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Supreme Court No. (to be set)
Court of Appeals No. 56351-7-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington, Respondent
v.
Joshua Lee McCabe, Appellant

Clark County Superior Court

Cause No. 19-1-02022-9

The Honorable Judge Gregory Gonzales

PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

Joshua McCabe's attorney failed to subject the State's case to meaningful adversarial testing. He allowed the trial to go forward even though his client kept falling asleep and may have been intoxicated. He didn't give an opening statement, didn't conduct meaningful cross-examination, didn't object to inadmissible evidence that prejudiced his client, didn't notice when the State failed to present evidence on an essential element of bail jumping, and didn't object to prosecutorial misconduct. When the prosecutor called his own officemates to testify, counsel raised no objections.

At sentencing, counsel initially appeared by phone while attending another calendar and declined an opportunity to consult with his client. He proposed two sentencing alternatives that Mr. McCabe was ineligible for. He didn't notice that his client was sentenced with an incorrect offender score that increased his standard range. He made no meaningful argument in favor of his sentencing recommendation.

For all these reasons, Mr. McCabe did not have "the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

In addition, the prosecutor committed prejudicial, flagrant and ill-intentioned misconduct. He misstated the burden of proof, telling jurors conviction was required if they merely believed the complaining witness, implying that acquittal required jurors to disbelieve her. He attempted to bolster her credibility with "facts" not in evidence, asserting that "[t]rauma affects memory," and that "memories of trauma are… not static." RP 218, 243.

Mr. McCabe's sex offense convictions must be reversed. The case must be remanded for a new trial.

DECISION BELOW AND ISSUES PRESENTED

Petitioner Joshua McCabe asks the Court to review the Court of Appeals' Opinion entered January 30, 3023.[1] This case presents two issues:

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[1] Attached, cited as OP.

1. Did defense counsel fail to subject the State's case to meaningful adversarial testing?

2. Did the prosecutor commit prejudicial misconduct by arguing facts not in evidence and misstating the burden of proof?

STATEMENT OF THE CASE

Joshua McCabe had a drinking problem. RP 106, 297, 298. His daughter S.M. wanted him to stop. RP 106, 269-270. When she was in high school, S.M. told the school counselor that her father had touched her while she slept years before. RP 146. She had no idea that it would lead to criminal charges, and she maintained that what she wanted for her father was help with his drinking, and not prison or other criminal penalties. RP 147, 269-270, 301.

Mr. McCabe never denied his a serious drinking problem. RP 297. In fact, after trial, Mr. McCabe's attorney David Kurtz expressed his belief that his client was so intoxicated during trial that he couldn't remember the proceeding. RP 285-286.

The charges were two counts of first degree child molestation, one count of second degree child molestation, and one count of incest. CP 1-2. A count of bail jumping was later added.[2] CP 2.

The case went to trial. Following a break after jury selection, defense counsel told the court that he was "okay with us talking without [Mr. McCabe] present," and that he'd "fill him in when he gets up here." RP 28. He asserted that Mr. McCabe "doesn't seem to care" about being present. RP 28.

After the State gave its opening statement, Kurtz reserved opening. RP 44. He did not later present one. RP 173-214.

The State offered evidence that S.M. told multiple people about the offense under the "fact of the complaint" doctrine. RP 10-11. The court admitted the evidence, even though S.M.'s statements were made years after the alleged offenses. RP 52, 64-65, 95, 128-129, 134, 137, 143-145, 148-150, 154, 162, 171.

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[2] The Court of Appeals reversed the bail jumping conviction for insufficient evidence. OP 24.

Defense counsel acquiesced to the admission of this evidence. RP 11.

The State's first called the investigating officer, who claimed that delayed disclosures of abuse are common, and that S.M. "disclosed abuse" at a forensic interview. RP 48, 52. The interview took place five years after the most recent alleged incident. RP 51, 137. Brief cross examination only addressed the officer's failure to go to the location where the claimed abuse occurred. RP 56-57.

Next up was the forensic interviewer, who also told the jury that children often delayed disclosures and that S.M. "disclosed abuse" five years after the last alleged offense. RP 62-65, 137. Kurtz did not cross examine this witness. RP 66.

A friend of S.M. testified that S.M. had "disclosed abuse." RP 93-95. S.M.'s brother testified that S.M. had "disclosed abuse," five years later. RP 149, 171. Kurtz did not cross examine either witness. RP 95, 172.

S.M.'s mother testified that her daughter had "disclosed abuse" to her about two years after the last alleged incident. RP 143-144, 148, 154, 162. She said she took no action because Mr. McCabe was in alcohol treatment. RP 162. Kurtz did not cross examine this witness. RP 162. The girlfriend of S.M.'s mother also testified, explaining that the family took no action because the event was years earlier, and they weren't sure what had happened. RP 164-166.

S.M. testified that twice when she was in third grade, her father had touched her bottom as she slept. RP 128-131. She said that he touched her once again in 6th grade. RP 137-140. She said she told her mother in 8th grade, and then later told her high school counselor. RP 144-147, 150. S.M. did not understand that telling the school counselor might result in action taken against her father, she just wanted him to stop drinking. RP 147, 154-155.

Two prosecutors provided testimony about the bail jumping charge, without any objection. RP 80-92. Even with

attorney witnesses, the State failed to offer any evidence on the essential element of having been released by court order or admitted to bail. RP 80-92. Kurtz did not point this out to the court at any point.

During his closing argument, the prosecutor told the jury that "[t]rauma affects memory," and that "memories of trauma are… not static." RP 218, 243. Even though no witness had testified to this, Kurtz did not object. RP 218, 243.

The prosecutor highlighted the defense's failure to put on any kind of case: "There's no other evidence, no other testimony anyone else that could have done this but the defendant." RP 220. He told jurors "If you believe [S.M.], the defendant is guilty." RP 224. He went on to say "And does [S.M.] have any motive to lie and make and exaggerate, no [sic]. None whatsoever." RP 225. He reminded the jury of the

number of times that S.M. had "disclosed abuse", telling them that her statements had been consistent.[3] RP 227.

Kurtz urged the jury to consider that if a person is a sex offender, that person would commit many more than three acts for sexual gratification. RP 230-237. The prosecutor responded in rebuttal that there could be many more instances of molestation. RP 240.

The jury acquitted Mr. McCabe of one count of child molestation (Count II) but convicted on the other counts. RP 248-258; CP 28-32.

After trial concluded, counsel told the court he thought that Mr. McCabe had been intoxicated during the proceedings. RP 286. He also told the judge, for the first time, that Mr. McCabe had been asleep every day of the trial. RP 286.

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[3] Despite the fact that none of her statements to others, including those made to the forensic interviewer, were offered or admitted in trial. RP 46-172.

Even though Mr. McCabe had been convicted of multiple sex offenses, his attorney asked the court to evaluate him for a drug offender sentencing alternative. RP 263. Upon being told that was a legal impossibility, he asked for a special sex offender sentencing evaluation. RP 264. Kurtz said he had told his client that he had the right to request a SSOSA evaluation. RP 264. But the prosecutor pointed out that the sentencing range rendered Mr. McCabe ineligible for SSOSA. RP 265.

