SUPREME COURT NO. 98588-0

COA NO. 79204-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON CHRISTOPHER STONER,

Petitioner.

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

The Honorable Brian L. Stiles, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Johnathon Christopher Stoner asks this Court to grant review of the court of appeals' unpublished decision in State v. Stoner, slip op. 79204-1-I, filed April 20, 2020 (Appendix).

B. ISSUES PRESENTED FOR REVIEW

This case presents the following questions. Did the prosecutor commit misconduct by commenting upon Stoner's pro se cross-examination of a key witness and by arguing to the jury that Stoner's questioning showed evidence of his guilt? Does the constitutional error standard of review apply on appeal?

1. Is this Court's review warranted under RAP 13.4(b)(3) because this case presents a "significant question" of constitutional law under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution, involving the related rights of self-representation and cross-examination? In addition, is review warranted under RAP 13.4(b)(1) and (2) because the court of appeals' opinion conflicts with established Washington Supreme Court jurisprudence interpreting these constitutional rights?

2. Is this Court's review warranted under RAP 13.4(b)(2) because the decision of the court of appeals conflicts with the published

court of appeals decisions in State v. Espey, 184 Wn. App. 360, 336 P.3d 1178 (2014)?

3. Is this Court's review warranted under RAP 13.4(b)(4) because it presents a question of "substantial public interest": whether prosecutors may comment upon a pro se litigant's cross-examination (either the choice to proceed pro se, to cross-examine pro se, or the content of such cross-examination) as evidence of guilt?

C. STATEMENT OF THE CASE

Stoner was charged and convicted of one count of third-degree child molestation against his step-daughter J.B., and one count of communicating with a minor against her friend and neighbor E.F. 3RP 665, 863. Stoner represented himself through much of the pre-trial and trial proceedings. 1RP 6. Stand-by counsel stepped in to handle Stoner's trial testimony, closing argument, and sentencing. 3RP 729.

The evidence at trial involved no evidence of any third party witnesses observing the alleged acts. One neighbor observed a separate incident which the State argued showed evidence of misconduct. The charges rested mostly on the word of E.F. and J.B. as well as a pair of J.B.'s underwear. J.B. testified that a stain on her underwear had been left by Stoner when he ejaculated after making her rub her hand on his penis, and that the underwear had been in the family laundry basket for a couple of

days before she retrieved it to show to her mother. 3RP 345, 380, 434. While representing himself, Stoner asked J.B. during cross-examination if she had heard Stoner and her mother (his wife) having sexual intercourse the night before. 3RP 381. J.B. agreed stating, "I think I heard something." 3RP 381. Officers retrieved J.S.'s underwear and sent it to the State crime lab for testing. 3RP 562.

Carol Vo, a forensic scientist from the State crime lab, testified that she analyzed DNA samples from Stoner and J.B. and compared them with samples taken from the interior and exterior front crotch of J.B.'s underwear. 3RP 626-39. She found no sperm cells in the underwear sample, but did observe a protein called "p30." 3RP 639. P30 is found in semen in high levels but is also produced by some women in detectible amounts. 3RP 639. Vo did not detect any acid phosphate, another indicator of semen, on the underwear. 3RP 639, 641. As a result, she did follow-up DNA testing, and found DNA matching both J.B. and Stoner in the sample. 3RP 644-45. However, because her sample cut through the entire fabric, she could not tell whether the DNA she detected was from the inside or the outside of the underwear. 3RP 654.

Vo used special lighting to observe a stain on the outside front panel of the underwear and noted the boundaries of the stain had "clear margins." 3RP 645-46, 654. She opined these "clear margins" showed the stain was

more recent, unlike an older, washed stain that would appear "amorphous." 3RP 645-46, 654. Vo also testified that a simple touch by the hand would not transfer DNA in amounts detectible by the methods she used. 3RP 646-47. However, detectible amounts of DNA could be transferred from one article of clothing to another with the presence of liquid, and specifically a wet stain transfer could occur in a laundry basket. 3RP 646-47, 653.

