SUPREME COURT NO. 96299-5

NO. 76368-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN GRIFFITH,

Petitioner.

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

The Honorable Janet Helson, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHIGNTON CASES

RULES, STATUES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Kevin Griffith, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Griffith seeks review of the Court of Appeals decision in State v. Kevin Griffith, No. 76368-7-I, (Slip Op. filed July 23, 2018). A copy of the decision is attached as an appendix.

C. REASON TO ACCEPT REVIEW

Review is warranted because the decision raises a significant question about what constitutes an "implicit" improper commented on the evidence under Wash. Const. art. 4, § 16. RAP 13.4(3).

D. ISSUE PRESENTED FOR REVIEW

Did the trial court violate art. 4, § 16 when it (a) repeated stricken testimony to the jury thereby highlighting both the admitted and stricken evidence, and (b) admitted hearsay not for the truth of the statement, but then informed the jury it showed the statement was actually made?

E. STATEMENT OF THE CASE

The King County Prosecutor charged Griffith with first degree child molestation, allegedly committed against his five-year old daughter, D.G. (d.o.b. 3/22/08). The prosecution alleged that between February 11, 2014 and February 16, 2014, Griffith had sexual contact with his daughter

for purposes of sexual gratification. CP 1, 63. A jury trial was held before the Honorable Janet Helson, Judge. RP[1] 1-1562.

D.G. is the daughter of Griffith and Amanda Ricks. RP 889-90. According to Ricks, D.G. was diagnosed with ADHD at age two and Fetal Alcohol Syndrome (FAS) when she was seven. RP 889. Ricks acknowledged D.G. has behavioral issues involving defiance. RP 899. Ricks agreed D.G. throws tantrum by yelling and screaming, and may kick, bite or spit. RP 900. Ricks explained she disciplines D.G. by making her sit in a corner, but occasionally resorts to spanking. RP 900. Ricks explained D.G. must wear a diaper due to incontinence. RP 902.

According to Ricks, D.G. loves everyone in her family and looks forward to visits. RP 969. Ricks agreed D.G. loves babies, loves playing with them and loves "playing being mom," and has wanted to be a mother since she was three years old. RP 969-70.

After D.G.'s birth, Ricks and Griffith followed a court-ordered parenting plan that gave custody to Ricks and allowed supervised visits with Griffith, but no overnight visits. RP 891-92. In November 2013, Ricks and D.G. moved from King County to Ocean Shores to live with

[1] There are 17 consecutively paginated volumes of verbatim report of proceeding referenced herein as "RP."

Ricks' best friend, Amanda Warren.[2] RP 892-93, 895. Ricks filed a motion to modify the parenting plan to allow visit supervision by Griffith's wife, Teri Griffith and/or his mother, Candace Griffith.[3] RP 893-94. Although the motion was never granted, Ricks allowed Griffith to visit D.G. with Teri or Candace supervising, and also allowed overnight visits at Griffith's home provided Teri was there to supervise. RP 894-95.

Ricks recalled that between November 2013 and February 2014, D.G. would go to Griffith's for weekend overnight visits about twice a month and looked forward to going. RP 898. The last visit between D.G. and her father occurred February 7-18, 2014, longer than usual, in part, according to Ricks, because D.G. was ill at the time and her school was on a reduced schedule. RP 910, 968.

According to Ricks, on Saturday, February 22, 2014, four days after D.G. returned from the extended visit with her father, the same day Ricks started a job at the Ocean Shores Ramada Inn, Warren called her at work and advised her she needed to have a conversation with D.G. RP 905. When Ricks got home from work that afternoon she was greeted by

[2] Amanda Warren was, by the time of trial, "Amanda Swaner," having married Dale Swaner a couple of months before. RP 895-96. For clarity, she will be referred to herein as "Warren." No disrespect is intended.

[3] Griffith's wife and mother will be referred to herein as "Teri" and "Candace," respectively for clarity. No disrespect is intended.

Warren, who explained why she thought Ricks needed to speak with D.G. RP 906-07.[4]

According to Ricks, after hearing Warren's explanation, which she understood to be that D.G. had a dream about having babies with her "daddy," she waited about 20 minutes before ordering D.G. to join her in Warren and Swaner's bedroom, to which D.G. asked if she was in trouble. RP 907-08, 971, 973. Ricks recalled responding, "no, I just want to talk to [you]." RP 908. After D.G. came in the room, Ricks recalled closing the door, kneeling to D.G.'s level and asking, "[D.G.], does your daddy touch you?" When D.G. responded, "Yes," Ricks asked her, "Where does Daddy touch you?" D.G. replied, "My hoo hoo and my butt."[5] Ricks acknowledged D.G. applied the moniker "Daddy" to several men, but always included their first names, as in "Daddy Dave" or "Daddy Robert," except with Griffith, who Ricks claimed D.G. only called "Daddy." RP 909-10. When she was done obtaining responses to her questions, Ricks told D. G. she was "very proud of her." RP 909. Ricks claimed she did reveal her emotions when D.G. responded to her questions, instead

[4] Warren never testified at trial what it was D.G. said that prompted Warren to insist that Ricks speak with D.G. Pretrial, however, Warren testified that on February 22, 2014, while she was out of the home, D.G. told Swaner she wanted to have babies with her "daddy," who then informed both Ricks and Warren about the comment when they returned home. RP 116-17. Swaner did not testified in any proceedings.

claiming she had an emotional breakdown only later. RP 911-12. After the children went to bed Ricks called local police, then Federal Way police because that was where the alleged acts occurred. RP 912-13.