The sentencing judge asked Kurtz if he wanted to "have a sit down" to talk to his client about sentencing "at some point." RP 265. Kurtz replied that no, he wished to go forward with sentencing. RP 265.

Kurtz was not in the courtroom for the sentencing hearing, but instead appeared by phone. RP 272. When it came time to present the defense argument, the audio was of such poor quality that he was unintelligible. RP 272-273, 280.

When the judge interjected that Kurtz's argument could not be understood, Kurtz said that he was appearing in a

different courtroom on another docket, trying "to do both at the same time." RP 280. The judge indicated that Kurtz should expect to appear in person in court for the sentencing hearing. Kurtz again asked to proceed by phone, which the court refused. RP 281-283.

At the sentencing hearing, the court doubled the points from a prior assault to reach an offender score of 9 on Counts I, III, and IV. RP 266; CP 39, 55. Kurtz did not point out that this was an error.[4] RP 263-307. His very brief sentencing recommendation reminded the court that Mr. McCabe maintained his innocence. RP 272-273, 296.

S.M. told the court that she loved her father, she did not want a no-contact order or prison for him, but that she wanted him to get help with his drinking. RP 269-270. On Count I, the court gave Mr. McCabe a sentence of 149 months with a life

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[4] The Court of Appeals remanded the case for a new sentencing hearing. OP 24.

term of community custody.[5] CP 40-41. He told Mr. McCabe that his attorney had done an "admirable job." RP 301.

Mr. McCabe timely appealed. In a part-published opinion, the Court of Appeals reversed the bail jumping conviction and remanded the other charges for resentencing.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. MR. MCCABE WAS CONSTRUCTIVELY DENIED THE ASSISTANCE OF COUNSEL UNDER THE *CRONIC* STANDARD.

Mr. McCabe's attorney did not subject the State's case to meaningful adversarial testing. As a result, Mr. McCabe was denied the assistance of counsel. His convictions must be reversed, and the case remanded for a new trial.

Defense counsel allowed the trial to proceed even though his client slept through most of it, possibly intoxicated. Counsel didn't make an opening statement. He didn't object to

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[5] Mr. McCabe received concurrent sentences on the other convictions. CP 40-41.

inadmissible and prejudicial evidence. He didn't conduct meaningful cross-examination. He didn't object to prosecutorial misconduct in closing. He didn't notice the complete absence of any proof on one element of bail jumping.

He sought to attend sentencing by phone while simultaneously appearing on another calendar. He declined an opportunity to meet with his client. He didn't notice an error in Mr. McCabe's offender score. He proposed unavailable sentencing options. He made no meaningful argument in favor of his sentencing recommendation.

A. A criminal defense attorney must subject the prosecution's case to meaningful adversarial testing.

The Sixth Amendment right to the assistance of counsel includes "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). A failure to subject the State's case to such testing "makes the adversary process itself presumptively

unreliable." *Cronic*, 466 U.S. at 659. When the accused is constructively denied the assistance of counsel, reversal is required even absent a showing of prejudice. *Cronic*, 466 U.S. at 659; *State v. Chavez*, 162 Wn.App. 431, 439, 257 P.3d 1114 (2011).

Here, Mr. McCabe was constructively denied the assistance of counsel. Counsel's multiple failures are not mere instances of ineffectiveness, instead the State's case was not subjected to meaningful adversarial testing.

B. Throughout the proceedings, defense counsel did not meaningfully advocate for his client.

Mr. McCabe's participation in his own trial. After the verdict, attorney Kurtz announced that Mr. McCabe had been "falling asleep during, pretty much all three days" of trial.[6] RP 286. He raised the possibility that his client may have been "so intoxicated at the time of trial that he doesn't remember it." RP

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[6] Kurtz suggested that the judge was aware of this. RP 286.

286. Counsel should have addressed these issues earlier in the proceedings. As it was, Mr. McCabe was effectively absent from much of his own trial.

Inadmissible evidence. Kurtz acquiesced in the introduction of prejudicial testimony that was inadmissible under the "fact of the complaint" doctrine. *See State v. Martinez*, 196 Wn.2d 605, 614, 476 P.3d 189 (2020).

That doctrine permits testimony for the limited purpose of showing that a victim of abuse timely complained to someone, even absent a report to law enforcement. *State v. Ferguson*, 100 Wn.2d 131, 135–36, 667 P.2d 68 (1983), *abrogated on other grounds by State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022); *see also State v. Goebel*, 40 Wn.2d 18, 25, 240 P.2d 251 (1952), *overruled on other grounds by State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995).

But the complaint here was not timely. Complaint made a year after the offense is untimely and hence inadmissible. *State v. Chenoweth*, 188 Wn.App. 521, 532-533, 354 P.3d 13 (2015).

Complaints made the same day as the offense,[7] the day after the offense,[8] or "while [abuse] was ongoing" are timely. *Martinez*, 196 Wn.2d at 614.

As in *Chenoweth,* S.M.'s complaints were untimely. She told her friend and her mother approximately two years after the last incident, others were told 5 years later. RP 52, 64-65, 95, 128-129, 134, 137, 143, 144, 145, 148-150, 154, 162, 171.

Although S.M.'s statements were made two to five years after the alleged abuse, Kurtz did not object to their admission under the "fact of the complaint" doctrine. RP 11. Nor did he seek a limiting instruction. RP 11. Instead, the evidence was admitted without limitation, allowing the jury to consider it as substantive evidence of Mr. McCabe's guilt. *See State v. Mohamed*, 186 Wn.2d 235, 244, 375 P.3d 1068 (2016); *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

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[7] *Goebel*, 40 Wn.2d at 20, 24.

[8] *Ferguson*, 100 Wn.2d at 139; *see also State v. Alexander*, 64 Wn.App. 147, 149, 822 P.2d 1250 (1992) (disclosure came four days after the last incident of abuse).

Meaningful cross-examination. At trial, the State called nine witnesses. RP 46-172. Kurtz did not conduct *any* cross-examination of five of these witnesses. RP 66, 92, 95, 162, 172. He did not conduct a meaningful cross-examination of the remaining witnesses, apart from his brief and tepid questioning of S.M. herself. RP 56-57, 86, 106-108, 148, 165-166. For example, Kurtz's only question during examination of a witness for the bail jumping charge was "what does mandatory mean?" RP 86.

The role of defense counsel is "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. Cross-examination has a "central role in ascertaining the truth." *State v. Rohrich*, 132 Wn.2d 472, 478, 939 P.2d 697 (1997). Indeed, cross-examination "has been characterized as the greatest legal engine ever invented for the discovery of truth." *State v. Smith*, 148 Wn.2d 122, 142, 59 P.3d 74 (2002) (Sanders, J., concurring) (internal quotation marks and citations omitted).

Kurtz's failure to perform this central role left the State's evidence unchallenged.

Prosecutorial misconduct. Kurtz did not object when the prosecutor misstated the law, diminished the burden of proof, and argued "facts" not in evidence, as outlined elsewhere in this brief. Nor did counsel raise any objection when two prosecuting attorneys provided material evidence establishing elements of bail jumping.

Opening statement. Mr. Kurtz never made an opening statement, evincing his lack of interest in his client's case.