Stoner denied having any sexual or inappropriate contact with J.B. 3RP 762-63. He testified that on the date of the allegations, J.B. had been getting into arguments with her siblings and had flown into a rage when Stoner attempted to discipline her by revoking cell phone and other privileges. 3RP 759, 761-62. J.B. also recanted, and testified that she had initially lied because she wanted "revenge" on Stoner and because she was mad about the arguments they had had. 3RP 386.

During closing argument, the State argued J.B.'s initial disclosures were credible and that Stoner had influenced J.B. causing her to recant. 3RP 823, 824-26.

The State's main theme centered on "normalization." 3RP 821, 857. The prosecutor argued Stoner had engaged in a "process of normalization of breaking down appropriate boundaries" with J.B. and E.F. by wrestling, lying in bed, and wearing only underwear in their presence. 3RP 821. Immediately after discussing this theme, the prosecutor remarked:

> Speaking of "normal," isn't it interesting that in this particular case, when the defendant was handling his own examination of the witnesses, the person that he chose to ask about whether he had sexual relations with Misty [his wife] the night before was his stepdaughter, was [J.B.]. Why would he do that? He never asked Misty. He never testified to that himself. But it's normal to ask the child in the house, "Oh, by the way, did you hear your mother and I having sex last night?"

3RP 821-22 (quotation marks in original).

Defense counsel immediately objected, asking the court to "remind the jury that at that point Mr. Stoner was acting as a lawyer" when asking those questions, and "[t]he comments and questions of the lawyer are not evidence." 3RP 822. The Court responded by stating the following:

> Well, Members of the Jury, just as a reminder, that you determine what evidence is presented in the case by witnesses or the exhibits, that the statements by lawyers and arguments -- during arguments or during the questioning, that's not evidence that you are to consider, so just as a reminder of that. Otherwise, the objection is overruled. You may continue.

3RP 822 (emphasis added).

Stoner's counsel argued the jury should recognize that J.B. had brought the initial allegations out of vindictiveness and since then, she had been under pressure to maintain her initial story, yet had done her best to resist this pressure, to rectify the situation, and to tell the truth on the stand. 3RP 847, 854-55, 848. Defense counsel also pointed out the DNA expert testified Stoner's DNA was on the spot on the underwear, but the witness

also stated she had no opinion about how or when Stoner's DNA came to be there. 3RP 849. Where the underwear had been in a laundry basket shared by the entire household, the DNA transfer could have been from one clothing item to another. 3RP 849-50.

The jury convicted Stoner of both counts. 3RP 863.

On appeal, Stoner argued the prosecutor had committed misconduct by commenting upon his rights under the State and federal constitutions to confront witnesses, to present a defense, and to represent himself at trial; and by inviting the jury to view the exercise of those rights as bearing on his culpability. Br. App. at 14. Stoner further argued the court's curative instruction was inadequate and confusing, particularly where the court had overruled the defense objection and failed to address the critical issue: that Stoner had been acting as an attorney. Br. App. at 21. Finally, Stoner argued the attorney who represented him during closing provided ineffective assistance of counsel by failing to object to the curative instruction. Br. App. at 25.

The court of appeals viewed the prosecutor's remarks as presenting no difficulty and affirmed the convictions. Slip. op. at 8, 9. The court of appeals distinguished the case from Espey, 184 Wn. App. 360, by concluding:

> [H]ere, the prosecutor did not invite the jury to make negative inferences from the fact that Stoner chose to represent himself. Rather, the prosecutor's statement focused on Stoner's trial strategy, the testimony he chose to elicit, and the witness from whom he chose to elicit that testimony. Because the prosecutor's remarks did not focus on Stoner's exercise of the constitutional right itself, the remarks did not infringe upon Stoner's constitutional right to self representation. The prosecutor did not commit misconduct.

Slip. op. at 8.

The court of appeals then concluded the instruction was sufficient and in fact was not even required, and the defense attorney's performance was sufficient, because there had been no improper remarks by the prosecutor. Id. at 8-9.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO CLARIFY THAT A PROSECUTOR MAY NOT POINT TO A PRO SE DEFENDANTS' EXERCISE OF FUNDAMENTAL CONSTITUTIOAL RIGHTS IN ORDER TO INFER GUILT.