After speaking with the Federal Way police, Ricks took D.G. to an Aberdeen hospital so a "rape kit" exam could be conducted. RP 914. That hospital, however, is not authorized to use rape kits on children under 12. RP 915. The next day Ricks took D.G. to an Olympia hospital for an exam, which revealed no physical trauma. RP 916-17, 1272.

On February 27, 2014, D.G. was interviewed by child interview specialist Thomas Taylor. RP 987, 1021. The interview lasted about a half hour and was recorded, and a redacted version played for the jury, who were provide with a transcript to follow along. RP 1023-26; Ex. 2; Ex. 3.[6] D.G. told Taylor that Griffith had touched her in the groin area under her clothes when she was in bed in her little half-brother's room, that it hurt, felt "wiggly," and occurred more than once. Ex. 3 at 9-13, 17.

Taylor agreed that the younger the child the more susceptible they are to memory contamination. RP 1035. Taylor acknowledged that such contamination can be the result of asking leading questions. RP 1035. He

---

[5] Ricks had explained in earlier testimony that she taught D.G. to refer to her vagina as her "hoo hoo" when she was about 18 months old. RP 902.

[6] Exhibit 2 is the DVD, and Exhibit 3 is the transcript. Citations in this petition are by page number in Exhibit 3.

also agreed it is bad practice to praise a child for responding to a question, and it is particularly bad to praise them for giving a specific response. RP 1037-38. He also noted that prior interviews that involved coaching or questions suggesting the answer expected can taint the results of subsequent interviews because it is difficult to know whether response was what the child remembered, or instead the result of pressure to give an expect answer despite being false. RP 1038-40.

Taylor testified he was unaware of D.G.'s developmental and cognitive delays prior to the interview, although he noticed on his own that she seemed delayed. RP 1045-46. Taylor agreed that had he known in advance, he could have better structured his questions. RP 1051.

Following the Taylor interview, D.G. was subjected to another sexual assault examination and interview on March 4, 2014, by Sexual Assault Nurse Examiner Lisa Wahl. RP 1256. As before, the physical examination of D.G. produced no significant findings. RP 1266.

Wahl's interview of D.G. was recorded and played for the jury, who were provided a transcript to follow along. RP 1257, 1259; Ex. 9; Ex. 10.[7] Ricks informed Wahl D.G. had the cognitive age of a three-and-a-half-year-old, but it is unclear if that was before the interview. RP 1268.

[7] Exhibit 9 is the audio recording, and Exhibit 10 is the transcript. Citations in this petition are by page number in Exhibit 10.

During the interview, Wahl led D.G. into discussing her father by asking about her baby brother and whether they had the same father, which D.G. confirmed. Ex. 10 at 9-10. D.G. agreed she got to see her dad and noted that "I like to hug him[,]" before offering that "what he did to me was wrong and now he is in jail." Ex. 10 at 10. When Wahl asked why, D.G. replied, "He pushed on my hoohoo." Id. When asked what her "hoohoo" was for, D.G. replied, "I use it for pants[,]" and when asked, initially denied anything comes out of her hoohoo, but then agreed that "poop come[s] out of it." Ex. 10 at 10-11. When Wahl pressed D.G., she said his touch was on skin, and that it felt "dirty." Ex. 10 at 12. She denied being asked to do anything to him. Ex. 10 at 13.

Following a series of questions and answers that led D.G. to claim her father told her not to tell anyone, D.G. replied she had gotten in trouble by telling, to which Wahl assured her:

> Well I want you to know that your [sic] talking to us is not getting you in trouble at all. You're not in trouble at all. If your dad did something that wasn't okay it's not your fault. You're doing the right thing by taking care of your body. And let the grownups take care of grownups when they're treating kids right okay.

Ex. 10 at 15.

Towards the end of the interview, the following exchange occurred:

[Wahl]: So you told me about your dad pushing on your hoohoo has anybody else ever done that to you.

[D.G.]: No.

[Wahl]: Good I'm glad. And do you know you did the right thing by telling[?]

[D.G.]: Hey, I [sic] writing, too.

[Wahl]: You did the right thing. Do you know that?

[D.G.]: And…

[Wahl]: You did the right thing you're a smart girl. . . .

Ex. 10 at 24-25.

Griffith was arrested without incident the same day D.G. was interviewed by Wahl. RP 1170-71. Griffith waived his rights and agreed to a recorded interview. Ex. 6; Ex.7. [8] During that interview Griffith suggested Ricks may have orchestrated the allegations to prevent him from seeing D.G., noting she had done a similar thing in the past. Ex. 7 at 3, 7. Griffith also explained that a court-ordered parenting plan required his visits with D.G. to be supervised by a professional visitation service, but admitted that since moving to Ocean Shores, Ricks allows Griffith's mother Candace to supervise them. Ex. 7 at 5, 7.

[8] Exhibit 6 is the audio recording, and Exhibit 7 is the transcript. Citations in this brief are by page number in Exhibit 10.

When confronted directly, Griffith denied every molesting D.G., and offered that if someone did, he hoped "that fucker dies." Ex. 7 at 10-13. Griffith also denied every touching D.G.'s private parts, noting he never bathes or changes her diaper, which is always done instead by Ricks, Candace or his wife, Teri. Ex. 7 at 12. Griffith also denied D.G. would spend the night at his home, claiming instead she always stayed the night at Candace's, in Candace's room. Ex. 7 at 14.