Insufficiency of bail jumping evidence. The State did not present any evidence that Mr. McCabe was "released by court order or admitted to bail," an essential element of bail jumping. Former RCW 9A.76.170(1) (2019). Defense counsel did not notice this failure or raise the issue at any time. Although that conviction has been reversed, this failure demonstrates Kurtz's failure to assist Mr. McCabe at trial.

Sentencing. Kurtz attempted to make his sentencing argument by telephone while simultaneously appearing on another docket. RP 272-273, 279-280. He initially declined the opportunity to consult with his client. RP 265. He did not notice an error in the calculation of Mr. McCabe's offender score.[9] RP 263-307; CP 39, 54-55. He proposed unavailable sentencing options (DOSA and SSOSA). RP 263-265, 296. He gave no support for his sentencing argument other than to briefly say that Mr. McCabe maintained his innocence. RP 272, 296.

C. Counsel's lack of engagement left Mr. McCabe without the assistance of counsel.

Mr. Kurtz showed a complete lack of dedication to Mr. McCabe's case. He allowed the case to go forward while his client slept, failed to conduct any meaningful cross-examination, allowed prejudicial evidence that should have

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[9] The court had improperly doubled a prior conviction for assault. CP 54-55; *see* RCW 9.94A.525.

been excluded, didn't seem to notice that the State had failed to prove an element, as well as many other deficiencies.

At sentencing, Kurtz planned to 'phone it in' while he was appearing on another calendar. He initially declined an opportunity to meet with his client. He proposed two sentencing alternatives that Mr. McCabe was ineligible for. He didn't notice that his client was sentenced with a higher offender score and standard range than was correct. He made no meaningful argument in favor of his sentencing recommendation.

Taken together, these failures show that counsel did not provide Mr. McCabe "the Assistance of Counsel for his defence." U.S. Const. Amend. VI. Mr. McCabe's convictions must be reversed, and the case remanded for a new trial.

The Court of Appeals erroneously suggests that *Cronic* does not apply. According to the Court of Appeals, a *Cronic* claim is only appropriate where counsel "ha[s] been absent or *entirely* nonparticipatory." OP 11. To support this position, the

court lists a number of opinions denying a defendant's *Cronic* claim. OP 6-10.

But there are at least as many cases where counsel participated in the proceedings but nonetheless constructively denied the defendant the assistance of counsel under *Cronic.* *See, e.g., Edwards v. Comm'r of Correction*, 183 Conn. App. 838, 842, 194 A.3d 329, 331–32 (2018) (Performance "so ineffective that he failed to subject the state's case against [defendant] to any meaningful adversarial testing, and thus that prejudice should be presumed under *Cronic*); *Urquhart v. State*, 203 A.3d 719, 732 (Del. 2019) ("defendant should not have to point to any specific event of prejudice and disprove the State's contention that trial counsel was able to 'wing it' enough at trial to satisfy the Sixth Amendment"); *Phillips v. White*, 851 F.3d 567, 581 (6th Cir. 2017) (attorney "constructively deprived [defendant] of counsel throughout sentencing by neglecting to make an opening statement; failing to investigate or present evidence, mitigating or otherwise; and offering a potentially

off-putting and self-deprecating remark”); *Patrasso v. Nelson*, 121 F.3d 297, 305 (7th Cir. 1997) (Performance at sentencing “was constitutionally substandard, poor enough to impute prejudice to [defendant’s] defense and render the result of the sentencing unfair and unreliable”); *People v. Bonslater*, 261 Ill. App. 3d 432, 441, 633 N.E.2d 830, 836 (Ill. App. Ct. 1994) (“[t]he only way to have subjected the prosecution's case to ‘meaningful adversarial testing’ would have been to challenge [the officer’s] testimony and there is absolutely no valid trial strategy which could explain defense counsel's failure to do so.”)

As these cases show, an attorney’s participation in trial is not a bar to a denial-of-counsel claim under *Cronic.* In *Edwards,* for example, the defense attorney participated in trial, but chose not to cross-examine most of the State’s witnesses. *Edwards*, 183 Conn. App. at 845. Counsel also did question the lead detective on a minor issue, moved for a directed verdict, and made an argument in closing that that the victim and other

witnesses “had a motive and had a bias to testify against [him].” *Id,* at 846-848.

Although the defense attorney provided some assistance at trial, he “failed to subject the state's case… to any meaningful adversarial testing, and, pursuant to *Cronic*, prejudice… must therefore be presumed.” *Id.,* at 851. The court reversed the defendant’s conviction. *Id.*

Here, as in *Edwards,* Mr. McCabe was denied the assistance of counsel under *Cronic.* The applicable standard under *Cronic* is whether the State’s case was subjected to *meaningful* adversarial testing. It is not necessary to show that counsel was completely absent from court or entirely non-participatory.

Instead, there is a threshold at which poor performance shifts from mere ineffectiveness (requiring a showing of prejudice) to a more substantial failure—an absence of meaningful adversarial testing— where prejudice is presumed.

Here defense counsel was more than ineffective. His failures meant that the State's case was not subjected to meaningful adversarial testing. Mr. McCabe was constructively denied the effective assistance of counsel. *Id.*

D. This court should grant review under RAP 13.4(b).

The Supreme Court will grant review if the appellate court's decision involves "a significant question of law under the Constitution" or if "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(3) and (4).

Mr. McCabe's case presents a significant question under the Sixth Amendment. This court clarify that a denial-of-counsel claim under *Cronic* need not rest on the absence or complete nonparticipation of defense counsel.

This is also an issue of substantial public interest that should be determined by the Supreme Court. As the Court of Appeals points out, "[t]he Washington Supreme Court has discussed *Cronic* on only one occasion." OP 8.

II. THE PROSECUTOR'S FLAGRANT MISCONDUCT REQUIRES REVERSAL.

Misstating the burden of proof. At trial, the jury's role is to determine if the State has met its burden. Furthermore, "[t]his task is independent of whether the jurors think any witnesses are lying or telling the truth." *Crossguns*, 199 Wn.2d at 297.

Here, the prosecutor told jurors "If you believe [S.M.], the defendant is guilty." RP 224. This was misconduct. Jurors were required to acquit if they had a reasonable doubt, even if they believed S.M. These arguments strongly insinuated that acquittal required the jury to disbelieve S.M. The prosecutor compounded the problem by asking

> And does [S.M.] have any motive to lie and make [sic] and exaggerate [?]. None whatsoever.
> RP 225

The prosecutor did not tie any of these arguments to the burden of proof or the reasonable doubt standard. Thus, according to the prosecutor, simply believing S.M. required

conviction; only a "motive to lie and make and exaggerate [sic]" could lead to acquittal. RP 224-225.

But jurors were "*required* to acquit *unless* [they] had an abiding conviction in the truth of [S.M.'s] testimony." *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) (emphasis in original). As in *Fleming*, the distortion of the burden of proof was "a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial." *Id.,* at 214.

This case is unlike other decisions addressing similar arguments about believing an alleged victim. Here, the argument was not tied to the burden of proof or reasonable doubt. This distinguishes cases such as *State v. Clark*, 17 Wn.App.2d 794, 487 P.3d 549 (2021), *review denied,* 198 Wn.2d 1033, 501 P.3d 132 (2022); *State v. Larios-Lopez*, 156 Wn.App. 257, 233 P.3d 899 (2010); *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011).