1. This case presents a significant question of federal and State constitutional law under RAP 13.4(b)(3), and conflicts with established jurisprudence interpreting these rights under RAP 13.4(b)(1) and (2).

As a threshold matter, this Court should accept review in order to clarify the following constitutional issue: that the right to represent one's self is an expression of the related constitutional rights to counsel, to present a defense, and to confrontation of adverse witnesses, and as such, warrants

application of the constitutional harmless error standard. By determining that the prosecutor did not commit misconduct, the court of appeals avoided addressing this issue. However, this Court should reach the merits of the case and so address this issue of the proper standard of review.

In previous cases where a prosecutor's remarks directly violate certain constitutional rights, the constitutional harmless error standard applies. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (citing WASH. CONST., ART. I, § 22; also State v. Evans, 154 Wn.2d 438, 454, 114 P.3d 627 (2005) (citing State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002); State v. Evans, 96 Wn.2d 1, 4, 633 P.2d 83 (1981)). In such cases, reversal is required unless the State carries the heavy burden to show "beyond a reasonable doubt" the misconduct did not affect the verdict. Monday, 171 Wn.2d at 680; State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012), review denied, 176 Wn.2d 1006, 297 P.3d 68 (2013).

Prosecutorial arguments on a defendant's silence fall within this category of constitutional error. See State v. Emery,[1] 174 Wn.2d 741, 757, 278 P.3d 653 (2012) (citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); State v. Fricks, 91 Wn.2d 391, 396-397, 588 P.2d 1328 (1979)). So

[1] In Emery, the Court noted, "We have long held that the constitutional harmless error standard applies to direct constitutional claims involving prosecutors' improper arguments" prejudicing a defendant's pre-arrest and post-arrest silence. Emery, 174 Wn.2d at 757. However, the Emery Court declined to adopt the constitutional harmless error standard in the context of a prosecutor's closing argument. Id. at 757-59.

do comments implying the defense has a duty to present evidence. State v. Toth, 152 Wn. App. 610, 614-615, 217 P.3d 377 (2009) (applying constitutional harmless error standard to prosecutor argument). As well as comments infringing on a defendant's right to a fair trial free from racial animus. Monday, 171 Wn.2d at 680. Such rights are bedrock constitutional rights, and have been described by Washington courts as "basic," "fundamental[]," and implicating "[d]ue process." Fricks, 91 Wn.2d at 395 (right to silence is "basic constitutional principle"); Easter, 130 Wn.2d at 236 (use of post-arrest silence is "fundamentally unfair and violates due process"); Toth, 152 Wn. App. at 614-615 (implication defense has "duty to present evidence" is an issue of "[d]ue process").

This Court should find the right to represent one's self is an expression of the related constitutional rights to counsel, to present a defense, and to confrontation of adverse witnesses. Washington Courts have similarly described these rights as "basic" and "fundamental." State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010); Espey, 184 Wn. App. at 367. Given their foundational nature, this Court should find improper comments that prejudice the exercise of these rights warrants application of the constitutional error standard.

In addition, this Court should accept review because the merits of the case involve important State and federal constitutional issues. The Sixth

Amendment and article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., AMEND. VI; WASH. CONST., ART. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Taken together, these rights constitute the right to present a defense. State v. Duarte Vela, 200 Wn. App. 306, 317, 402 P.3d 281 (2017) (citing Jones, 168 Wn.2d at 720-21). The Washington Supreme Court has described the right to present a defense, including the right to cross-examine witnesses, as "basic in our system of jurisprudence." Jones, 168 Wn.2d at 720 (citing Chambers, 410 U.S. at 294).

The Washington Supreme Court has repeatedly recognized "'[c]riminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution.'" State v. Burns, 193 Wn.2d 190, 201-02, 438 P.3d 1183 (2019) (quoting State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing WASH. CONST., ART. I, § 22 ("the accused shall have the right to appear and defend in person"); Faretta v.

California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)).[2] The Court has also described this right as "fundamental." Burns, 193 Wn.2d at 202 (citing State v. Stenson, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997)).