Shortly after interviewing Griffith, the detective contacted Griffith's wife, Teri, who agreed to an interview. RP 1286. Teri testified at trial that when D.G. would visit she would spend the night at their home in their son's room, and she would supervise. RP 1285.

D.G. testified at trial and was eight years old at the time. RP 1081, 1084. D.G. no longer lived with Warren, who had lost custody for exposing D.G. to a violent boyfriend who struck and bruised on D.G. on her face, back and buttocks. RP 962-63. D.G. had not seen either of her parents in over a year when she testified. RP 963.

D.G. was a difficult witness to keep focused, and many of her responses did not address the questions asked.[9] The prosecutor started by

[9] See e.g., RP 1088-89 (D.G. interrupts to tell the prosecutor to stand closer and then gets distracted by the microphone); RP 1091 (D.G. wants to know who someone is in the courtroom); RP 1095-96 (D.G. advises defense counsel he should wear a different tie and no glasses); RP 1100 (D.G. gets upset when there is whispering); RP 1101 (D.G.

stating he was going to ask her "some questions," and D.G. promptly interrupted, stating, "Hold on. One thing. I got hurt before and I was spanked by my dad." RP 1084. When later asked if she got to see her father when she lived in Ocean Shores, D.G. replied, "No, because he already is in jail." RP 1086. When asked to identify her father in the courtroom, D.G. replied, "He looks like one of the people. . . . I think I do. But in my mind, in my own vision, I think I see right standing in front of me." RP 1092-93. When asked if her father had ever touched her "hoo hoo," she replied, "I'm going to think about that. Yes." RP 1093. She then explained it was when he tucked her into bed and "started digging around in [her] pants and did touch it." RP 1094.

The only defense witness was Dr. Hugues Herve, a clinical psychologist specializing in forensic psychology, with sub-specialties in risk assessment, personal injury assessment, and critiquing interview practices employed in child interviews. RP 1340-41, 1345, 1374. Dr. Herve's research concentrates on "interviewing, credibility assessment, and memory[,]" and he is published in various peer review journals and books and has presented at international conferences. RP 1343.

---

interrupt to ask the court about the microphone, the recording system, and why the court calls one of the defense attorneys "Mr. Peaquin").

According to Dr. Herve, the younger the child, the less developed is their ability to form accurate memories, at least in part because they do not have a sufficient knowledge base to comprehend what is happening so that they can later accurately reconstruct the event from memory. RP 1347, 1349. Dr. Herve also noted that memories change over time, and with each retelling of the memory. RP 1350.

Dr. Herve explained that memory can be contaminated by how a person is questioned, particularly with young children, who tend to be more prone to suggestibility, i.e., "they're more likely to believe pieces of information provided by others as actually having happened in their event." RP 1351-52, 1383-84, 1402. Children with special needs are particularly prone to suggestibility. RP 1364.

Dr. Herve explained that leading or suggestive questions are particularly problematic with getting young children to accurately recall an event because they are conditioned to respond in agreement with suggestions from adults, particularly if the questioning is by an authority figure, like a parent. RP 1364. This problem can be exacerbated by cognitive deficits. RP 1367. And once a child has incorporated a false memory, those 'memories' become real for the child, and can be "very difficult" for to separate from the truth. RP 1353, 1370.

Memories are also subject to decay, particularly in young children, whose memories begin to decay within days. RP 1359. And the more benign the event, the faster it decays. RP 1360.

Dr. Herve noted that a poorly conducted first interview can "create distortions in the child's recall and it contaminates the child's recall." RP 1384. And that contamination can carry forward to any subsequent interviews. Id. And "selective reinforcement" of a child's response to questions, such as "Thank you for that," or "Well done," can reinforce erroneous memories and contaminate others. RP 1404.

Dr. Herve's reviewed the interviews of D.G. conducted by Taylor and Wahl. RP 1417-19. He considered both interviews poorly done because leading questions were used to introduce the topic of concern, and failed to properly follow up the responses provided, particularly the interview conducted by Wahl. Id.

In closing, the prosecutor conceded the lack of "forensic or medical evidence" and that the verdict would turn on credibility. RP 1486. The prosecutor highlighted testimony by the Federal Way officer who took Ricks' call, arguing that what that officer wrote down was consistent with Ricks' testimony and medical reports. RP 1495-96.

Defense counsel argued that D.G.'s statement she wanted to have babies with her "Daddy" was not particularly unusual given D.G. had

always loved babies and had wanted to be a mother since she was three years old. RP 1502-03, 1511. Counsel offered that D.G.'s statement was misinterpreted by the adults and then Ricks questioned D.G. in a manner that led her to give responses seemingly confirming the suspicions of the adults, but instead served only to create a false memory that was reinforced through the course of at least two recorded interviews, and possibly several other unrecorded interviews. RP 1511-24, 1529. As for Griffith's lie claiming D.G. never spends the night at his home, defense counsel reminded jurors that although Ricks had authorized such overnight visits, they still violated the court-ordered parenting plan, and therefore it was understandable Griffith would try to avoid losing visitation altogether by not admitting to violation of the court order. RP 1527-28.