In each of these other cases, the prosecutors tied their arguments to the reasonable doubt standard and the burden of

proof. In *Clark,* the prosecutor told jurors "if you believe [the victim's] testimony *beyond a reasonable doubt then you have enough evidence to convict.*" *Clark*, 17 Wn.App.2d at 804 (emphasis added).

In *Larios-Lopez,* the State's attorney argued that "if you believe this officer is telling the truth, *and you believe him to an abiding belief, I have proven to you beyond a reasonable doubt* that the defendant is guilty." *Larios-Lopez*, 156 Wn.App. at 259 (emphasis added).

In *Thorgerson,* the prosecutor argued "if you believe her, you must find him guilty *unless there is a reason to doubt her based on the evidence in the case.*" *Thorgerson*, 172 Wn.2d 454 (emphasis added).

The arguments in Mr. McCabe's case diverge from those addressed in *Clark, Larios-Lopez,* and *Thorgerson.* Here, no connection was drawn with the State's burden to prove the elements beyond a reasonable doubt or the necessity for an abiding belief.

Instead, the State's attorney suggested that *any* level of belief *required* conviction, whether or not jurors believed S.M.'s testimony beyond a reasonable doubt. RP 224. Combined with the argument that S.M. had no motive to lie, the prosecutor's argument here was equivalent to that in *Fleming*.

The only conclusion to be drawn from this argument was that any quantum of belief in the truth of S.M.'s account required conviction, and that acquittal could only rest on a determination that S.M. lied. RP 224-225.

Facts not in evidence. The effect of these misstatements of the burden of proof was magnified by another improper argument. During her testimony, S.M. was unable to remember some facts about her allegations. RP 101-152. To explain this, the prosecutor told jurors that "[t]rauma affects memory," and

that "memories of trauma are… not static." RP 218, 243. No witness had testified about the effects of trauma on memory.[10]

A prosecutor "may not make statements that are unsupported by the evidence and prejudice the defendant." *State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005); *see also Matter of Sandoval*, 189 Wn.2d 811, 832-833, 408 P.3d 675 (2018). A prosecutor "commits reversible misconduct by urging the jury to decide a case based on evidence outside the record." *State v. Pierce*, 169 Wn.App. 533, 553, 280 P.3d 1158 (2012).

According to the Court of Appeals, the prosecutor's remarks "were more akin to an inference than a fact." OP 19. Under this reading, the prosecutor was inferring "that S.M. had experienced a traumatic event and that it had an effect on her." OP 20.

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[10] One witness testified about trauma's impact on a child's "demeanor or reactions during forensic interviews." RP 62. Nothing was said about the effect of trauma on memory. RP 62.

This is incorrect. The prosecutor made more specific statements of fact regarding the relationship between trauma and memory: "[t]rauma affects memory," and "memories of trauma are… not static." RP 218, 243. These statements were not inferences from testimony, and they did not merely suggest that trauma affected S.M. in some general way. OP 20.

The misconduct here is akin to the misconduct in *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008). There, the prosecutor argued "that children assess very carefully who they will disclose sexual abuse to and that long delays are common because people frequently repress sexual abuse." *Id.,* at 29. The Supreme Court found this to be misconduct,[11] pointing out that "[n]o evidence supporting that argument had been offered to the jury." *Id.*

Contrary to the Court of Appeals' assertion, the misconduct here was unlike that in *Matter of Phelps*, 190

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[11] However, the court affirmed, finding that the appellant had not established prejudice.

Wn.2d 155, 170, 410 P.3d 1142 (2018). OP 19 (citing *Phelps*). In *Phelps*, the Supreme Court held that "the concept of grooming, as used in this case, is within the common knowledge of jurors and the State was not required to present expert testimony." *Id.*

But the Opinion did not suggest that the statements made by the prosecutor are within the common knowledge of jurors. Any relationship between trauma and memory is necessarily complex. The prosecutor overstepped by inserting unsupported "facts" about that relationship.

If the State wished to argue that "[t]rauma affects memory," and that "memories of trauma are… not static," it was required to present expert testimony. RP 218, 243. *Warren*, 165 Wn.2d at 29. Here, as in *Warren,* the argument was not supported by the evidence.

Prejudice. A conviction must be reversed where the cumulative effect of a prosecutor's misconduct prejudices the accused person. *State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d

268 (2015). In the absence of an objection, reversal is required when prejudicial misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available at the time of the misconduct. *Glasmann*, 175 Wn.2d at 707. Courts focus on "whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

Here, the prosecutor violated established professional standards and caselaw. The State's attorney strongly insinuated that acquittal would require them to disbelieve S.M.'s account, and argued extrinsic "facts" purporting to explain problems in S.M.'s account. The cumulative effect of the misconduct could not have been cured by an instruction. *See State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010). The misconduct was especially prejudicial because it came during the prosecutor's

closing argument. *Glasmann*, 175 Wn.2d at 706. The misstatement regarding the burden of proof undermined a foundational principle of the criminal justice system.

Both arguments related directly to the primary issue in the case: S.M.'s credibility. By arguing that mere belief was sufficient, and that "facts" outside the record supported S.M.'s credibility, the prosecutor committed flagrant and ill-intentioned misconduct requiring reversal. *Id*.

Review under RAP 13.4(b). This is an issue of substantial public interest that should be reviewed by the Supreme Court. Appellate courts are frequently faced with prosecutorial misconduct claims under the flagrant and ill-intentioned standard. This court can provide clarity and guidance regarding misconduct in closing arguments.

CONCLUSION

Mr. McCabe was denied the assistance of counsel. Counsel's errors and lack of participation were so severe as to require a presumption of prejudice. In addition, the prosecuting

attorney committed flagrant and ill-intentioned misconduct. Mr. McCabe's convictions must be reversed, and the case remanded for a new trial.

CERTIFICATE OF COMPLIANCE

I certify that this document complies with RAP 18.17, and that the word count (excluding materials listed in RAP 18.17(b)) is 4993 words, as calculated by our word processing software.

Respectfully submitted February 16, 2023.

BACKLUND AND MISTRY

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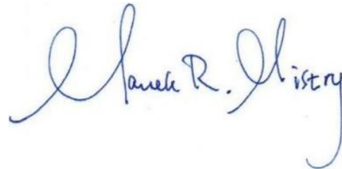

Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE

I certify that on today's date, I mailed a copy of this document to:

Joshua McCabe DOC# 385462
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia Washington on February 16, 2023.

____
Jodi R. Backlund, No. 22917
Attorney for the Appellant

FILED
1/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSHUA LEE MCCABE, Appellant.	DIVISION ONE No. 84635-3-I OPINION PUBLISHED IN PART

DWYER, J. — Joshua McCabe appeals from the judgment entered on a jury's verdict finding him guilty of one count of child molestation in the first degree, one count of child molestation in the second degree, one count of incest in the second degree, and one count of bail jumping. The State concedes that McCabe's bail jumping conviction was not supported by sufficient evidence and that multiple errors require McCabe to be resentenced. We accept the State's concessions and remand for dismissal of McCabe's conviction for bail jumping. We affirm the remainder of McCabe's convictions and also remand for resentencing.

