SUPREME COURT NO. 96825-0
COURT OF APPEALS NO. 50446-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Respondent

vs.

Carl Lee Domingue, Appellant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Carl Lee Domingue (hereafter Mr. Domingue) (pronounced ‘doe-main’) asks the Supreme Court to accept review of the Court of Appeals decision terminating review, which is designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals, Division II, filed an unpublished opinion in this matter on January 8, 2019. This decision affirmed Mr. Domingue’s conviction for first child molestation following a jury trial. A copy of the decision is attached hereto.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the prosecutor’s closing argument to the jury that the only two possibilities were that the alleged victim was either telling the truth or “making it up” misstated the burden of proof and otherwise denied Mr. Domingue due process of law where it was in effect an argument that in order to acquit him the jury must find that the alleged victim was lying.

2. Whether the trial court’s non-corroboration instruction was a comment on the evidence forbidden by Article IV, sec. 16 of the Washington State Constitution.

D. STATEMENT OF THE CASE

This is an appeal from a judgment and sentence entered on following a jury trial resulting in a guilty verdict on April 7, 2017. CP at 48. On that date, the jury found Mr. Domingue guilty of the charged offense of Child Molestation in the First Degree, RCW 9A.44.083. CP at 48; RP VI at 465.

On October 21, 2015, the State of Washington charged Mr. Domingue with one count of Child Molestation in the First Degree, allegedly committed as follows:

> On or between the 31st day of July, 2015 and the 1st day of August, 2015, [the defendant] … being at least 36 months older than K.L.[sic][1] [had] sexual contact with K.L., who [was] less than 12 years old and not married to the defendant[.]

See CP at 3 (emphasis added).

At trial, the State called the following five (5) witnesses in its case-in-chief: (1) the alleged victim (K.W.); (2) K.W.'s mother (Thaieka Anderson); (3) Marvin Harris, a friend of the mother; (4) Tacoma Police Department (TPD) Detective Cynthia Brooks; and (5) Jazalena Chhem, a school friend of the alleged victim. (The State called a sixth witness, TPD Officer Joseph Bundy, for ER 613 purposes during rebuttal.) CP at 47.

[1] After trial started, the information was amended without objection correcting the initials of the alleged victim. RP III at 227; CP at 25.

K.W. (DOB: 1/14/04), who was 13 years old at the time of trial, testified that in the summer of 2015 (when she was 11), she was living at 1428 S 94th St in Tacoma with her mother, two older sisters, uncle JoJo and the defendant, Mr. Domingue. RP II at 55. She testified that she had known Mr. Domingue her whole life and referred to him as her uncle. RP II at 61-62.

On the night in question (July 31-August 1), K.W. testified that in the early morning hours ("any time around 3 and up") she was laying down on the couch of the living room. RP II at 63. K.W. had decided to sleep on the couch around midnight instead of her own room to watch T.V. RP II at 64-65. She was wearing shorts and t-shirt, underwear and bra, and had a blanket and pillow with her to sleep. RP II at 65.

K.W. testified that the first thing she remembered after falling asleep was Mr. Domingue leaning over the separator between the kitchen and living room with his hand in her shorts. RP II at 66 ("I woke up, and he was leaning over the hole in the separator that separates the living room and the kitchen, and he had his hand in my shorts.") Mr. Domingue had his hand underneath her pajama shorts and "around the side" of her underwear. RP II at 69-71. Mr. Domingue had alcohol in his other hand and that she knows it was alcohol because she "had seen [her] mom drink it before, and because, like, you get drunk off of [it]." RP II at 71.

However, she did not remember what Mr. Domingue was wearing. RP II at 78.

K.W. further testified that the touching stopped after she woke up. RP II at 71-72. Mr. Domingue then "sped walked" out the front door. RP II at 72. K.W. got up and went through the back door to tell her mom through her bedroom window. RP II at 73. K.W. testified that she was able to see Mr. Domingue's face and that the room was lit by the T.V. RP II at 74. Twenty minutes after the touching, she saw Mr. Domingue once more in the backyard outside her mother's widow laughing. See RP II at 75. Her mother locked the window and put down the curtains and told her try to get some sleep. RP II at 76.