Griffith was found guilty, sentenced to life without the possibility of parole and appealed. CP 99-100, 177-99; RP 1608.

On appeal, Griffith claimed his judgment and sentence should be reversed because the trial judge improperly commented on the evidence and that his jury was never properly instructed on how to deliberate to reach a constitutionally valid unanimous verdict. In a pro se Statement of Additional for Review, Griffith claimed reversal was warranted because of prosecutorial misconduct, ineffective assistance of counsel and the trial

court's refusal to admit evidence Ricks had been reported to Child Protective Services by D.G.'s school principal. The Court of Appeals rejected all of Griffith's claims in an unpublished decision. Appendix.

F. ARGUMENTS

1. UNCONSTITUTIONAL JUDICIAL COMMENTS ON THE EVIDENCE WARRANT REVERSAL.

Twice the court made improper judicial comments to Griffith's jury. The first occurred during examination of Ricks,[10] and the second occurred during examination of the Federal Way police officer Ricks spoke to February 22, 2014, reporting what D.G. told her.[11] These improper comments deprived Griffith of a fair trial.

---

[10] Yesterday, I sustained an objection during testimony from Ms. Ricks about her discussions with [D.G.] in the bedroom. Ms. Ricks said that [D.G.] had looked at her "like she knew I knew something." The only portion of Ms. Ricks' testimony was stricken and that you must disregard is that part of [D.G.] looking at her as if she knew something. The rest of Ms. Rick's testimony before that statement is admitted.

RP 958-59.

[11] In the context of describing what Ricks told him, the following colloquy occurred before the jury:

Q [prosecutor]: Okay. So what was the first question that Ms. Ricks asked [D.G.]?

A [Travis]: First question appeared to be "Does Daddy touch you?"

Q: How did [D.G.] respond?

MR. PEAQUIN [defense counsel]: Your Honor, objection, hearsay.

The Court of Appeals decision rejected Griffith's claim on the basis that the court's comments had not "implicitly conveyed an opinion concerning the worth or credibility of the testimony at issue." Appendix at 8. This decision reflects an overly myopic view of what may be "implicitly conveyed," thereby narrowing the scope of the constitutional protections afforded by Wash. Const. article 4, § 16. This Court should

---

> COURT: I'm going to overrule it and allow it to be offered not for the truth of the matter asserted. So the jury is to consider this particular testimony in terms of the questions and answers that were given by Ms. Ricks, but to consider it as evidence as to what happened.
>
> You may proceed.
>
> Q: I just asked you what the question was and then you responded. I'm asking you what the answer was to the first questions.
>
> A: [D.G.] replied, "Yes."
>
> Q: And what was the second question that Ms. Ricks asked?
>
> A: Ms. Ricks asked, "Where?"
>
> Q: And how did [D.G.] respond?
>
> MR. PEAQUIN: Your Honor, the same objection to the response, and if just a continuing objection can be noted.
>
> COURT: Alright. And the same ruling. And the same direction to the jury, that it's for the fact that it was said, not for the truth of the matter.
> So you may proceed.
>
> WITNESS: [D.G.] responded by saying something similar to "On my hoo haw and butt."

RP 1158-59 (emphasis added).

grant review to determine if such narrowing is warranted. RAP 13.4(b)(3).

(a) The Relevant Law

Article 4, § 16 of Washington's constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The purpose of this prohibition "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

(b) The Trial Court's Comments Implied the Court Believed the Prosecution's Evidence.

The defense theory was that D.G.'s statement about having babies with her "daddy" was misinterpreted as indicating sexual misconduct by Griffith. RP 1503. Counsel noted D.G. was infatuated with babies, and that left unknown by the prosecution's case was the context in which the statement was made, so what she meant was at best unclear. RP 1511.

The defense argued Ricks acted on this misinterpretation by questioning her daughter in a manner that led to false molestation claims, which were subsequently reinforced through improper questioning by Taylor, Wahl and possibly others. RP 1512-18, 1520-24.

The first improper judicial comment, where the trial court insisted on readvising the jury about which portion of Ricks' testimony it had previously stricken, unfairly emphasized Ricks' unstricken claim that D.G. said her "Daddy" touches her on her "hoo hoo" and butt, and that it hurt, which evidence the prosecution insisted was "an important part of trial." RP 922, 958-59. Although the court did not reiterate what Ricks claimed D.G. said to her, the court did reassure the jury that that portion of her testimony was admitted. RP 959. Emphasizing this "important part" of the prosecution's case implied the trial court also thought this portion of Ricks testimony was important and should be looked at extra carefully by the jury.

This improper judicial comment on the evidence also expressly emphasized the evidence the court had stricken. See RP 908 (court instructs "jury to disregard that statement about what [D.G.] knew") and RP 958-59 (court reinstructs it "must disregard . . . the part about [D.G.] looking at [Ricks] as if she knew something"). As the defense had argued, reinstruction was unnecessary because the original ruling specifically struck that portion of

Ricks' testimony, and it therefore served only to "ring the bell" once again on the offending speculative testimony.

Likewise, the court's second improper judicial comment again unfairly emphasized Ricks' claims about D.G.'s responses to her questions. In sustaining the defense hearsay objections, the trial court told the jury not to consider Ricks statements testified to by Officer Travis' as true, but instead, only "for the fact that it was said." RP 1159. Once again, the court's ruling implies the trial court believed Ricks' claim about how D.G. responded to her questioning, which was a contested issue at trial because it was those alleged responses that led to the entire investigation and prosecution. If the jury had determined they were not true or not said, then the prosecution was doomed because those comments were the genesis of the case.

