.N., went to the Boys and Girls Club after school while their parents worked. The Nolens separated in 2006 and finalized their divorce in 2009. A.N. remained active with the Boys and Girls Club, and was recognized as Student of the Year when she was a senior in high school. After the recognition ceremony for the award, A.N. told her mother that her father had sexually abused her in the past.

A.N. testified that when Nolen still lived with her, he molested her while she was alone with him in her parents' bedroom. At the time, A.N. was nine or ten. A.N. testified about two other times Nolen molested her in her bedroom. And, after her parents separated, A.N. testified that when she was 14 years old Nolen raped her when they were alone together in a hotel room.

In the amended information, the State charged Nolen with first degree rape of a child (count I), first degree child molestation (counts II-IV), and third degree rape of a child (count V). The jury returned verdicts of not guilty on counts I and V. It convicted the defendant of first degree child molestation as charged in counts II-IV. The court sentenced Nolen to 130 months to life in confinement and imposed community custody conditions. Nolen appeals.

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<sup>1</sup> Because several witnesses share the same surname, unless otherwise indicated, we use first names for clarity. We refer to the appellant as "Nolen."

## DISCUSSION

### I. Admitted Evidence

Nolen argues that the trial court twice abused its discretion in admitting evidence that had a prejudicial effect that outweighed its probative value. First, he contends that the trial court abused its discretion in admitting testimony of how A.N. suffered as a result of Nolen's offenses. Second, he argues that the trial court abused its discretion in allowing the State to ask Nolen's mother about a conversation she had with A.N.'s mother, Tina.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds or reasons. Id.

#### A. Victim Impact Evidence

Nolen first argues that evidence of the impact of the alleged abuse on A.N. was not relevant to the issues at trial, and, therefore, the evidence's prejudicial effect outweighed its probative value.

Before trial, Nolen moved to exclude evidence of the impact on A.N. of the alleged abuse. The court denied the motion, balancing the probative value against the prejudice of the evidence on the record:

The objection was under ER 403. With regard to that, generally the analysis that is supposed to take place is a balancing process, where you balance probative value against prejudice of the evidence. And the burden is on the moving party to show the prejudice. And what you are basically looking at is . . . whether the evidence is designed

to illicit [sic] an emotional response versus a rational response. In other words, the problem is it inflammatory towards the jury? Is it intended to inflame them or confuse them?

In this situation, the impact of the crime on the victim, I don't see how, given what I've heard in terms of offer of proof, how it would be inflammatory at all.

The fact that a person was assaulted and was injured by that and the injury was primarily psychological, it is sort of a common thing to be expected in these types of situations. And I think that the probative value of the evidence outweighs the prejudicial value so far, and so that motion is denied.

Under ER 403, the only question is whether the evidence's probative value is outweighed by its prejudicial effect. Carson v. Fine, 123 Wn.2d 206, 222, 867 P.2d 610 (1994). Unfair prejudice is caused by evidence likely to arouse an emotional response rather than a rational decision among the jurors. Id. at 223.

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Evidence bearing on a witness's credibility is relevant when there has been an attack on her credibility. State v. Bourgeois, 133 Wn.2d 389, 401, 945 P.2d 1120 (1997). Where the State can reasonably anticipate such an attack, it need not wait until after the witness has been cross-examined. Id. at 402. The credibility of a witness often is " 'an inevitable, central issue' " in cases in which the witness is a child victim of sexual molestation. State v. Hakimi, 124 Wn. App. 15, 25, 98 P.3d 809 (2004) (quoting State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). Cases involving crimes against children generally put in issue the credibility of the complaining



witness, especially if the defendant denies the acts charged and the child asserts their commission. Id. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence. Id.

Here, the defense's theory of the case, of which it notified the court before trial, was that the alleged abuse was a fabrication. In support of admitting the impact evidence, the State argued,

[T]he disclosure was a late disclosure. . . . I expect [A.N.] to testify that when she ultimately did disclose it was because it had been having quite an emotional impact on her, and she couldn't keep it in anymore. I think that is certainly relevant, especially considering the defense is that she made it up. I think circumstances surrounding when she did ultimately disclose are key to this case, especially in light of the defense.

She also then has had difficulty talking about it with different people and I think she should be allowed to talk about how hard it is to talk about and what she was feeling at the time when she was having various discussions with various people.

And ultimately she did seek counselors and she saw counselors as a result of this. These are counselors I think [defense counsel] is calling as her own witness.

So all of it is part and parcel of the way this came about, how it's affected her, why she told, who she told, when she told, and how -- how her emotions were significantly affecting those things. So I do think that's relevant.

Nolen argues that A.N.'s testimony about her counseling and the techniques she used to cope with her challenges was inflammatory and invoked undue sympathy, and did not connect to the elements of the offense. He cites to where A.N. testified that she was feeling overwhelmed, and that her second counselor

helped her with methods to overcome her emotions, enabling her to talk about what happened.