I

When McCabe's daughter S.M. was in high school, she reported to a school guidance counselor that her father had, on three separate occasions, inappropriately touched her genital area while she was attempting to sleep. After a forensic interview was conducted with S.M., the State charged McCabe with

two counts of child molestation in the first degree, one count of child molestation in the second degree, and one count of incest. When McCabe failed to appear for a pretrial hearing, the State amended the information to add a charge of bail jumping.

The jury acquitted McCabe on one count of child molestation in the first degree, but convicted on all other charges. McCabe appeals.

II

A

McCabe first asserts that he was constructively deprived of his constitutional right to counsel, in violation of his right to counsel under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), due to an alleged exceptionally poor performance by his defense attorney. However, he specifically disclaims a claim of ineffective assistance of counsel within the ambit of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Applying the legal standards applicable to a deprivation of counsel claim—as opposed to an ineffective assistance of counsel claim—we conclude that McCabe does not demonstrate an entitlement to appellate relief.

B

On May 14, 1984, the United States Supreme Court filed its opinion in Strickland. As noted by the Court, the right to counsel is included in the Sixth Amendment as a means of ensuring that the accused receives his fundamental right to a fair trial. Strickland, 466 U.S. at 684. "[A] fair trial," the Court stated, "is

one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland, 466 U.S. at 685. The right to counsel is a crucial part of ensuring a fair trial, because the knowledge and skill of counsel allows the accused to challenge the prosecution's case on an even footing. Strickland, 466 U.S. at 685. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685. Accordingly, the Court has recognized that the right to counsel encompassed in the Sixth Amendment is the right to effective assistance of counsel. Strickland, 466 U.S. at 686.

In Strickland, David Washington, a criminal defendant sentenced to death in Florida for three counts of murder, filed a habeas petition alleging ineffective assistance of counsel at his sentencing hearing. 466 U.S. at 678. Until that point, the Supreme Court had not had the occasion to address a claim of "'actual ineffectiveness'" of counsel that did not involve a conflict of interest or interference by the government. Strickland, 466 U.S. at 686.

The Court first recognized that any claim of actual ineffectiveness must be guided by the purpose of the right to counsel—to ensure a fair trial. Strickland, 466 U.S. at 686. With this purpose in mind, the Supreme Court announced the following test applicable to claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

> defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

On the same day that it filed its opinion in Strickland, the United States Supreme Court also issued its opinion in Cronic. There, the Court of Appeals had held that the defendant had been completely denied counsel because the attorney appointed for him was inexperienced and lacked sufficient time to prepare for trial and, accordingly, reversal was required regardless of the quality of the defense counsel's actual performance. Cronic, 466 U.S. at 652-53. The Supreme Court in Cronic overturned the Court of Appeals' decision.

In reversing the appellate court decision, the Supreme Court noted, consistent with its opinion in Strickland, that the Sixth Amendment is not implicated absent an effect of the challenged conduct on the reliability of the trial process. Cronic, 466 U.S. at 658; see also Strickland, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). Ordinarily, the burden to prove an effect on the reliability of the trial process rests with the defendant. Cronic, 466 U.S. at 658; Strickland, 466 U.S. at 687. However, the Court recognized that there exists a limited set of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. Only when one of these circumstances applies will prejudice be presumed and

the defendant relieved of his burden under Strickland. Cronic, 466 U.S. at 658.

Although it did not purport to create an exclusive list of these circumstances, the Supreme Court did discuss three situations in which a presumption of prejudice is warranted. The first of these situations is when the defendant has been completely denied counsel at a critical stage of the proceedings. The Supreme Court listed multiple examples of cases that fell under this exception, including Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), wherein the trial court prohibited the defendant from speaking to his counsel overnight during the trial, and Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961), in which the defendant did not have a private attorney nor was an attorney appointed to represent him at his arraignment. Cronic, 466 U.S. at 659 n.25.

The second situation discussed in Cronic arises when the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is minimal. Cronic, 466 U.S. at 659-60. As an example of this situation, the Supreme Court noted Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), wherein the trial court first appointed the entire Alabama bar as counsel for eight defendants charged with a capital offense, then, on the day of trial (only six days after arraignment), instead appointed an attorney from Tennessee who was not licensed to practice law in Alabama. Cronic, 466 U.S. at 660.

The third and final situation discussed in Cronic arises when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

Cronic, 466 U.S. at 659. If the defendant cannot establish that his case is sufficiently similar to one of these three situations, then the claim of denial of assistance of counsel is subject to the standard announced in Strickland, Cronic's companion case, and a showing of actual prejudice is required.

C

The Supreme Court elaborated on what it means for counsel to "'entirely fail[] to subject the prosecution's case to meaningful adversarial testing'" in Bell v. Cone, 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (quoting Cronic, 466 U.S. at 696). There, the defendant argued that he had been denied his Sixth Amendment right to counsel at his death penalty sentencing hearing because his attorney did not present mitigating evidence and waived closing argument. Bell, 535 U.S. at 692. The federal circuit court determined that because Bell's counsel had not asked for mercy following the prosecution's closing argument, the defense attorney had failed to subject the prosecution's call for the death penalty to "meaningful adversarial testing" and, accordingly, ruled that no showing of actual prejudice was required to establish a violation of the right to counsel. See Bell, 535 U.S. at 693 (citing Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001)). The Supreme Court reversed the decision of the Court of Appeals. Bell, 535 U.S. at 693.

In so doing, the Supreme Court clarified that "[w]hen we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure *must be complete.*" Bell, 535 U.S. at 696-97 (emphasis added). When assessing whether a

complete failure has occurred, the Court indicated that the specific proceeding must be viewed "as a whole," not by assessing any claimed ineffectiveness "at specific points." Bell, 535 U.S. at 697. With respect to the case at hand, the Supreme Court stated that "[t]he aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." Bell, 535 U.S. at 697-98.

As Bell indicates, the cited exception is a narrow one and cases in which there is a complete failure to subject the prosecution's case to meaningful adversarial testing will be few and far between. Indeed, cases in which this exception has been properly applied are limited to those in which the defendant's counsel was so uninvolved that the attorney may as well have not been present in court at all. See Lewis v. Zatecky, 993 F.3d 994, 1006 (7th Cir. 2021), cert. denied sub nom. Reagle v. Lewis, 142 S. Ct. 897, 211 L. Ed. 2d 605 (2022) (counsel's only comment during sentencing hearing was "'Judge, I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add.'"); Burdine v. Johnson, 262 F.3d 336, 338-39 (5th Cir. 2001) (counsel slept through trial); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (counsel was silent through entire trial); Martin v. Rose, 744 F.2d 1245, 1250 (6th Cir. 1984) (counsel refused to participate in trial).

On the other hand, federal courts have been consistent in holding that allegations of poor performance are subject to the Strickland analysis and actual

prejudice must be demonstrated in order for the defendant to obtain relief. See, e.g., Darden v. United States, 708 F.3d 1225, 1230 (11th Cir. 2013) (no presumption of prejudice when attorney conceded guilt on one charge and defended against others); McDowell v. Kingston, 497 F.3d 757, 763 (7th Cir. 2007) (counsel allowed client to testify in narrative form); United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (counsel conducted incomplete investigation, asked open-ended questions of witnesses, and was unfamiliar with federal rules); United States v. Thomas, 417 F.3d 1053, 1057 (9th Cir. 2005) (counsel conceded guilt on one charge while defending on others); United States v. Griffin, 324 F.3d 330, 363 (5th Cir. 2003) (counsel repeatedly deferred to counsel of co-defendant); Moss v. Hofbauer, 286 F.3d 851, 862 (6th Cir. 2002) (counsel did not conduct witness interviews, gave no opening statement, and conducted limited examination of State's witnesses). As one circuit court observed, "bad lawyering, regardless of *how* bad, does not support the presumption [of prejudice]; more is required." McInerney v. Puckett, 919 F.2d 350, 353 (5th Cir. 1990).

