No. Washington Supreme Court

101756-1

(No. 56660-5-II Washington Court of Appeals, Division II
No. 18-1-00296-6 Clark County Superior Court)

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

MICHAEL McMAHON,
Defendant-Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Defendant-Appellant Michael Dennis McMahon, by and through his attorney, Cassandra Stamm, hereby seeks review of the Court of Appeals' decision designated in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals issued an unpublished decision affirming in part and reversing in part. *State v. McMahon,* No. 56660-5-II (February 7, 2023). A copy of the decision is in the Appendix at pages A-1 through 11. In pertinent part, the Court of Appeals upheld admission of testimony from a pediatrician who had never examined the alleged victim to explain "why the State did not offer physical evidence," A-7,[1] and argument by the state that "if you believe [KM], then [McMahon] is guilty" because even *if* such argument was improper, trial counsel failed to object and an instruction could have cured the prejudice. A-10.

1 "This information was probative because it explained why the State did not offer physical evidence of abuse."

C. ISSUES PRESENTED FOR REVIEW

1. Whether 'proof problems' associated with child sexual abuse prosecutions warrant a special evidentiary rule allowing opinion testimony that is not helpful to the jury and is used by the state to dilute the burden of proof.

2. Whether the state's repeated argument that if the jury believed the alleged victim then the accused was necessarily guilty of all counts, disapproved by this Court some thirty years ago, was sufficiently flagrant and ill-intentioned to warrant reversal absent a timely objection from defense counsel.

D. STATEMENT OF THE CASE

Michael McMahon is currently fifty-eight years old and serving a sentence of 240 months to life imprisonment, CP 279, based solely on the word of a single person, his estranged adult adopted daughter KM. Aside from the instant convictions, Mr. McMahon has no criminal history whatsoever. CP 247. He

remains married to his wife of approximately thirty years, Marjorie McMahon. *See,* CP 248. Mr. McMahon has consistently asserted his innocence. *See, e.g.,* 2 RP 661 line 6 – 694 line 15. Michael and Marjorie McMahon's four children in common all wrote letters in support of him at sentencing. 2 RP 624 line 24 – 694 line 15; CP 258, 265.

The Court of Appeals' statement of Mr. McMahon's case is accurate, though extremely one-sided. *See,* Appendix at p. A1-5. KM, Mr. McMahon's adoptive daughter, did indeed testify that Michael McMahon raped and molested her on numerous occasions when she was a young child—some twenty years prior to trial. *See, id.* KM leveled these allegations after she and her family had a falling out and her parents had stopped supporting her financially. *See,* 2 RP 647 line 3-15.

KM's testimony was entirely uncorroborated by any evidence, circumstantial or otherwise. And KM's testimony was neither unassailable nor uncontroverted. For example, KM

testified she had been abused while on an outing to a Costco that was not built until a year *after* the McMahon family had moved out of state. *Compare,* 1 RP 443 line 23-25, *and* 2 RP 680 line 22 – 681 line 7. Similarly, KM testified she was forced to perform oral sex on Michael McMahon in an elevator in his office but the building was only two stories high. Although it did have an elevator, the elevator ride would have been at most seconds long. *Compare,* 1 RP 455 line 11-14, *and* 2 RP 501 line 4-16. KM testified she had gotten in trouble for drawing pictures of naked people in school and that Mr. McMahon had dramatically chased her onto school grounds when she threatened to report the alleged abuse, but no school records of either of these events was ever located or presented. *Compare,* 1 RP 469 line 1-24, 471 line 6-18; *and,* 2 RP 637 line 15-17.

Other examples abound and include the following. KM alleged she was routinely molested when her mother would get up early and she would join Mr. McMahon in bed. 1 RP 432

line 1 – 436 line 15. Both Michael and Marjorie McMahon testified that this scenario - with Marjorie getting up early while Michael laid around in bed with KM - never happened at all and certainly never happened on any sort of regular basis. 2 RP 628 line 23 – 629 line 22, 676 line 14 – 677 line 6. Likewise, KM alleged she was molested and raped while regularly showering with Mr. McMahon. 1 RP 438 line 3 – 439 line 25. Marjorie and Michael McMahon both testified that Michael and KM did not shower together. 2 RP 631 line 24-25, 676 line 5-13. KM testified she told her mother about the alleged abuse when she was six-years-old but her mother did not confirm this and Mr. McMahon testified it never happened. *Compare,* 1 RP 465 line 18-20, and 2 RP 681 line 8-12.

In an effort to bolster KM's uncorroborated and controverted testimony, the state offered the testimony of a doctor who had never met, much less examined KM, Dr. Kimberly H. Copeland. The testimony was offered *prior* to the

start of trial, as *rebuttal* evidence. *See,* CP 13;[2] 1 RP 82 line 11-14.[3] Over Mr. McMahon's timely written and oral objections, CP 16[4] & 18,[5] 1 RP 78 line 8 – 84 line 15, Dr. Copeland testified at length and in detail regarding sexual abuse examinations and delayed disclosure in sexual abuse cases. *See,* 2 RP 605 line 1 – 621 line 15.