Throughout trial, Nolen's defense was that A.N.'s allegations were false. On cross, Nolen called A.N.'s credibility into question, asking why she was now able to remember things that she had previously told a detective she could not remember. Thus, testimony about the impact of the abuse and the techniques she learned from counseling was relevant to why A.N. disclosed more information about the abuse over time. The trial court did not abuse its discretion in allowing testimony of how the abuse affected A.N.

B. Witness Bias Testimony

Second, Nolen argues that the trial court abused its discretion in allowing the State to elicit testimony from Nolen's mother that was overly prejudicial.

Before trial, Nolen moved to exclude testimony that Elizabeth "Kay" Nolen, Nolen's mother, told Tina that she had money and was able to hire a good lawyer. In evaluating the defense's motion, the trial court read from the defense witness list and the accompanying summary of anticipated testimony from Kay. That summary included that "Kay will describe . . . Tina's persistent pleas for money from her." The court noted that since the defense planned on attacking the credibility of another witness by bringing up the money issue, it would be fair to allow the State to inquire into Kay's bias on cross-examination. The trial court denied the motion to exclude Kay's statements.

Although the court did not bar the State from asking Kay if she told Tina that she could hire a good lawyer, the State did not explicitly ask this at trial. Instead, in cross-examination the State asked,

Q. And didn't you intercede on [Nolen]'s behalf when you tried to manipulate Tina into not supporting this prosecution?

A. Okay.

Is that regarding after we heard about it and that I e-mailed her and asked her why she was doing this, is that what you mean?

Q. You asked her why she was doing it?

A. Uh-hum.

Q. And you said we have money behind our case, did you not?

A. I did.

Nolen asserts that the admitted testimony was irrelevant and a burden on his Sixth Amendment right to counsel. The law allows cross-examination of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption. State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994). The scope of such cross-examination is within the discretion of the trial court. Id. The State may not draw adverse inferences from the exercise of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006) overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). But, not all arguments touching upon a defendant's constitutional rights are impermissible comments on the exercise of those rights. Id. Where the focus of a prosecutor's question is not

on the right itself, the comment does not violate the defendant's constitutional right at issue. Id. at 807.

Here, after the State asked Kay if she told Tina that she had money behind the case, the State asked, "And you said we are going to bring you down with charges, it's a felony, correct?" The focus of the prosecutor's line of questioning was to show Kay's attempt to intimidate Tina and to establish witness bias. It did not focus on the defendant's right to counsel. The trial court did not abuse its discretion in admitting the testimony.

## II. Prosecutorial Misconduct

Nolen argues that the prosecutor improperly commented on the credibility of the complaining witness in closing argument, denying him a fair trial.

Prosecutorial misconduct is grounds for reversal only if the prosecutor's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). We evaluate a prosecutor's conduct in the full trial context, including the evidence presented, the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions. Id. It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). But, a statement is misconduct only if it is a clear and unmistakable expression of a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). Otherwise, the prosecutor remains free to argue an inference from the evidence. Id. When there is an

objection, an improper argument is prejudicial if there is a substantial likelihood it affected the verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Absent a timely objection, reversal is required only if the conduct is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. Warren, 165 Wn.2d at 43.

Here, in closing argument, the prosecutor focused on A.N.'s credibility. At one point, about A.N., she stated,

Ultimately you are here to decide what's reasonable and what's not reasonable, what makes sense, what doesn't make sense, in light of what you heard. . . . [If s]he sat up there and every time she talked about it, she talked about it the same way, used the same words, didn't show any emotion, that would certainly have you wondering, wouldn't it? That would make it clear that she was reciting some sort of script. But that's not what happened here.

Then, she recounted A.N.'s testimony about the incident in her parents' bedroom:

And he ended up pushing her down onto the bed. . . . And what did he say, I asked her. It's fine, it's fine.

What were you thinking? Well, I didn't understand. I was confused. I thought - - I guess it was okay.

That's scripted? I don't think so.

Nolen argues that the prosecutor improperly vouched for her witness when she asked and answered her own question with " 'That's scripted? I don't think so.' " In Warren, our Supreme Court found that a prosecutor's comment that a witness's statements had a " 'ring of truth' " was not improper. 165 Wn.2d at 30. It found that it was not an explicit statement of personal opinion, and stated that

prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility. Id. Likewise here, the prosecutor's comment was an argued inference about A.N.'s testimony, not a clear and unmistakable expression of a personal opinion.

Even if we had instead concluded the prosecutor's comment was improper, Nolen did not object below. The prosecutor's comment was not so flagrant and ill intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by a curative jury instruction. The comment does not constitute a basis for reversal.<sup>2</sup>

### III. Cumulative Error

Next, Nolen argues that he is entitled to a new trial because during his trial "several critical errors occurred which unfairly prejudiced the jury against him and their cumulative impact affected the outcome of the case."