The Court of Appeals, unfortunately, concluded there were no improper judicial comments. The Court reached this conclusion by failing to appreciate the context in which the trial court's comments were made and how that context can lend to implied meaning of statements. Although the Court claimed it was considering the statements in "context," the decision reveals otherwise. Appendix at 6. Instead, the Court of Appeals viewed them purely in their literal sense. This was error because it violates prior case law establishing that the court's opinion need not be express to violate the prohibition; it can simply be implied. Levy, 156 Wn.2d at 721. This

Court should grant review to decide whether such a narrowing of the rights under Wash. Const. art. 4, § 16 is warranted. RAP 13.4(3).

2. THIS COURT SHOULD ACCEPT REVIEW OF GRIFFITH'S CHALLENGES IN HIS PRO SE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

In his Statement of Additional Grounds for Review, Griffith made three arguments: (1) prosecutorial misconduct in closing argument warrants reversal; (2) he was denied his right to effective assistance of trial counsel because counsel failed to object to the prosecutor's misconduct and because counsel failed to present certain evidence; and (3) the trial court erred by excluding evidence that D.G.'s school principal reported Ricks to Child Protective Services. Statement of Additional Grounds for Review. The Court of Appeals rejected Griffith's arguments. Appendix at 13-16. Griffith respectfully also requests review of these issues.

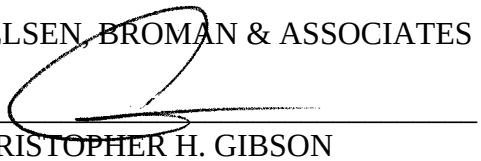
G. CONCLUSION

For the reasons stated herein, this Court should accept review.

DATED this 21st day of August 2018

Respectfully submitted,

NIELSEN, BROMAN & ASSOCIATES



CHRISTOPHER H. GIBSON
WSBA No. 25097
Office ID No. 91051

Attorneys for Petitioner

APPENDIX

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

STATE OF WASHINGTON, Respondent, v. KEVIN SCOTT GRIFFITH, Appellant.	)	No. 76368-7-I UNPUBLISHED OPINION FILED: July 23, 2018

VERELLEN, J. — Kevin Griffith appeals his jury conviction for child molestation in the first degree, domestic violence. Griffith argues that the trial court impermissibly commented on the evidence and committed structural error by failing to instruct the jury that it must deliberate only while together. In his statement of additional grounds, Griffith also argues that the prosecutor committed misconduct, that his trial counsel was ineffective, and that the trial court abused its discretion in denying the admission of hearsay evidence. Finding no error, we affirm.

FACTS

The State charged Griffith by amended information with child molestation in the first degree, domestic violence, alleging that he molested his then five-year-old daughter, D.G. D.G. is the daughter of Griffith and Amanda Ricks.

At trial, the State presented testimony from several witnesses. According to Ricks's testimony, she suspected Griffith molested D.G. during an overnight visit after her friend and roommate, Amanda Swaner, told Ricks that D.G. had a dream about having babies with her "daddy."[1] Ricks questioned D.G., who responded that her "daddy" touched her "hoo hoo" and "butt."[2] Ricks notified police of the abuse the same day.

D.G also testified. She explained that Griffith tucked her into bed and "started digging into [her] pants" and touched her "hoo hoo."[3] Other witnesses included Thomas Taylor and Lisa Wahl. Taylor, a child interview specialist, interviewed D.G. five days after Ricks reported the abuse. The court admitted and the State played a video recording of Taylor's interview with D.G. and her descriptions of the abuse, which were consistent with D.G. and Ricks's testimony. Wahl, an advanced registered nurse practitioner in the Providence St. Peter Hospital sexual assault and child maltreatment center, also testified. The jury listened to an audio recording of her interview with D.G. about a week after Taylor's interview. In the interview, D.G. again states that Griffith touched her "hoo hoo" with his hand.

Griffith's only defense witness was Dr. Hugues Herve, a child psychologist who specializes in issues of interviewing, credibility assessment, and memory. He

---

[1] Report of Proceedings (RP) (Oct. 26, 2016) at 973.

[2] RP (Oct. 25, 2016) at 908.

[3] RP (Oct. 27, 2016) at 1093.

testified that the interviews performed by Taylor and Wahl included leading and suggestive questions with specific reinforcement of answers. The defense's theory of the case was that D.G. was susceptible to manipulation because she suffered from developmental delays and that Ricks questioned her in a way that led her to adopt false molestation claims as true. Defense counsel argued that D.G.'s false claims were then reinforced with additional leading questions from Taylor and Wahl, contaminating D.G.'s memory.

The jury convicted Griffith as charged. Because Griffith had a prior conviction for first degree child rape, the trial court sentenced him to life without parole as a persistent offender.

Griffith appeals.