Thus, the rights to present a defense, to confront witnesses, and to self-representation, are similarly fundamental when compared with other rights warranting the constitutional error standard. This Court should apply this standard to analyze the prosecutor's remarks in Stoner's trial.

In addition, this Court should address the court of appeals' interpretation of the prosecutor's remarks and hold that such comments are indeed a comment upon a defendants' constitutional rights, are requesting a negative inference on the basis of the exercise of those rights, and as such are improper because they infringe upon those constitutional rights.

For the reasons discussed above, this Court should accept review of Stoner's case under RAP 13.4(b)(3).

2. The court of appeals' decision conflicts with a published court of appeals decision under RAP 13.4(b)(1).

The court's opinion in Stoner's case conflicts with the published court of appeals decision of Espey, 184 Wn. App. at 367-68, which found

[2] Similarly, the Washington and U.S. constitutions also provide the right of an accused to counsel of his choice. Espey, 184 Wn. App. at 367 (citing U.S. CONST., AMEND. VI; WASH. CONST., ART. 1, § 22). Division Two has described this right as "fundamental" to "due process." Espey, 184 Wn. App. at 367.

reversible misconduct when the prosecutor commented upon a defendant's exercise of the right to counsel.

There, the prosecutor's remarks in closing suggested the jury should conclude Espey had concocted a story because he had exercised his right to counsel and met with two attorneys shortly after the incident giving rise to the charges. 184 Wn. App. at 367. On appeal, Division Two noted, "No prosecutor may employ language that denigrates the right of a criminal defendant to retain the counsel of his choice, or otherwise limits the fundamental due process right of an accused to present a vigorous defense." Id. Division Two concluded the State, "improperly commented on and penalized Espey's exercise of the right to counsel," and such error was substantially likely to affect the verdict and incurably prejudicial where the trial hinged on two disparate versions of events and Espey's credibility. Id. at 368.

Just as in Espey, Stoner's trial hinged on credibility, and the prosecutor attempted to use his exercise of constitutional rights (here, the rights to cross-examination and to represent himself) to influence the jury's credibility analysis by using the subject matter of his own questions against him. In the context of Stoner's trial, the State cannot meet its burden to prove beyond a reasonable doubt the verdict was unaffected. Even if the

non-constitutional error standard is applied, Stoner has shown prejudice and a substantial likelihood the misconduct affected the verdict.

The court of appeals' reasoning—that there was no improper comment by the prosecutor—is inconsistent with the analysis in Espey. This Court should accept review under RAP 13.4(b)(1) in order to clarify that rights such as the right to cross-examine witnesses and represent oneself at trial are analogous to the rights discussed in Espey, and prosecutors may not comment upon those rights to imply guilt.

3. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

This case creates a compelling issue of substantial public interest because left unchecked, the court of appeals' flawed reasoning will erode important constitutional protections for all individuals in Washington accused of crimes.

Under the reasoning of the court of appeals, a prosecutor could remark upon a pro se litigant's choice of cross-examination questions, reasonable trial tactics, or even decision to proceed pro se at all, as a justifiable reason to infer guilt. Such a proposition cannot stand because it has a significant chilling effect on the exercise of these fundamental rights.

Furthermore, this reasoning may have widespread application beyond the confines of this case. In cases involving family members or

domestic violence allegations, prosecutors would feel free to utilize argument or even expert witness testimony to develop their power and control theory of the case, and then to apply that theory to suggest to the jury that the mere fact a defendant chose to represent himself, or to cross-examine a witness, was evidence of a desire to maintain control and thus evidence of his guilt.

Had a defense attorney asked the questions rather than Stoner himself, the prosecutor would not have been permitted to comment upon the attorney's questions as evidence of Stoner's guilt. As the Espey court noted, "No prosecutor may employ language that denigrates the right of a criminal defendant to retain the counsel of his choice, or otherwise limits the fundamental due process right of an accused to present a vigorous defense." Espey, 184 Wn. App. at 367 (citing Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir.1990); United States v. McDonald, 620 F.2d 559, 562-64 (5th Cir.1980); United States ex rel. Macon v. Yeager, 476 F.2d 613, 615 (3d Cir.), cert. denied, 414 U.S. 855, 94 S. Ct. 154, 38 L. Ed. 2d 104 (1973)). Thus, a comment on a defense attorney's choice of cross-examination questions would be improper as a denigration of the role of counsel and an improper comment upon the fundamental rights to trial, cross-examination, presentation of a defense, and representation.