D

The Washington Supreme Court has discussed Cronic on only one occasion. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004). There, our Supreme Court rejected the petitioner's argument that the presumption of prejudice articulated in Cronic should apply to his 15 claims of ineffective assistance of counsel. Instead, the court held that "[a]bsent a complete denial of counsel or a breakdown in the adversarial process, Davis 'can

therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.'" Davis, 152 Wn.2d at 675 (quoting Cronic, 466 U.S. at 666). The court then proceeded to analyze the petitioner's claims of ineffective assistance of counsel under the Strickland standard.

Our Supreme Court has never upheld a claim of denial of assistance of counsel based on counsel's performance without a showing of prejudice. Only in rare cases have we done so. In State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996), we held that the defendant was denied the right to counsel when his attorney took the stand to testify against him.[1] Similarly, in State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783 (2008), we held that the right to counsel was denied and we would presume prejudice when the defendant demonstrates an actual conflict of interest that adversely affected counsel's performance.

The sole appellate decision which relied on Cronic to find a deprivation of counsel without requiring a showing of prejudice was State v. Chavez, 162 Wn. App. 431, 257 P.3d 1114 (2011). There, Division Three considered a claim that the defendant was deprived of the assistance of counsel because his attorney filed an Anders[2] brief in conjunction with the defendant's request to withdraw a guilty plea. Division Three held that counsel was denied because an Anders brief is not an appropriate filing in a trial court and the brief effectively conceded that the motion was frivolous. Chavez, 162 Wn. App. at 439-40. The opinion did

[1] Although we did not cite Cronic in our opinion in Harell, the facts of that case fall squarely within the circumstances in which the United States Supreme Court has held that because a conflict of interest was present, assistance of counsel is denied and prejudice is presumed.

[2] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

not address the issue of prejudice, instead remanding for further review of the defendant's motion to withdraw his guilty plea. Chavez, 162 Wn. App. at 440.

Judge Korsmo dissented. In his dissent, Judge Korsmo concluded that counsel's filing of an Anders brief did not constitute a "complete denial of counsel at a critical stage of the proceedings" under Cronic whereby prejudice could be presumed. Chavez, 162 Wn. App. at 445 (Korsmo, A.C.J., dissenting). This was so, Judge Korsmo stated, because counsel "did present the arguments to the court." Chavez, 162 Wn. App. at 445 (Korsmo, A.C.J., dissenting).

Although we believe the dissent in Chavez had the better of this exchange, the majority opinion can charitably be read to hold that an issue of fact existed by virtue of counsel's concession that the motion was meritless. Nonetheless, we decline to adopt the approach taken by Division Three.

E

We turn now to the specific arguments made in this case. McCabe asserts that he was constructively denied the assistance of counsel because his attorney failed to alert the court that McCabe was falling asleep during trial, did not object to inadmissible evidence, did not cross-examine many of the State's witnesses, did not make an opening statement, did not move for dismissal of the bail jumping charge, was inattentive at sentencing, did not correct a miscalculated offender score, and argued for sentencing alternatives for which McCabe was not eligible.

All of McCabe's complaints concern his counsel's level of performance. Nevertheless, he specifically bases his claim on Cronic and affirmatively

disclaims a Strickland claim. However, allegations of poor performance, no matter how poor, cannot form the basis of a Cronic claim. McInerney, 919 F.2d at 353. For such a claim to be presented, counsel must have been absent or entirely nonparticipatory. But McCabe makes no such allegation. On the contrary, McCabe's counsel clearly participated in the trial, even if not in a manner satisfactory to McCabe. Accordingly, McCabe's assertions of underperformance and "lack of dedication" are not cognizable under Cronic.

McCabe discusses his counsel's performance in a manner that is typical of a Strickland ineffective assistance of counsel claim. However, because he affirmatively disclaims advancing such a claim, we will not treat his claim as such.

McCabe fails to demonstrate that he was deprived of the assistance of counsel within the meaning of Cronic. His claim fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III

At trial, the State primarily relied on the testimony of S.M. S.M. testified that when she was in third grade, she woke up feeling a hand on her buttocks inside of her pants. After the touching stopped, S.M. waited, then opened her eyes to see McCabe getting up from underneath the raised footrest of the recliner on which she had been sleeping. S.M. testified that the same thing

happened a second time while she was in third grade. However, she could not remember as many of the details. She did not see McCabe during the second incident.

S.M. further testified that when she was in sixth grade, she was asleep on her grandparents' couch when she awoke to a "tickling feeling" under her underwear on the skin of her vagina. S.M. saw McCabe's head peeking up from the back of the couch. When S.M. looked at him, McCabe "ducked down" and then "went into the kitchen."

S.M. told several people about these incidents, including her best friend Kambria, S.M.'s mother Samantha, her "mom's girlfriend" Maxine Buhler, and S.M.'s grandparents. In 2019, when S.M. was in high school, she disclosed the three incidents to her school guidance counselor. S.M.'s guidance counselor made a report to law enforcement, which then scheduled a forensic interview. Deedee Pegler, a forensic interviewer with the Arthur D. Curtis Children's Justice Center, conducted the interview with Vancouver Police Department Officer Darren Oceguera observing.

Kambria, Samantha, Pegler, Oceguera, and S.M.'s brother Jeremy all testified at trial that S.M. had told them that she had been abused. None of the witnesses were questioned about what precisely S.M. had said to them or about other specifics of the disclosures.

During her testimony, Pegler was questioned about her experience in conducting forensic interviews of children. Pegler testified that:

> So, different children process events in different ways. And some of those children, not all, have undergone traumatic events that they could process in different ways. So, so their reactions to what we're discussing are gonna be different.

Pegler also testified that delayed disclosures of abuse are common due to a wide variety of factors, including "loyalty to the offender," feelings of "shame, blame, [or] embarrassment," "developmental factors," not wanting the "positive aspects" of a relationship with the offending family member "to go away," and whether someone else had been in the room when the abuse was occurring.

During closing argument, the prosecutor informed the jury that "we as the State have the burden to prove to you each element of each crime charged beyond a reasonable doubt." After defining all of the elements of each of the charged sexual offenses, the prosecutor argued to the jury, "If you believe [S.M.], every single one of the elements in the sex crimes is met. If you believe [S.M.], the defendant is guilty of the first four counts." McCabe did not object to this argument.

The prosecutor admitted that S.M.'s memory of the incident giving rise to the second count of child molestation in the first degree was not as clear as her memory of other incidents. The prosecutor argued:

> Doesn't remember as many details and that's okay and that makes sense. Trauma affects memory and reactions. So, going through a traumatic event of your father touching you inappropriately, sexually is not something you remember every detail of.

McCabe did not object to this argument.