On cross-examination, K.W. acknowledged making the following inconsistent statements in prior interviews on the subject (RP III at 187):

- that when Domingue was reaching over the counter, she could not see his face (RP III at 185);
- that she was wearing button-up or blue jeans and a green sweatshirt during the alleged incident (RP III at 186), and that Domingue had unbuttoned her jeans (RP III at 187);
- that she was wearing basketball shorts and a tank top at the time of the incident (RP III at 187); and
- that she saw the time on the TV clock, and that it was 1:00 am.

K.W. also indicated that she did not like Domingue for many reasons (RP III at 187-188):

(1) he sometimes played too rough with her;

(2) she thought it was creepy that he had so many girlfriends and so many children; and

(3) he would yell at her about putting her things away.

K.W. conceded that her mother did not impose any type of curfew restrictions on her nor did she impose any types of rules on her. RP III at 188. Despite being given the opportunity by defense counsel, K.W. could not explain why she explained various facts about her buttons being undone during a previous interview. RP III at 194.

Thaieka Anderson, K.W.'s mother, testified that after K.W. went to sleep, she smoked weed with Mr. Domingue and Matthew Turner, a family friend. RP II at127-128. After they smoked, Anderson and Turner wen and sat in her room and talked because he had just come from the bar. RP II at 129. Before she knew it ("not long at all"), K.W. was at her window scared and crying. RP II at 129-130. K.W. said, "*Mommy, Carl touched me*." RP II at 130.

Anderson walked out of her bedroom, told K.W. to come back around, brought her into her room and put her in her bed and sat with her. *See id*. Anderson and Turner started closing every window and every door

and locked everything up. See id. She did not know where Mr. Domingue was at this point. *See id*. After locking the doors and windows and with K.W. in her bed, Mr. Domingue made his way back around the house and went to the window maybe ten minutes later, according to K.W. (Anderson did not see him come to the window.) RP II at 130-131.

Anderson next saw Mr. Domingue while she and Turner were standing in the living room talking. RP II at 131-132. Domingue was standing in front of the microwave bent down and then popped up. RP II at 132. Domingue asked Anderson, "*What, did she put you out of your room?*" RP II at 134. Anderson answered, "*Yeah.*" She did not confront him about what happened because he had a gun. *See id*. The next time she saw him was when she let Turner out of her house at 4:00 am; Domingue's female friend had pulled up and he (Domingue) went and hopped in her truck. RP II at 134.

Anderson did not immediately call the police. RP II at 134. When asked why she did not immediately call the police, Anderson answered as follows: "Fear that what would happen. And being the fact that yes, I was drinking. I was, like, okay. And then it's never good, police and how, the way the police came the next day. Me being inebriated would not have been a good thing." RP II at 135. She made the decision to sober up a little bit. *See id*. She called her brother, Marvin, at about 6:00 am after

K.W. finally went to sleep. RP II at 135. Marvin arrived at her house about ten minutes before the police were called; Marvin actually called the police at her house. RP II at 135. K.W. then stayed with Marvin's girlfriend, her aunt (Odessa Williams) and with Jazalena Chhem. RP II at 136. Anderson made the decision to move to Alaska with K.W. and her middle child "[w]hen the police basically laughed at [her[and told [her] there was nothing they could do to keep [them] safe." RP II at 136. K.W was sad when they moved to Alaska because she had lived here her whole life. RP II at 138. Anderson never confronted Domingue about what happened. RP II at 139.

On cross-exam, Anderson clarified that she never saw Domingue touch K.W. She painted the scene as follows:

> When I came out of my room [K.W.] was asleep. [Domingue] was sitting on the short couch like he was going to sleep, because he had an attitude because the girl hadn't showed up yet. So I started turning off TVs and everything else. And he said he was just going to sit there, so I went in my room. I smoke cigarettes in my home. So therefore, being [K.W.]'s on the couch, I close my door. He was on the couch, on the small couch like this, like he was going to sleep. So I was like, all right. Goodnight, bro.