This Court should find that Washingtonians are equally entitled to these rights when they represent themselves, and are not penalized by their choice to proceed pro se.

This Court should accept review under RAP 13.4(b)(4), to prevent the court of appeals' reasoning from eroding the rights to cross-examination and self-representation for all accused persons in Washington.

E. CONCLUSION

For the aforementioned reasons, Stoner respectfully asks this Court to grant review under RAP 13.4(b)(1), (2), (3), and (4).

DATED this 3rd day of June, 2020.t

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHNATHON CHRISTOPHER STONER, Appellant.	)	No. 79204-1-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Johnathon Christopher Stoner appeals his jury convictions for third degree child molestation of J.B. and communication with minor E.F. for immoral purposes. Stoner argues that the prosecutor improperly commented on his constitutional right to represent himself and confront witnesses at trial, that the court failed to give an adequate curative instruction to address the error, and that he received ineffective assistance of counsel. We affirm.

FACTS

Stoner lived with his longtime partner Misty Guerrero. Stoner and Guerrero were raising four children in their home. Stoner is the biological father of the two younger children, R.S. and J.S. Stoner acted as a stepfather to J.B. and P.G., Guerrero's two children from earlier relationships. Guerrero's daughter J.B. is the oldest child.

About the time J.B. entered middle school, Stoner began to "wrestle" with her. He also frequently "cuddle[d]" with her wearing only his underwear. This often occurred in Stoner's bed while Guerrero was at work.

J.B. had just turned 15 years old in November 2016. On December 26, J.B.'s younger brother P.G. called Guerrero at work and told her to come home because J.B. was "freaking out." Guerrero arrived to find J.B. sitting on the floor, crying. J.B. refused to speak with her mother in front of Stoner. Guerrero brought J.B. into her bedroom, closed the door, and asked J.B. what happened. Guerrero said, "I had to really pry at [J.B.]. She wasn't giving me any information." Eventually, J.B. told her mother that Stoner "had done things" to her or "had her do something." J.B. made a "back and forth" hand gesture that Guerrero understood to mean that Stoner had made J.B. rub his penis.

J.B. told her mother that Stoner had forced her to do this on more than one occasion. In an effort to convince Guerrero that she was telling the truth, J.B. told Guerrero that her underwear had "stuff on it" from when Stoner had ejaculated earlier that day. J.B. retrieved her underwear from the dirty laundry pile in Stoner and Guerrero's bedroom and showed them to her mother. J.B. later said, "I was just trying to get her to believe me. I was doing whatever I could to get her to believe me." Guerrero held J.B.'s underwear in her hand and confronted Stoner. Guerrero said Stoner "wouldn't say anything to me. He just shook his head."

Guerrero called 911. Skagit County Sherriff's Deputy Brad Holmes responded and took a statement from J.B. J.B. was "obviously upset" and

"uncomfortable." She told Deputy Holmes that she "had been jacking off [her] dad" that day and that he "ejaculated on [her] underwear." She also said Stoner "would touch her vagina." In a written statement, J.B. stated:

> [Stoner] expects me to come lay down with him and Jack him off. Bec[a]use if I did not I would get in a[ ]lot of tro[u]ble. . . . [H]e pulled down my pan[ ]ts (leggings) and pulled up my shirt and made himself put his priv[a]te area on me and I did not want that.

Deputy Holmes collected J.B.'s underwear from the laundry hamper for forensic testing.

Deputy Holmes arrested Stoner and read him his Miranda[1] rights. Stoner waived his rights and agreed to speak with Deputy Holmes about the incident. Deputy Holmes asked if Stoner's semen would be on J.B.'s underwear. Stoner denied that it would. After Deputy Holmes told Stoner that he talked to Guerrero about the underwear, Stoner admitted that "it was possible" there would be semen on J.B.'s underwear and that it may be from his bed sheets. He explained that he suffers from premature ejaculation and "ejaculates throughout the night in his sleep," so some of his semen may have "rubbed on" J.B.'s underwear when she was on his bed that morning.