The prosecutor additionally addressed the fact that the charged incidents had occurred multiple years before S.M. had told her guidance counselor about

them. As part of this argument, the prosecutor stated the following:

> [S.M.] told her mom, her brother, her friend, her mom's partner, and the counselor. She's been consistent with everyone that she's been abused. But until this point, nothing has ever happened about it. And she did delay her disclosure. She did not tell right away.

The prosecutor then recounted the testimony of Oceguera and Pegler about why children commonly delay disclosing abuse. McCabe did not object to this testimony.

The jury found McCabe guilty of one count of child molestation in the first degree, one count of child molestation in the second degree, one count of incest, and one count of bail jumping. The jury found McCabe not guilty on the second count of child molestation in the first degree.

The trial court began McCabe's sentencing hearing on September 10, 2021.[3] At the hearing, the State asserted that McCabe had an offender score of 9, but did not present any evidence of McCabe's prior convictions. The trial court accepted the State's assertion. The trial court sentenced McCabe to a minimum of 149 months of confinement on count one (child molestation in the first degree), 116 months of confinement on count three (child molestation in the second degree), 60 months of confinement on count four (incest in the second degree), and 29 months on count five (bail jumping), all to be served concurrently.

As conditions of his community custody, the trial court ordered that McCabe "[m]ay not possess or access sexually explicit materials that are

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[3] Defense counsel sought to appear at sentencing by telephone. The sentencing hearing had to be continued due to defense counsel's poor telephone connection. The hearing was continued a second time in order for McCabe to undergo a competency evaluation.

intended for sexual gratification" and "[m]ay not enter into or frequent establishments or areas where minors congregate without being accompanied by a responsible adult approved by [Department of Corrections] and sex offender treatment provider to include, but not limited to: . . . parks."

IV

McCabe asserts that the prosecutor committed misconduct during closing argument and that this misconduct deprived him of a fair trial. The State counters that no misconduct occurred and, if it did, McCabe has failed to demonstrate any prejudice. The State has the better argument.

A defendant claiming prosecutorial misconduct has the burden to prove that the prosecutor's conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

When reviewing a claim of prosecutorial misconduct, we consider the prosecutor's statements and actions in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The prosecutor has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (citing State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d

1105 (1995)), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

McCabe asserts that the prosecutor committed misconduct in three different respects.[4] First, McCabe contends that the prosecutor engaged in misconduct by suggesting that the jury could only acquit if they believe the victim lied. Second, McCabe contends that the prosecutor engaged in misconduct by arguing facts that were not in evidence at trial. Third, McCabe contends that the prosecutor engaged in misconduct by attempting to bolster S.M.'s credibility through the improper use of prior consistent statements. We address each of these arguments in turn.

First, McCabe contends that the prosecutor committed misconduct by suggesting that the jurors could acquit only if they believe that the victim lied. During closing argument, the prosecutor made the following argument to the jury:

> If you believe [S.M.], every single one of the elements in the sex crimes is met. If you believe [S.M.], the defendant is guilty of the first four counts. So, how do we know [S.M.] is telling the truth? That comes down to credibility. Jury Instruction 1 talks about that. That you are the sole judges of credibility. You decide how much weight you put on the testimony and the evidence that you heard come out of that box. Consider someone's motive. [Their] reasons for testifying. What they have to gain or to lose. And [S.M.] has nothing to gain from this. Something she doesn't want to be a part of. Think about the details that she gave. Where it happened to her, what happened to her, in graphic detail. And think about her demeanor while testifying.
>
> . . . .

[4] A fourth claim of misconduct pertains to the introduction of evidence in support of the charge of bail jumping. Because we order that McCabe's bail jumping conviction be dismissed on other grounds, we do not consider this claim of error.

> And does [S.M.] have any motive to lie and make and exaggerate, no. None whatsoever. She tried to tell people what happened to her too.

McCabe interposed no objection to this argument.

McCabe asserts that this argument constituted flagrant and ill-intentioned misconduct, likening this circumstance to that in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). In Fleming, the prosecutor began his closing argument by stating:

> "Ladies and gentlemen of the jury, *for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree,* with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, *you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom."*

Fleming, 83 Wn. App. at 213. The prosecutor further argued that because there was no evidence the victim lied, the defendants must be guilty. Fleming, 83 Wn. App. at 214. We held that this constituted flagrant misconduct because it had been well-established in case law that a prosecutor cannot argue that the jury must find that the complaining witness was lying or mistaken in order to acquit. Fleming, 83 Wn. App. at 213.

This case is not like Fleming. Here, the prosecutor argued that if the jury believed S.M. to be telling the truth, then all of the elements of child molestation had been established. It does not follow that this statement would lead the jury to believe that they could acquit only if they believed S.M. had lied. When considered in the context of the entire closing argument, we cannot say that this single statement constituted misconduct. Unlike in Fleming, the prosecutor here

correctly informed the jurors of the law, repeatedly informing them that they could convict only if the State proved each element of each charge beyond a reasonable doubt.

Furthermore, in order to obtain the relief he seeks, McCabe must show not only that the prosecutor committed flagrant and ill-intentioned misconduct, but also that any prejudice from the misconduct could not have been cured by a jury instruction. Padilla, 69 Wn. App. at 300. McCabe presents no argument as to how he was prejudiced, let alone how any prejudice could not have been cured by a jury instruction. Here, the jury was correctly instructed that the State had the burden of proving each element of the charges beyond a reasonable doubt. The jury is presumed to have followed that instruction. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

Second, McCabe contends that the prosecutor engaged in misconduct by arguing facts that were not in evidence at trial. Specifically, McCabe avers that the prosecutor transgressed by stating "that's okay and that makes sense. Trauma affects memory and reactions."

The prosecutor's full statement was as follows:

> And then Count 2 is child molestation in the first degree as well. This is the other incident that happened to [S.M.] in third grade. It's the one where she described it happening almost the same, almost identically. Doesn't remember as many details and that's okay and that makes sense. Trauma affects memory and reactions. So, going through a traumatic event of your father touching you inappropriately, sexually is not something you remember every detail of.

The prosecutor later argued on rebuttal:

> And so, ladies and gentlemen, why is [S.M.] credible, again. This case comes down to [S.M.]'s credibility. Again, it's common sense. People don't give the same details or every single detail, every time they talk about something. It depends on who they're with, how comfortable they are and what questions you're asking them.
>
> The memories of trauma are also not static. It affects people differently. While defense points out inconsistencies in [S.M.]'s account of the abuse. What she should or shouldn't have done. That she didn't remember every little detail. That's natural and normal.

References to facts outside the evidentiary record constitute misconduct. Fisher, 165 Wn.2d at 747 (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). However, it is not misconduct to draw or suggest inferences based on the evidence. Thorgerson, 172 Wn.2d at 448.

In In re Personal Restraint of Phelps, 190 Wn.2d 155, 410 P.3d 1142 (2018), our Supreme Court considered whether it constituted flagrant and ill-intentioned misconduct when the prosecutor used the word "grooming" 19 times during closing argument, given that no expert witness had testified about grooming. The court held that no misconduct had occurred because the prosecutor did not urge the jury to consider grooming as a fact establishing the defendant's guilt. Phelps, 190 Wn.2d at 167. Rather, the prosecutor used grooming as a means of summarizing the evidence presented, basically "to paint a picture of the evidence for the jury." Phelps, 190 Wn.2d at 167. By using the word "grooming" in this manner, the prosecutor's statement was more akin to an inference than a fact not in evidence. Phelps, 190 Wn.2d at 167.