Dr. Copeland testified that even in cases involving alleged penetration, physical evidence of sexual assault is only observed in 4-5% of all cases. 2 RP 616 line 14 – 618 line 8. She then detailed several reasons for such lack of physical findings. *Id.* Dr. Copeland also opined that delayed disclosure is not at all uncommon because of numerous variables which she explained at trial. 2 RP 619 line 18 – 620 line 17. None of this was connected in any way to any lack of physical findings concerning KM; KM was never physically examined.

2 State's Witness List – Amended, filed October 8, 2018.
3 Prior to the start of trial, the State argued that Dr. Copeland's testimony would be necessary to rebut "the generalized concept of missing evidence."
4 Defense Second Motion in Limine filed November 21, 2018.
5 Defense Memorandum in Support of Motions in Limine filed November 29, 2018.

Similarly, none of Dr. Copeland's testimony was connected in any way to the timing of KM's allegations; KM was never interviewed by Dr. Copeland.

The state's closing argument focused on Dr. Copeland's testimony, characterizing it as "extremely helpful" in explaining the lack of evidence presented by the State and the commonality of delayed disclosure. 2 RP 739 line 22 – 741 line 1. With Dr. Copeland's testimony in mind and discounting the lack of evidence produced by the state, the state then argued repeatedly in closing argument, "[i]f you believe [KM], then the defendant is guilty." 2 RP 739 line 14-15; see also 2 RP 736 line 12-15 ("if you believe [KM], every single one of the elements we just talked about is met. If you believe [KM], then the defendant is guilty of all counts.").

The trial court had barred the state from arguing that the jury must conclude KM was lying to find Mr. McMahon not guilty. CP 55. In the face of this ruling, the state deliberately

and repeatedly argued the inverse. 2 RP 739 line 14-15; *see also,* 2 RP 736 line 12-15. Trial counsel for Mr. McMahon did not object. *See, id.*

The Court of Appeals upheld Mr. McMahon's convictions finding no error in allowing Dr. Copeland's testimony "because it explained why the State did not offer physical evidence of abuse." A-7. The Court of Appeals further held that even if the state's argument was improper, Mr. McMahon failed to show that an instruction could not have cured the prejudice thereof. A-10.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. 'Proof problems' associated with child sexual abuse prosecutions do not warrant any special evidentiary rule allowing opinion testimony that is not helpful to the jury and is used by the state to dilute the burden of proof.

Almost thirty-five years ago, this court noted that child sex offense prosecutions may present unique problems of proof

for the state.[6] This Court observed:[7]

> Acts of abuse generally occur in private and in many cases leave no physical evidence. Thus, prosecutors must rely on the testimony of the child victim to make their cases. Children are often ineffective witnesses, however. Feeling intimidated and confused by court room processes, embarrassed at having to describe sexual matters, and uncomfortable in their role as accuser of a defendant who may be a parent, other relative or friend, children often are unable or unwilling to recount the abuses committed on them. In addition, children's memory of abuse may have dimmed with the passage of time. For these reasons, the admissibility of statements children make outside the court room, and especially statements made close in time to the acts of abuse they describe, is crucial to the successful prosecution of many child sex offenses.

The Court of Appeals has since made similar observations.[8]

The state now routinely uses such reasoning to argue that child sex abuse prosecutions should be subject to various different, special legal standards.[9] For example in Mr.

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6 *State v. Jones,* 112 Wn.2d 488, 494, 772 P.2d 496 (1989).

7 *Id.*

8 *State v. Krause,* 82 Wn. App. 688, 696, 919 P.2d 123 (1996); *State v. DeVincentis,* 150 Wn. 2d. 11, 23, 74 P.3d 119 (2003).

9 *See, e.g., State v. C.J.,* 148 Wn.2d 672, 681, 63 P.3d 765 (2003) (trial courts are granted greater discretion in determining the trustworthiness of an alleged child sex abuse victim's out-of-court statements under RCW § 9A.44.120); *State v. Foster,* 135

McMahon's case, the state argued there was a recognized and "*heightened need* for probative evidence in child sex cases due to the unique evidentiary challenges of that type of crime." CP 65 (emphasis added).

The standards governing the admissibility of testimony should not be relaxed in child sex offense prosecutions. The state's perceived "heightened need" for evidence in such prosecutions is completely unrelated to the standards that determine whether any given evidence should be admitted. Arguments to the contrary are really just pleas that the court should afford the state some sort of special leeway or consideration in a child sex abuse prosecution because they are difficult. This is wholly inappropriate, has become far too normalized, and should be disavowed by this court.