RP II at 147.

Anderson conceded that she turned off all the TV's, but said that the room was not pitch black because a light above the stove had been left

on. RP II at 147-148 ("[K.W.] doesn't like the dark, so we don't do pitch black.").

Anderson also elaborated on her reasoning for not immediately calling 911:

> Because I was fucked up. I was shot by a train. Do you know how hard it was for me not to go out the door and stab him? Do you know how hard it was for me not to do anything to jeopardize the fact that my child was hurt? We all know how to call the police. They would have took my kids because I was inebriated. So therefore, I had to be in my clear mind before I hurt somebody, because my first priority, yes, is my children. But if I'm not in my right mind how am I going to help them.

RP II at 149.

Anderson also conceded that it was possible for a person to walk through the unlocked gate that separates the backyard from the front. RP II at 150.

On redirect, the following exchange took place with regard to the ability of an individual to touch the couch from the area where Domingue was standing in the kitchen when the alleged touching occurred:

> Q. So if you wanted to reach the couch, you couldn't -- you weren't -- you wouldn't be unable to get on the counter. You just have to go through some -- the blender and that kind of stuff, right?
> A. Uh-huh.
> Q. So it's not impossible to get up on the counter.
> A. No. It's not impossible. But you would have to literally move something to have got on top of it.
> Q. Sure, okay.

See RP II at 152.

The defense called four witnesses regarding various interactions at the house on July 31, 2015: Denise Barrett (RP IV at 259-279); Kendall Hagger (Domingue's cousin) (RP IV at 279-296); Ronchetta Battee (aka "Big Mama") (RP IV at 296-311); and Audrey Parker (RP IV at 311-339).

Hagger, who is Barrett's husband (both live at the residence), recalled actually seeing Domingue leave the residence between 12:45-1:00 am. RP IV at 290. However, he did not observe Domingue come back to the residence. RP IV at 291.

Mr. Domingue testified in his own defense. He testified that he was born in Lafayette, Louisiana, speaks with a Creole accent and has lived off-and-on in Washington state since 1995. RP IV at 339-340. He has 12 children, eight of whom reside in Washington. RP IV at 342-343.

On July 31, 2015, he was living with Thaieka Anderson on 1428 94th Street. RP IV at 343. His reasoning for living with Anderson was his kids. RP IV at 344. He testified that he woke up about noon. RP IV at 345. He acknowledged "drinking and smoking and just joking around, laughing and joking all day" with various company. RP IV at 345. He left around 8:30 pm to drop off his other girlfriend, Talisha Edwards, at her home. RP IV at 346. He got a ride from a friend, Chris, to do this.

RP IV at 347. He returned back to the residence at almost 9:00 pm or a little bit after. RP IV at 348. When he returned, Audrey Parker, Thaieka Anderson, Anderson's middle child and Matthew Turner were present at the house. RP IV at 348. K.W. had left with a friend and didn't return until almost 10:00 pm. RP IV at 349.

The group continued drinking and then went to get some liquor. RP IV at 349. They were drinking Seagrams gin. *See id*. Domingue was drinking beer and the women were drinking wine. *See id*. Parker, Anderson, Turner and Domingue also consumed cocaine, which Domingue provided. *See id*. Domingue was feeling buzzed, but he felt more alert from the cocaine. See RP IV at 350. The used cocaine several times throughout the day. RP IV at 351.

K.W. came back around 10:00 pm. *See id*. Anderson, Parker and Domingue were still hanging outside the house drinking and then decided to do some more cocaine in Anderson's room, but outside the presence of K.W. RP IV at 355. Parker left between midnight and 1:00 am. RP IV at 356.

Maria Gonzalez showed up to house around 1:00 am. RP IV at 353. Gonzalez and Domingue decided to go to the Emerald Queen Casino in Tacoma around 2:20-2:30 am. RP IV at 358. The duo were at the casino for a couple of hours or enough time to get the comp (i.e., playing

for two hours or more grants a free food voucher for $25.00.) RP IV at 358. Domingue lost about $250.00 at the casino. RP IV at 359.