The State charged Stoner with communication with a minor for immoral purposes, four counts of child molestation in the third degree, and one count of indecent liberties as to J.B. The State also charged Stoner with a second count of communication with a minor for immoral purposes related to a July 2016 incident with J.B.'s 14-year-old friend E.F.[2]

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Because the facts of the July 2016 incident involving E.F. are unrelated to the issues on appeal, we do not address them.

Approximately six weeks after his arrest, Guerrero posted bail for Stoner. J.B. then recanted her allegations. She claimed that she made up the accusations to get Stoner "in trouble" because she was angry with him for taking away her cell phone.

Stoner waived his right to counsel and represented himself for the majority of his trial. Standby counsel stepped in to conduct Stoner's direct examination and to make closing arguments.

At trial, Washington State Patrol Crime Laboratory technician Carol Vo testified about the forensic testing of J.B.'s underwear. The exterior front crotch of the underwear tested positive for a protein called "p30," which is present in very high levels in semen.[3] Vo also found a mixture of both male and female DNA[4] components on the underwear. The male component matched the DNA profile of Stoner. The female component matched the DNA profile of J.B.

Stoner's theory at trial was that his DNA could have transferred to J.B.'s underwear in the family laundry pile. On cross-examination, Vo testified that it was "possible" that Stoner's DNA transferred to J.B.'s underwear in the laundry but that it was unlikely.

In support of his theory, Stoner cross-examined J.B. about whether she heard Guerrero and him having sex the night before the incident. He did not ask Guerrero the same question. Nor did he offer testimony on the topic himself when he testified on his own behalf. In her closing argument, the prosecutor

[3] Vo discussed that p30 protein is also found in smaller amounts in other bodily fluids but her tests were not sensitive enough to detect them.

[4] Deoxyribonucleic acid.

remarked that Stoner's choice to elicit that testimony from J.B. rather than from Guerrero or himself when he testified on his own behalf was "interesting" and not "normal."

At the close of the evidence, the State dismissed all but one count of child molestation in the third degree as to J.B.[5] The jury convicted Stoner as charged and the trial court imposed a standard-range sentence. Stoner appeals.[6]

ANALYSIS

Prosecutorial Misconduct

Stoner argues that the prosecutor committed misconduct by commenting on his constitutional right to represent himself and to confront witnesses. We disagree.

This court applies two standards of review for prosecutorial misconduct claims based on whether a defendant objected at trial. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under both standards, a defendant must prove the prosecutor's conduct was both improper and prejudicial. Emery, 174 Wn.2d at 756. Where a defendant properly objects to a prosecutor's conduct at trial, the defendant must prove the prosecutor's misconduct resulted in prejudice that had a "substantial likelihood of affecting the jury's verdict." Emery, 174 Wn.2d at 760. Where a defendant does not object at trial, he or she is deemed to have waived any error "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting

[5] The State did not dismiss the count of communication with a minor for immoral purposes related to the July 2016 incident involving E.F.

[6] Stoner appeals both convictions; however, his assignments of error relate to the incident with J.B. only.

prejudice." Emery, 174 Wn.2d at 760-61.[7]

Stoner's trial strategy was to discredit the DNA evidence. He argued that his DNA could have transferred to J.B.'s underwear in the family laundry. On cross-examination, Stoner asked J.B., "Were you aware at all that your mother and me had sexual intercourse the night before" December 26, 2016. He did not ask Guerrero a similar question. And although he testified on his own behalf, Stoner himself did not offer testimony on the topic.

In her closing remarks, the prosecutor argued:

> Speaking of "normal," isn't it interesting that in this particular case, when the defendant was handling his own examination of the witnesses, the person that he chose to ask about whether he had sexual relations with [Guerrero] the night before was his stepdaughter, was [J.B.]. Why would he do that? He never asked [Guerrero]. He never testified to that himself. But it's normal to ask the child in the house, "Oh, by the way, did you hear your mother and I having sex last night?"