Here, the prosecutor's two references to trauma affecting memory similarly were more akin to an inference than a fact. The jury herein heard

testimony from Pegler that children who experience traumatic events process the events in different ways and that delayed disclosure of abuse is common for children. Officer Oceguera testified that, in his experience, children commonly make disclosures in bits and pieces, rather than all at once. Pegler testified that, with regard to S.M. specifically, S.M. acted nervous, "look[ed] away a few times," and cried during her forensic interview. S.M. herself testified that the "whole case" made her sad. From this evidence, it could reasonably be inferred that S.M. had experienced a traumatic event and that it had an effect on her. The prosecutor was permitted to encourage the fact finders to draw such inferences.

Our decision today is in line with courts in other states that have held that similar remarks about trauma affecting a child subject to sexual abuse did not constitute prosecutorial misconduct, even in the absence of any expert testimony concerning trauma. See People v. Maloy, 465 P.3d 146, 160 (Colo. App. 2020) (not misconduct for prosecutor to argue "Is she absolutely supposed to cry every time she talks about it, or perhaps is there more than one way to deal with that trauma[?]" as reasonable jurors could have inferred from evidence that child experienced trauma); State v. Ringstad, 424 P.3d 1052, 1070 (Utah Ct. App. 2018) (argument, based on counsel's personal experience, that "'[w]e don't remember everything . . . especially when it's a traumatic experience,'" did not constitute misconduct); State v. Ceballos, 832 A.2d 14, 42 (Conn. 2003), overruled on other grounds by State v. Douglas C., 2022 WL 17660010 (Conn. Dec. 13, 2022) ("In our view, it is axiomatic that child sexual abuse has mental and emotional repercussions for the victim. Thus, the state's attorney's

comments about the psychological effects of the sexual acts alleged to have been committed against S were proper."); cf. Petric v. State, 157 So.3d 176, 224 (Ala. Crim. App. 2013) (reference to "post-traumatic stress disorder" not misconduct when evidence showed witness was frightened of domestic violence perpetrator).

Even if the prosecutor's statements about trauma affecting memory had been in reference to facts outside of the record, McCabe makes no attempt to demonstrate how the statements were so prejudicial that no jury instruction could have cured the prejudice. Nor could he. The prosecutor's argument that trauma affects memory was made in support of count 2, the second charge of child molestation in the first degree. The jury found McCabe not guilty on count 2. McCabe could not have been unfairly prejudiced by an argument that the jury plainly did not accept.

Third, McCabe contends that the prosecutor committed misconduct by arguing that S.M. was "consistent with everyone that she's been abused," thereby urging the jury to consider matters outside of the record. As McCabe did not object to this argument, he must demonstrate that the prosecutor's misconduct was so flagrant and ill-intentioned that no jury instruction could have cured the prejudice. Once again, he does not do so.

McCabe likens the prosecutor's argument to the closing argument given in State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In that case, we held that the prosecutor had committed misconduct in three respects: first, by referencing three counts of rape that had been dismissed; second, by bolstering

the victim's credibility by arguing that her prior unadmitted statements were consistent with her trial testimony; and third, by asking the defendant whether the victim had "'made [it all] up.'" Boehning, 127 Wn. App. at 513-14. It is the second of these circumstances that McCabe contends occurred in his case as well. However, the prosecutor in Boehning did not merely state that the victim was "consistent" in reporting abuse. Rather, the prosecutor argued:

> "And then she comes and she talks to you. And *there wasn't anything brought up that she told a different story to Diana Tomlinson. If she had told a different story to Diana Tomlinson about the touching, you would have heard about it, because Defense counsel would bring up something if it was different. So the reasonable inference, when she spoke to Diana Tomlinson, she told her the same thing she told you.*
>
> . . . .
>
> Is open court—you know, just think about this common sense, common experience, is open court going to be the best place to gather information from a child? Or is it going to be in a place where a child might feel a little bit safer? The *State would submit that it's in a place where a child would feel a little safer. And so it's reasonable that this child might have gone a little farther in discussing what happened to her in a safer environment.*

Boehning, 127 Wn. App. at 521.

By making this argument, the prosecutor not only urged the jury to surmise the substance of the victim's earlier statements, but also suggested that the witnesses possessed far more information favorable to the State than was introduced at trial. Boehning, 127 Wn. App. at 522. Furthermore, the prosecutor also argued that because the defendant had not shown that the victim made prior inconsistent statements, that this proved that the victim was credible. Boehning, 127 Wn. App. at 523. This argument impermissibly shifted the burden of proof to the defendant. Boehning, 127 Wn. App. at 523.

The prosecutor's argument here is far different from the one made in Boehning. Here, the prosecutor argued only that S.M. was consistent about the fact that she had been abused. This was well-supported by the testimony of multiple witnesses. The prosecutor did not suggest that the substance of S.M.'s earlier disclosures was consistent with her trial testimony; nor did the prosecutor suggest that S.M. had disclosed more than what she testified to at trial. To the contrary, the prosecutor argued on rebuttal that the substance of S.M.'s earlier statements did not matter; that the only thing the jury could consider was the testimony given in court. Furthermore, the prosecutor's argument was not made to bolster S.M.'s credibility by the fact of repetition, but to explain why S.M. had delayed disclosure: that she had repeatedly said she was abused, but no one did anything about it. Boehning is therefore inapposite. The prosecutor's argument did not constitute misconduct.[5]

Furthermore, McCabe once again fails to demonstrate prejudice. McCabe states in his brief that the cumulative effect of the prosecutor's argument prejudiced him without explaining how this is so. Nor does McCabe assert how a curative instruction could not have cured any prejudice that may have occurred. We cannot simply presume prejudice based on the facts of this case, particularly when McCabe was acquitted on one of the charges. We therefore affirm McCabe's convictions for child molestation in the first degree, child molestation in the second degree, and incest in the second degree.

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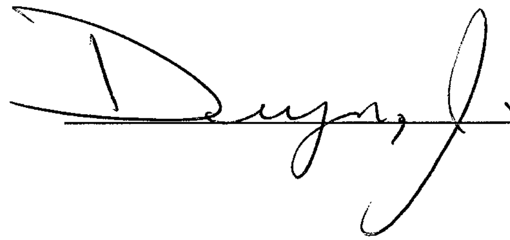
[5] Similarly, the prosecutor did not misstate the law by arguing that S.M. was "consistent with everyone that she's been abused." This argument was a summation of witness testimony, not a statement of law.

V

McCabe additionally asserts that his conviction for bail jumping was not supported by sufficient evidence, that the State did not present evidence of his prior convictions, and that his community custody conditions prohibiting him from entering parks or possessing sexually explicit material are not crime-related. The State concedes error as to all of these assertions. We accept the State's concessions. Accordingly, we order that McCabe's conviction for bail jumping be dismissed, and remand this matter for such dismissal and for resentencing.

Affirmed in part, reversed in part, and remanded for further proceedings.



WE CONCUR:

Díaz, J. Andrus, C.J.

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