The duo then went back to the garage of the residence and had sex. *See id.* Domingue then fell asleep right after having sex and did not wake up until around 10:00 am. RP IV at 359-360.

Domingue later testified that he never engaged in foreplay with K.W. nor did he ever touch any part of her body that would be considered a private part. RP IV at 386.

On April 6, 2017, the trial court instructed the jury on the charged offense of Child Molestation in the First Degree. *See* RP V at 434.

Over the defense's objection, the trial court gave Instruction No. 9, to wit:

> In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

See CP at 60; RP IV at 393-395 (court's ruling); RP V at 432 (continuing objection noted), 434 (read to jury).

During closing argument, the prosecutor stated the following:

> The evidence that you have in this case, you've been instructed that there's no corroboration requirement. And something in voir dire that we talked about was weighing credibility. And now that you've heard the facts of the case, you really know that that's what it's going to come down to,

is a he said-she said; Khalilah said it happened to her and the defendant said he didn't do it. So now what? Now what.

What you have to do is you have to weigh the credibility of the witnesses. And I urge you to not get lost in the weeds. There's a lot of testimony from other people about the surrounding circumstances and facts and where they were and what time it was and so on and so forth.

And you heard that that testimony was from a lot, almost every individual was tainted by controlled substances; marijuana, cocaine, as well as excessive consumption of alcohol, which goes to credibility, ability to recall, so on and so forth.

But keep in mind, Ladies and gentlemen, that Khalilah was the only one, the only one that hadn't consumed any controlled substances that evening. So her ability to recall is better than her mother's, to be honest with you. It's better than the defendant's, and it's better than everyone else who had consumed controlled substances that evening or had the opportunity to see something.

So what do you -- what do you do? If she said it happened and he said it didn't happen, there's no percentage of weight assigned to what reasonable doubt is. But I mean, that's 50/50, and that's not it. So you've got to go one way or the other.

Let me focus just for a moment on who Khalilah is. She's a straight A student, who came home that evening, laid down on the couch and fell asleep to the Disney channel. What bias does she have? Her and the defendant got along just fine.

There's really only two possibilities. One, she's making it up; or two, she's telling the truth.

Why would she make it up? What reasons would she have to make up an allegation that somebody who was her uncle, her mother's brother, who took care of her, who babysat for

> her, who cooked for her, who even roughhoused a little bit with her, why? What a sinister, cynical plot that had to have been for her to make this up.

See RP V at 440-441 (emphasis added).

The jury returned a verdict of guilty on the following day, April 7, 2017. CP at 48; RP VI at 465. Mr. Domingue was sentenced to an indeterminate sentence of 108 months to life in prison on June 9, 2017. CP at 84. Mr. Domingue's timely appeal followed to the Washington Court of Appeals, Division II followed. CP at 72-73.

The parties briefed the case, and the case was decided without oral argument. And as mentioned above, on January 8, 2019, the Court of Appeals affirmed Mr. Domingue's conviction for first degree child molestation.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review should be accepted pursuant to RAP 13.4(b)(2) because the decision of the Court of Appeals is in conflict with established precedent regarding prosecutorial misconduct.

"[I]t is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *See State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *State v. Wheless*, 103 Wn. App. 749, 758, 14 P.3d 184 (2000);

State v. Wright, 76 Wn. App. 811, 825-826; *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991).

Here, the prosecutor set forth a false choice:

> So what do you -- what do you do? If she said it happened and he said it didn't happen, there's no percentage of weight assigned to what reasonable doubt is. But I mean, that's 50/50, and that's not it. ***So you've got to go one way or the other***. …
> ***There's really only two possibilities. One, she's making it up; or two, she's telling the truth.***

RP V at 441.