The cumulative error doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

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<sup>2</sup> Nolen also identifies another potential error, stating that the "prosecution's use of extraneous allegations of poor parenting further tipped the scales against [Nolen] and his hope for a fair trial." But, he does not provide any citation to the record, nor to any authority that the evidence was erroneously admitted. Therefore we do not review his claim. See State v. C.B., 195 Wn. App. 528, 535, 380 P.3d 626 (2016) (we will not review issues inadequately argued or mentioned only in passing).

Nolen contends that the errors at trial were the admission of two types of prejudicial evidence and an improper comment during the State's closing. We found above that these were not errors, so the cumulative error doctrine does not apply.

IV. Community Custody Conditions

Finally, Nolen argues that the trial court exceeded its authority by imposing community custody conditions that were not reasonably related to his offenses, overbroad, and vague.

The trial court lacks authority to impose a community custody condition unless authorized by the legislature. State v. Warnock, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). RCW 9.94A.505(9) provides, "As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." Community custody conditions are within the court's discretion and will be reversed only if manifestly unreasonable. State v. Valencia, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010).

Nolen first challenges condition 7, which states, "Do not access the Internet on any computer in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider. Any computer to which you have access is subject to search." We accept the State's concession that there is no evidence that using a computer or accessing the internet was related to Nolen's offenses. We remand to the trial court to strike condition 7 based on the lack of the requisite nexus between the crime and the

prohibited activity. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (holding that a prohibition on internet access without preapproval must be crime related).

Nolen next challenges condition 13, requiring him to “[p]articipate in urinalysis, [breath], and polygraph examinations as directed by the supervising Community Corrections Officer, to monitor compliance with conditions of community custody.” The State concedes that there was no evidence that alcohol contributed to the circumstances of the offense, and that the part of condition 13 requiring Nolen to participate in breath tests should be stricken.

But, the State argues that requiring Nolen to undergo urinalysis tests is not unlawful. Citing Warnock, Nolen argues that, absent the finding that chemical dependency contributed to his offense, the court lacked authority to order him to submit to tests monitoring substance abuse.

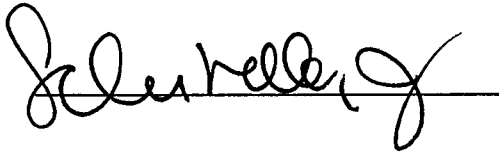
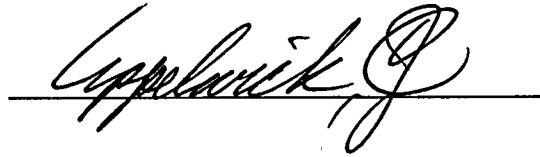
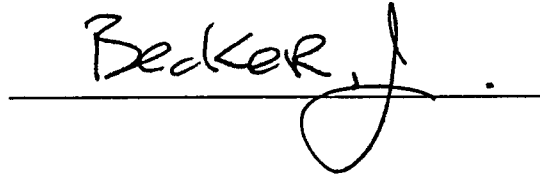
As conditions of his community custody, Nolen was ordered to “not consume controlled substances except pursuant to lawfully issued prescriptions” and to “not unlawfully possess controlled substances while on community custody.” This condition was properly issued under RCW 9.94A.703(2)(c), which states that as a condition of community placement the offender shall “refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” This condition is required unless the trial court waives it, regardless of the offense committed. RCW 9.94A.703(2). Stemming from this statutory authority, it follows that the trial court has the ability to enforce these conditions.



State v. Vant, 145 Wn. App. 592, 604, 186 P.3d 1149 (2008). As such, the trial court's imposition of random urinalysis tests to ensure compliance with its conditions does not constitute an abuse of discretion. Only the breath examinations must be stricken from condition 13.

We affirm in part and reverse in part, and remand.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Schubert", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Luppel", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Becker", written over a horizontal line.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

THE STATE OF WASHINGTON,	)	
	)	No. 75677-0-1
Respondent,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
CHRISTOPHER T. NOLEN,	)	
	)	
Appellant.	)	
_____	)	

The appellant, Christopher Nolen, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

  
Judge

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75677-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Mary Kathleen Webber  
[kwebber@co.snohomish.wa.us]  
Snohomish County Prosecuting Attorney

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: June 15, 2018

# WASHINGTON APPELLATE PROJECT

June 15, 2018 - 4:46 PM

## Transmittal Information

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**Appellate Court Case Number:** 75677-0  
**Appellate Court Case Title:** State of Washington, Resp v. Christopher Tory Nolen, App  
**Superior Court Case Number:** 15-1-01477-8

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