ANALYSIS

Comment on the Evidence

Article IV, section 16 of the Washington State Constitution states that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "This provision prohibits a judge from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'"[4]

[4] State v. Besabe, 166 Wn. App. 872, 880, 271 P.3d 387 (2012) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

The purpose of this provision "is to prevent the jury from being influenced by . . . the court's opinion of the submitted evidence."[5]

A jury instruction may constitute an improper comment on the evidence.[6] An instruction improperly comments on the evidence when it "relieve[s] the prosecution of its burden" of proof or "resolve[s] a contested factual issue" for the jury.[7] A jury instruction does not comment on the evidence when it "'does no more than accurately state the law pertaining to an issue'"[8] Further, an instruction does not comment on the evidence if the court expresses no opinion on the parties' character or credibility or the strength of their case but merely articulates the basis for evidentiary rulings or appropriately instructs the jury on the use of evidence admitted for limited purposes.[9] "We review a challenged jury instruction de novo, within the context of the jury instructions as a whole.[10]

First, Griffith argues that the trial court improperly commented on the evidence during Ricks's testimony as she described her initial conversation with D.G. Ricks testified that

---

[5] State v. Miller, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014).

[6] Id.

[7] State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

[8] Id. (quoting State v. Woods, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001), overruled on other grounds by State v. Schierman, ___ Wn.2d ___, 415 P.3d 106 (2018)).

[9] Wuth v. Lab. Corp. of Am., 189 Wn. App. 660, 700, 359 P.3d 841 (2015).

[10] Id. at 698 (quoting Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 635, 244 P.3d 924 (2010)).

> [D.G.] asked me if she was in trouble. I told her no, I just wanted to talk to her. And so I closed the door with her coming in in front of me. I get on my knees. The door is shut. I get on my knees in front of her to get at her level and ask her if her dad, if -- I said, "[D.G.], does your daddy touch you?" And she looked at me and she goes, "Yes." I said, "Where does Daddy touch you?" and she said, "My hoo hoo and my butt." I said, "Does it hurt when Daddy touches you?" She looked at me like she knew I knew something. I don't know.[11]

Defense counsel objected as to speculation and asked that "the answer" be stricken. The trial court responded, "I'll sustain, strike that, and ask the jury to disregard that statement about what [D.G.] knew."[12]

At the end of the day, the prosecutor argued that the limiting instruction was confusing as to which part of Ricks's testimony was stricken, and he asked the court to either instruct the jury again or allow him to ask the questions again. Defense counsel objected to this request, arguing that both options would ring the bell and reinforce the testimony in the jurors' minds. The trial court agreed to review the record and consider whether clarification was appropriate.

The following morning, the trial court reviewed the verbatim testimony with both parties. The court explained that "while I think what I asked them to disregard was pretty surgical, I do think there's some room for the answer, for the record to not be clear and for the jurors to not be clear when I said, 'I will sustain and strike that' really simply because the answer had gone for a long time."[13] After hearing

---

[11] RP (Oct. 25, 2016) at 908.

[12] Id.

[13] RP (Oct. 26, 2016) at 933.

argument from both sides and noting defense counsel's objection to any further instruction to the jury, the trial court eventually instructed the jury,

> Yesterday I sustained an objection during testimony from Ms. Ricks about her discussion with [D.G.] in the bedroom. Ms. Ricks said that [D.G.] had looked at her "like she knew I knew something." The only portion of Ms. Ricks's testimony was stricken and that you must disregard is the part about [D.G.] looking at her as if she knew something. *The rest of Ms. Ricks's testimony before that statement is admitted.*[14]

When considered in context, the trial court's instructions did not implicitly opine as to any matter to be determined by the jury. The trial court's instruction that "[t]he rest of Ms. Ricks's testimony before that statement is admitted" did not imply that the rest of Ricks's testimony was true. The statement merely articulated the basis for the evidentiary ruling and appropriately instructed the jury that all but that portion of Ricks's testimony was admissible.

Next, Griffith argues that the trial court improperly commented on the evidence during the testimony of Federal Way Officer Travis Loyd, who took Ricks's police report. When cross-examining Ricks, defense counsel asked whether she lied about the questions she initially asked D.G. to make them appear less leading. As a result, the prosecutor called Officer Loyd, who testified that the first question Ricks reported asking D.G. was "Does Daddy touch you?"[15] Defense counsel objected to the statement as hearsay, and the trial court overruled the objection, stating

---

[14] Id. at 958-59 (emphasis added).

[15] RP (Oct. 27, 2016) at 1158.

> I'm going to overrule it and allow it to be offered not for the truth of the matter asserted. So the jury is to consider this particular testimony in terms of the questions and answers that were given by Ms. Ricks, but not to consider it as evidence as to what happened.[16]

Officer Loyd then testified that Ricks reported her next question to D.G. was "Where?"[17] This prompted defense counsel to note a continuing objection, and the trial court replied, "Alright. And the same ruling. And the same direction to the jury, that it's for the fact that it was said, not for the truth of the matter."[18]

Griffith contends the trial court's instructions implied that it found Ricks's testimony about the questions she initially asked D.G. credible. But the court's instruction that Officer Loyd's testimony was admitted "for the fact that it was said, not for the truth of the matter" did not imply that the court believed Ricks made those statements. As with any instruction that evidence has been admitted for a limited purpose, it was still up to the jury to determine whether the evidence admitted for that limited purpose was credible. Therefore, there was no error.

Griffith argues that the trial court's comments are similar to comments held improper in several other cases including State v. Lampshire,[19] State v. James,[20] State v. Bogner,[21] and State v. Vaughn.[22] But in each of those cases, the trial

---

[16] Id. at 1158-59.

[17] Id. at 1159.

[18] Id.