This argument is fatally flawed because the jury was and is entitled to conclude that it did not necessarily believe the defendant, but was also not satisfied beyond a reasonable doubt that he sexually assaulted K.W. *See, e.g.*, *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169, 1174 (2007) ("***[T]o the extent the prosecutor's argument presented the jurors with a false choice, that they could find Miles not guilty only if they believed his evidence, it was misconduct***.") (emphasis added).

The prosecutor's argument set forth a false choice because it informed the jury that if it did not find K.W. was "making it up," they must find she was telling the truth (and therefore, that Domingue was guilty.) Because this argument misstated the burden of proof, Domingue was denied due process of law.

The Court of Appeals either misunderstood Mr. Domingue's argument or misapplied settled precedent when it held that the State did not commit prosecutorial misconduct:

> On appeal, Domingue characterizes the State's comment during closing argument as presenting the jury with a false choice—***that they could believe K.W. and convict Domingue or believe she was making up her story and acquit him***. Domingue likens this case to *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007), which held that the prosecutor committed misconduct when it told jurors that they could find Miles not guilty only if they believed his evidence. Domingue also likens this case to *State v. Fleming*, 83 Wn. App. 209, 213-16, 921 P.2d 1076 (1996), which held that the prosecutor committed misconduct when he told the jury that in order to acquit Fleming it must believe that the State's witnesses are lying or mistaken. However, this case is distinguishable from *Miles* and *Fleming* in that, here, the State did not misrepresent the role of the jury and burden of proof. Rather, the State's comment related entirely to the State's argument on K.W.'s credibility. ***The State was arguing that K.W. was a credible witness, referencing her sobriety and lack of motive to lie***. The State's comment did not misrepresent its burden of proof and thus, was not improper.

See State v. Domingue, No. 50446-4-II, at 4 (emphasis added).

Here, the State's argument clearly did more than suggest that K.W. was a credible witness. Rather, it gave the jurors a choice of "***two possibilities[:]. One, she's making it up; or two, she's telling the truth.***" *See* RP V at 441. This choice is false because a third possibility exists, *e.g.*, that K.W. earnestly believed that these things occurred, but that her

testimony was "***unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved***." *See State v. Rafay*, 168 Wn. App. 734, 836 (2012) (citing *State v. Casteneda-Perez*, 61 Wn. App. 354, 363 (1991) and *Fleming*, 83 Wn. App. at 213) (emphasis added). That is, the prosecutor's argument omitted any possibility of a middle ground based on something other lying or telling the truth. This omission deprived Mr. Domingue of a fair trial.

2. Review should be accepted pursuant to RAP 13.4(b)(3)-(4) because the "non-corroboration" instruction at issue constitutes a comment on the evidence forbidden by Article IV, sec. 16 of the Washington State Constitution.

Over the defense's objection, the trial court gave Instruction No. 9, to wit:

> In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

With very little substantive discussion as to why, the Court of Appeals indicated that it felt duty-bound to reject Mr. Domingue's argument that the giving of such instruction amounted to an impermissible comment on the evidence:

> Here, the noncorroboration instruction mirrored RCW 9A.44.020(1), which provides: "In order to convict a

> person of any crime defined in this chapter[,] it shall not be necessary that the testimony of the alleged victim be corroborated." Further, Washington case law has repeatedly upheld the propriety of noncorroboration instructions. *See State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949); *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978). In 2005, we held that a nearly identical jury instruction correctly stated the law and was not an improper comment on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005). Most recently, Division I of this court held that in cases involving sex crimes, it is permissible to instruct the jury that there is no corroboration requirement. *Chenoweth*, 188 Wn. App. at 537. ***We are bound by controlling precedent upholding noncorroboration instructions like the one issued here.***

See State v. Domingue, No. 50446-4-II, at 5 (emphasis added).

Interestingly, the *Zimmerman* court (cited and emphasized by the Court of Appeals) shared the "misgivings" of Washington Supreme Court Committee on Jury Instructions recommending against such an instruction:

> ***The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction.*** The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

See Zimmerman, 130 Wn. App. At 182-83 (emphasis added).