Standby counsel objected on the ground that "comments and questions of the lawyer are not evidence." The court instructed the jury to "determine what evidence is presented in the case by witnesses or the exhibits" and reminded them that the statements and arguments of the lawyers are "not evidence that you are to consider."

Stoner argues that the prosecutor's argument was an improper attempt to use Stoner's exercise of his constitutional rights against him. The State contends that the remarks were not an explicit or implicit attempt to draw any inferences from Stoner's choice to represent himself.

[7] The State argues that Stoner did not object with sufficient specificity at trial and urges this court to apply the more rigorous standard. Because we conclude there was no prosecutorial misconduct, we need not reach this issue.

A prosecutor may not invite the jury to draw a negative inference from a defendant's exercise of a constitutional right. State v. Jones, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993). However, the prosecutor's statements must go beyond a mere mention of a constitutional right; the prosecutor must have " 'manifestly intended the remarks to be a comment on that right.' " State v. Gregory, 158 Wn.2d 759, 806-07, 147 P.3d 1201 (2006) (quoting State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991), abrogated on other grounds by In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014). So long as the focus of the prosecutor's argument is not on the " 'exercise of the constitutional right itself,' " the argument does not "infringe upon a constitutional right." Gregory, 158 Wn.2d at 807 (quoting State v. Miller, 110 Wn. App. 283, 284, 40 P.3d 692 (2002)).

Stoner relies on State v. Espey, 184 Wn. App. 360, 336 P.3d 1178 (2014), to support his argument that the prosecutor's remarks were a comment on his exercise of a constitutional right. In Espey, the prosecutor argued that when considering Espey's statement to police, the jury should "[k]eep in mind that [Espey] had already consulted with two attorneys, ... [h]e had lots of time to figure out what story he was going to tell the police." Espey, 184 Wn. App. at 364-65. Division Two of this court concluded that the State's argument was an improper comment on Espey's exercise of his constitutional right to representation. Espey, 184 Wn. App. at 366. The court reasoned that the State penalized Espey by creating an inference of guilt from his election to exercise his

right to speak with counsel. Espey, 184 Wn. App. at 367-68.

In contrast, here, the prosecutor did not invite the jury to make negative inferences from the fact that Stoner chose to represent himself. Rather, the prosecutor's statement focused on Stoner's trial strategy, the testimony he chose to elicit, and the witness from whom he chose to elicit that testimony. Because the prosecutor's remarks did not focus on Stoner's exercise of the constitutional right itself, the remarks did not infringe upon Stoner's constitutional right to self-representation. The prosecutor did not commit misconduct.

Curative Instruction

Stoner contends that the court's curative instruction was not sufficient to remedy any prejudice caused by the prosecutor's improper remarks during closing argument on Stoner's constitutional right to represent himself. We disagree.

Stoner objected to the prosecutor's argument on the ground that "Mr. Stoner was acting as a lawyer" and that "[t]he comments and questions of the lawyer are not evidence." Standby counsel asked the court to remind the jury that the responses from witnesses are the evidence. The court then instructed the jury:

> Members of the Jury, just as a reminder, that you determine what evidence is presented in the case by witnesses or the exhibits, that the statements by lawyers and arguments — during arguments or during the questioning, that's not evidence that you are to consider.

The trial court's curative instruction accurately addressed Stoner's objection. We presume juries follow instructions of the court. State v. Osman, 192 Wn. App. 355, 379, 366 P.3d 956 (2016). Because we conclude that the

prosecutor did not comment on Stoner's constitutional right to represent himself, no additional instruction was necessary.

Ineffective Assistance of Counsel

Stoner argues that his trial attorney was ineffective for failing to object to the adequacy of the trial court's curative instruction.

To prove ineffective assistance of counsel, an appellant must prove both deficient performance and resulting prejudice. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Because we conclude that the prosecutor did not improperly comment on Stoner's exercise of his constitutional rights and that the court's curative instruction adequately addressed counsel's objection at trial, Stoner fails to show that his counsel's performance was deficient.

We affirm the convictions for third degree child molestation of J.B. and communication with minor E.F. for immoral purposes.

Brennan, J.

WE CONCUR:

Mann, C.J.

NIELSEN KOCH P.L.L.C.

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