[19] 74 Wn.2d 888, 447 P.2d 727 (1968).

[20] 63 Wn.2d 71, 385 P.2d 558 (1963).

[21] 62 Wn.2d 247, 382 P.2d 254 (1963).

court's comments implicitly conveyed an opinion concerning the worth or credibility of the testimony at issue.[23] Here, the trial court's instructions have no such effect. As such, those cases are not persuasive.

Jury Instructions

For the first time on appeal, Griffith argues that the trial court committed reversible structural error when it failed to instruct the jury that it could deliberate only when all 12 jurors were present. Because this claimed error is not structural or manifest under RAP 2.5(a), we decline to consider it.

Article I, section 21 of the Washington State Constitution guarantees criminal defendants the right to a unanimous jury verdict.[24] An essential part of that right is that the jury deliberations leading to a unanimous verdict be "'the

---

[22] 167 Wash. 420, 9 P.2d 355 (1932).

[23] Lampshire, 74 Wn.2d at 891 (In front of the jury, the trial court said "Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and I don't see the materiality, counsel."); James, 63 Wn.2d at 74 (trial court's comment that codefendant would be discharged after testifying as the State's witness "providing that he testify fully as to all material matters within his knowledge" implied codefendant testified truthfully because he never returned to the courtroom); Bogner, 62 Wn.2d at 249-50 (trial court's statement "Don't you think we are getting a little ridiculous, or aren't we?" implied the judge believed that it was undisputable that a robbery had taken place); Vaughn, 167 Wash. at 424 (trial court's comment that "I dare say [the witness] wouldn't answer anything that he shouldn't" was a comment on the weight of the testimony and the credibility of the witness).

[24] State v. Woodlyn, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017).

common experience of all [jurors].'"[25] We review de novo whether Griffith was denied his constitutional right to a unanimous jury.[26]

Under RAP 2.5(a)(3), an appellant may raise, for the first time on appeal, a manifest error affecting a constitutional right. In order to do so, he "must identify the constitutional error and show that it actually affected his or her rights at trial."[27] This requires the appellant to "make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial."[28] "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."[29]

In State v. Lamar, the trial court gave the pattern unanimity jury instruction, WPIC 1.04, on the first day of jury deliberations.[30] On the second day of deliberations, a juror fell ill, and the trial court substituted an alternate juror.[31] Rather than instructing the jury to start deliberations anew, the trial court instructed the remaining jurors to spend some time "reviewing" and "recapping" the past deliberations to bring the alternate juror "up to speed" and then to resume

---

[25] State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting People v. Collins, 17 Cal. 3d 687, 693, 552 P.2d 742 (1976)).

[26] State v. Armstrong, 188 Wn.2d 333, 339, 394 P.3d 373 (2017).

[27] Lamar, 180 Wn.2d at 583.

[28] Id.

[29] State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

[30] 180 Wn.2d 576, 580, 327 P.3d 46 (2014).

[31] Id.

deliberations.[32] The Washington Supreme Court held that WPIC 1.04 was constitutional,[33] but the court's later instruction was manifest constitutional error because the instruction "affirmatively told the reconstituted jury not to deliberate together as is constitutionally required."[34] The court then determined the error was prejudicial because the jury is presumed to follow the trial court's instructions absent evidence to the contrary.[35]

Here, in its opening instructions to the jury, the trial court instructed:

> The presiding juror will preside over your discussions of the case, which are called deliberations. You will deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else or remain with the hearing of anyone discussing it.[36]

Before the parties' closing arguments, the trial court gave WPIC 1.04:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.[37]

---

[32] Id. at 580-81.

[33] Id. at 585.

[34] Id. at 582 (emphasis omitted).

[35] Id. at 586.

[36] RP (Oct. 25, 2016) at 863.

[37] CP at 82.

The court also instructed the jury on how to initiate and carry out the deliberative process and that each juror had a right to be heard.

Griffith argues that these instructions were insufficient to guarantee unanimity. He contends that the trial court should have informed the jury that any deliberation must always involve all 12 jurors and that the jury must suspend deliberations when a juror is absent. He argues that, in the absence of such instruction, "there is no basis to assume the verdicts rendered were the result of 'the common experience of all of [the jurors],' as required."[38]

We recently rejected the same argument in State v. Sullivan.[39] There, the court observed that RAP 2.5(a) precluded Kevin Sullivan "from raising this issue for the first time on appeal unless he c[ould] show that failure to provide the additional instruction [was] a 'manifest error affecting a constitutional right.'"[40] It further observed that "[f]or an error to be manifest, there must be evidence of 'actual prejudice' having 'practical and identifiable consequences [at] trial.'"[41] Noting that Sullivan offered "no evidence that the jury failed to deliberate as a

---

[38] Appellant's Br. at 36 (alteration in original) (quoting State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389 (1979)).

[39] 3 Wn. App. 2d 376, 415 P.3d 1261 (2018).

[40] Id. at 1262 (quoting RAP 2.5(a)(3)).

[41] Id. (second alteration in original) (quoting State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009)).

whole" and instead relied "entirely on speculation[,]" the court held that such speculation was "'insufficient to warrant review under RAP 2.5(a)(3).'"[42]

Here, Griffith admits that "the record here fails to show whether any deliberations occurred with less than all twelve jurors present in the jury room."[43] Because the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.[44] Therefore, we decline to address Griffith's argument for the first time on appeal.