The *Zimmerman* court nonetheless felt it *too* was "bound" by *Clayton* to hold that the giving of such an instruction is not reversible error. *See id.*

This Court should overrule *State v. Clayton*, 32 Wn.2d 571, 202 P.922 (1949). Article IV, § 16 of the Washington State Constitution provides as follows: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits judges "from influencing the judgment of the jury on what the testimony proved or failed to prove." *Zimmerman*, 130 Wn. App. 170, 174, 121 P.3d 1216 (2005) (quoting *Bardwell v. Ziegler*, 3 Wash. 34, 42, 28 P. 360 (1891)).

The instruction was an impermissible comment on the evidence because a declaration by the trial court that the allegations made by the alleged victim—by themselves—could be sufficient to convict undoubtedly created an instruction manual for the jury regarding how to return of verdict of guilty. That is to say, if any jurors were entertaining doubt(s) as to whether this horrible offense was committed (in which case it would be their duty would be to return a verdict of "not guilty"), they could properly rely upon this instruction in order to convict Mr. Domingue. The better practice, and the practice which should have been employed here, would be to give no instruction at all.

F. CONCLUSION

For all the foregoing reasons, Mr. Domingue respectfully requests that the Supreme Court (1) accept review and (2) reverse the decision of the Court of Appeals affirming his conviction for first degree child molestation.

Respectfully submitted 6th day of February, 2019.

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Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CARL LEE DOMINGUE, Appellant.	No. 50446-4-II UNPUBLISHED OPINION

SUTTON, J. — Carl Lee Domingue appeals his conviction for first degree child molestation following a jury trial. Domingue argues that the State committed prosecutorial misconduct during closing argument and the trial court improperly commented on the evidence by issuing an instruction that the alleged victim's testimony need not be corroborated in order to convict. Because the State's comment during closing argument was not improper and the non-corroboration instruction did not constitute an improper comment on the evidence, we hold that Domingue's claims fail and affirm his conviction.

FACTS

On October 21, 2015, the State charged Domingue with one count of first degree child molestation, alleging that Domingue made sexual contact with an 11 year old girl, K.W.[1]

[1] We use initials to protect the witness's identity. General Order 2011-1 of Division II, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases*, available at: http://www.courts.wa.gov/appellate_trial_courts/.

At a jury trial, K.W., who was 13 years old at the time of trial, testified that around 3:00 A.M. one day in August of 2015, she woke up on her living room couch to discover Domingue with his hand up her shorts touching her private parts. K.W. testified that she saw Domingue's face lit up from the television. K.W. testified that after she woke up, Domingue "sped walked" out the front door and she went to tell her mom what happened. 2 Verbatim Report of Proceedings (VRP) at 71-72.

K.W.'s mother, Thaieka Anderson, also testified at trial. Anderson testified that earlier on the night in question, she had smoked marijuana with Domingue and another family friend. Anderson testified that she woke up to K.W. crying to her and saying, "Mommy, Carl touched me." 2 VRP at 130.

Domingue testified in his own defense. Domingue testified that on the day and night in question he smoked marijuana, drank alcohol, and consumed cocaine. Domingue denied ever touching K.W.

Over Domingue's objection, the trial court instructed the jury:

> In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

Clerk's Papers (CP) at 60.

During closing arguments, the State focused on K.W.'s credibility. The State acknowledged that the case essentially came down to a he-said-she-said determination. The State pointed out that K.W. was the only witness from the night in question who had not consumed any controlled substances and argued that it meant that K.W.'s ability to recall the events of the night was better than the other witnesses. The State continued:

> [K.W.]'s a straight A student, who came home that evening, laid down on the couch and fell asleep to the Disney channel. What bias does she have? Her and the defendant got along just fine.
>
> There's really only two possibilities. One, she's making it up; or two, she's telling the truth.

RP (4-6-17) 441.

The jury found Domingue guilty. Domingue appeals his conviction.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Domingue argues that the State committed prosecutorial misconduct during its closing argument when it stated, "There's really only two possibilities. One, she's making it up; or two, she's telling the truth." Br. of Appellant at18. Because the State's comment did not misrepresent the jury's burden of proof, the comment was not improper and thus, we hold that Domingue's prosecutorial misconduct claim fails.

To prevail on his prosecutorial misconduct claim, Domingue must demonstrate that, in the context of the entire record and trial circumstances, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). To demonstrate prejudice, Domingue must show a substantial likelihood that the improper conduct affected the verdict. *Thorgerson*, 172 Wn.2d at 442–43. Because Domingue did not object to the alleged misconduct at trial, he must also show that any misconduct was so flagrant and ill intentioned that any resulting prejudice could not have been cured by a jury instruction. *Thorgerson*, 172 Wn.2d at 443. We review a prosecutor's comments at closing in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions to the jury. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). "The State has wide latitude in drawing

and expressing reasonable inferences from the evidence, including inferences about credibility." *State v. Rodriguez-Perez*, 1 Wn. App.2d 448, 458, 406 P.3d 658 (2017).

On appeal, Domingue characterizes the State's comment during closing argument as presenting the jury with a false choice—that they could believe K.W. and convict Domingue or believe she was making up her story and acquit him. Domingue likens this case to *State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007), which held that the prosecutor committed misconduct when it told jurors that they could find Miles not guilty only if they believed his evidence. Domingue also likens this case to *State v. Fleming*, 83 Wn. App. 209, 213-16, 921 P.2d 1076 (1996), which held that the prosecutor committed misconduct when he told the jury that in order to acquit Fleming it must believe that the State's witnesses are lying or mistaken. However, this case is distinguishable from *Miles* and *Fleming* in that, here, the State did not misrepresent the role of the jury and burden of proof. Rather, the State's comment related entirely to the State's argument on K.W.'s credibility. The State was arguing that K.W. was a credible witness, referencing her sobriety and lack of motive to lie. The State's comment did not misrepresent its burden of proof and thus, was not improper. As a result, we hold that the State did not commit prosecutorial misconduct.

II. NONCORROBORATION INSTRUCTION

Domingue also argues that the trial court's noncorroboration instruction constituted an impermissible comment on the evidence. We disagree.

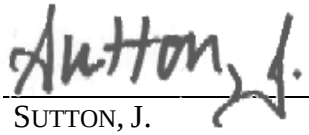
Article 4, section 16, of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. 4, § 16. This constitutional provision prohibits a judge from conveying to the jury his personal

opinion regarding the merits of the case or a particular issue within the case. *State v. Theroff*, 95 Wn.2d 385, 388–89, 622 P.2d 1240 (1980). The prohibition is intended to prevent a trial judge's opinion from influencing the jury. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). We review whether a jury instruction is legally correct de novo. *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). "'A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law.'" *Chenoweth*, 188 Wn. App. at 535 (*quoting State v. Johnson*, 152 Wn. App. 924, 935, 219 P.3d 958 (2009)).

Here, the noncorroboration instruction mirrored RCW 9A.44.020(1), which provides: "In order to convict a person of any crime defined in this chapter[,] it shall not be necessary that the testimony of the alleged victim be corroborated." Further, Washington case law has repeatedly upheld the propriety of noncorroboration instructions. *See State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949); *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978). In 2005, we held that a nearly identical jury instruction correctly stated the law and was not an improper comment on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005). Most recently, Division I of this court held that in cases involving sex crimes, it is permissible to instruct the jury that there is no corroboration requirement. *Chenoweth*, 188 Wn. App. at 537. We are bound by controlling precedent upholding noncorroboration instructions like the one issued here. Consequently, we hold that the noncorroboration jury instruction was not an impermissible comment on the evidence.

We affirm Domingue's conviction.

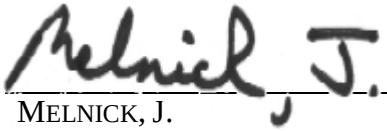
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, J.

We concur:

MAXA, C.J.



MELNICK, J.

GEHRKE, BAKER, DOULL & KELLY, PLLC

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