Alternatively, Griffith argues that even if he cannot show actual prejudice, reversal is warranted because "[t]he failure to instruct a jury in a criminal trial how to achieve constitutional unanimity constitutes structural error for which reversal is required without the need to show actual prejudice."[45] A structural error necessarily renders a trial unfair and is thus subject to automatic reversal without considering whether the error was harmless.[46] Structural error has been found in a very limited class of cases involving constitutional error such as the complete denial of counsel, a biased trial judge, racial discrimination in the selection of a

---

[42] Id. at 1263 (quoting State v. St. Peter, 1 Wn. App. 2d 961, 963, 408 P.3d 361 (2018)).

[43] Appellant's Br. at 37.

[44] Sullivan, 415 P.3d at 1263 ("[W]ithout evidence to demonstrate that the jury did not deliberate as a whole, the asserted error is not 'manifest.'").

[45] Appellant's Br. at 37-38; see State v. Paumier, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (RAP 2.5(a) does not apply in its typical manner where a structural error is involved).

[46] Neder v. United States, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

grand jury, denial of right to self-representation, and a defective reasonable-doubt instruction.[47] This case is not within that class. Because the unanimity instruction given here was held to be constitutional in Lamar, there was no structural error on these facts, and RAP 2.5(a) limits our review.

Statement of Additional Grounds

In a statement of additional grounds, Griffith argues that the prosecutor committed misconduct during closing arguments, that his trial counsel was ineffective, and that the trial court abused its discretion by failing to admit hearsay evidence. None of these grounds merit reversal.

First, Griffith takes issue with several arguments made in the prosecutor's closing arguments, including specific statements on the credibility of Ricks, D.G., and Swaner, the lack of credibility of Dr. Herve, and Griffith's guilt. He argues that these statements improperly expressed the prosecutor's personal opinion of both Griffith's guilt and the credibility of the witnesses.

A prosecutor commits misconduct where he expresses a personal opinion as to the credibility of a witness or the guilt of a defendant.[48] Prosecutorial misconduct during closing argument can violate the accused person's right to a fair trial.[49] "To prevail on a claim of prosecutorial misconduct, the defendant must

---

[47] Id. at 8.

[48] State v. Lindsay, 180 Wn.2d 423, 437, 326 P.3d 125 (2014).

[49] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'"[50] To establish prejudice, the defendant must prove that "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'"[51] Because he did not object at trial, Griffith must show that the alleged misconduct was "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'"[52]

Here, the prosecutor's arguments were not improper. He made no explicit statements of personal opinion and was within his authority to argue reasonable inferences from the facts concerning witness credibility.[53] Griffith also fails to establish that any of the challenged statements were incurably flagrant and ill intentioned. Any error could have been cured by a prompt instruction. And the jury was properly instructed that the State had the burden of proof.

Second, Griffith argues that his attorneys were ineffective because they failed to present impeachment evidence, call witnesses, and object to the prosecutor's allegedly improper closing arguments. To prevail on a claim of

---

[50] State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

[51] Id. at 443 (alteration in original) (quoting Magers, 164 Wn.2d at 191).

[52] Id. (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

[53] State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion); State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) ("The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.").

ineffective assistance of counsel, Griffith must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant.[54] Where the claim is brought on direct appeal, this court will not consider matters outside the trial record.[55] Griffith has the burden to show deficient representation based on the record presented.

On this record, Griffith does not show that defense counsel's representation was deficient. With the exception of the transcript of Taylor's interview with D.G., which was presented to the jury for consideration, none of the impeachment evidence Griffith refers to is included in the record. And the record does not include what beneficial information the potential witnesses he identifies would have testified to. Therefore, Griffith has not met his burden show ineffective assistance of counsel. If Griffith wishes to raise issues that require evidence or facts not in the trial record, the appropriate means of doing so is through a personal restraint petition.[56] Additionally, as explained above, the statements of the prosecutor during closing argument were not improper, therefore, defense counsel's failure to object was not deficient.

Finally, Griffith argues that the trial court abused its discretion in suppressing testimony from Ricks that D.G.'s school principal reported Ricks to Child Protective Services (CPS) based on alleged injuries D.G. suffered and that

---

[54] State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

[55] McFarland, 127 Wn.2d at 335.

[56] Id.

Ricks denied she caused. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[57] The trial court held that Ricks's testimony as to what the principal told CPS was hearsay and could not be admitted because it would be offered for the truth of the matter asserted. Griffith does not establish that the principal's statements to CPS were offered for any purpose other than to prove the truth of the matter asserted. Because this evidence was hearsay, the trial court did not abuse its discretion by excluding it.

We affirm.

WE CONCUR:

[57] ER 801(c).

NIELSEN, BROMAN & KOCH P.L.L.C.

August 21, 2018 - 3:08 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76368-7
Appellate Court Case Title:	State of Washington, Respondent v. Kevin Scott Griffith, Appellant
Superior Court Case Number:	14-1-01826-2

The following documents have been uploaded:

- 763687_Petition_for_Review_20180821150656D1337474_7502.pdf
  This File Contains:
  Petition for Review
  The Original File Name was State v. Kevin Griffith 76368-7-I.Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Sloanej@nwattorney.net
- ian.ith@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Copy mailed to client / appellant: Kevin Griffith, 741974 Coyote Ridge Corrections Center PO Box 769 Connell, WA 99326

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20180821150656D1337474