Wn.2d 441,463-464, 957 P.2d 712(1998) (same); *State v. Dunn,* 125 Wn. App. 582, 588, 105 P.3d 1022 (2005) (noting this statute "alleviates difficult proof problems that often frustrate prosecution of child sex abuse cases"); *State v. Swanson,* 62 Wn. App. 186, 194, 813 P.2d 614 (1991) ("In the usual case of child sexual abuse, there is no direct physical or eyewitnesss evidence. Thus, to give real effect to the child victim hearsay statute, 'the corroboration requirement must reasonably be held to include indirect evidence of abuse.'" (citation omitted)).

Opinion testimony is only admissible if it will assist the trier of fact in understanding the evidence or determining a fact in issue.[10] The Court of Appeals has fairly liberally allowed opinion testimony concerning alleged child victims of sexual abuse.[11] But these cases have not generally involved testimony of persons who have never examined or even met the complaining witnesses.[12] The Court has held that such testimony might be admissible to rebut a specific defense contention,[13] but here the testimony was offered prior to the start of trial and never did rebut any specific defense contention.

Dr. Copeland never examined KM and was never even asked to examine her. Dr. Copeland testified that physical findings of sexual abuse were uncommon, 2 RP 616 line 14-19,

10 ER 702.

11 *See, e.g., State v. Stevens,* 58 Wn. App. 478, 496, 794 P.2d 38 (1990); *State v. Cleveland,* 58 Wn. App. 634, 646-47, 794 P.2d 546 (1990).

12 *See, id.*

13 *State v. Petrich,* 101 Wn.2d 566, 683 P.2d 173 (1984) (admission of opinion testimony concerning delayed reporting of sexual abuse allegations was not an abuse of discretion in light of defense case focusing on several incidents prior to the alleged victim's initial report reflecting both opportunity and lack of motive to report claimed abuse).

but since she never examined KM she could have no idea whether such findings would or would not have been revealed by her physical examination (timely or otherwise).

Similarly, Dr. Copeland testified that delayed disclosure of child sexual abuse was not uncommon and speculated as to various reasons for such delayed reporting. 2 RP 619 line 18 – 620 line 17. Of course, Dr. Copeland could have no idea whether KM's 2015 allegations were the product of one of these reasons or instead were due to some other reason or reasons unknown to Dr. Copeland. Dr. Copeland had no particular knowledge of KM's allegations or the general lack of evidence in the case against Mr. McMahon.

And Dr. Copeland's testimony did not specifically rebut any defense argument. The defense never argued that the jury should find Michael McMahon not guilty due to the lack of physical evidence. The defense never argued that KM's delayed reporting proved no sexual abuse occurred.

The only real utility of Dr. Copeland's testimony was to explain away the state's lack of evidence proving Mr. McMahon was guilty. The state's purpose in introducing Dr. Copeland's testimony was to counter a general conception of 'missing evidence.' 1 RP 82 line 11-14. The state characterized this testimony as "extremely helpful" in convicting Mr. McMahon. 2 RP 739 line 22 – 741 line 1.

Insofar as Dr. Copeland's testimony was improperly used as a basis upon which the state urged the jury not to consider the quantum of proof offered by the state, not to consider any lack of evidence, and to presume that the timing of KM's reporting was further proof of Mr. McMahon's guilt then Dr. Copeland's testimony was indeed extremely helpful to the state. But all these uses were improper and in violation of the sacrosanct right of every criminal defendant to hold the state to their burden of proof regardless of the nature of the charges.

The state's use of such testimony in Mr. McMahon's case was not unique or unusual. Rather, it has become commonplace for prosecutors to offer the testimony of a purported expert in child sexual abuse who has never examined the alleged victim and who has no particular knowledge of the allegations in a given case to excuse their lack of evidence and dilute the burden of proof. The state cited to one such case in their appellate briefing, an unpublished opinion from Division I.[14] As in the instant case, this unpublished case involved a situation where the state called a nurse to testify about the possible conclusions from a normal physical exam in a child sex abuse case where the alleged victims had never been examined.[15] Division I allowed the testimony "to help the jury address the apparent discrepancy between the child's allegations of rape and the lack of medical evidence."[16]

14 *State v. Santiago,* 1 Wn. App. 2D 1024, 27 Wash. App. LEXIS 2612 (2017).
15 *Santiago,* 27 Wash. App. at 3.
16 *Id.* at 3*, citing State v. Kirkman,* 159 Wn.2d 918, 931, 155 P.3d 125 (2007).

Such reasoning is extremely problematic and this Court should grant review to refute it explicitly. It is the jury's duty to weigh and consider the evidence, and lack of evidence, for themselves. If expert testimony telling the jury not to consider the state's lack of proof is admissible, the state could call an 'expert' to explain away their lack of proof in any case. There is no confession? Perhaps the state could call a detective to testify that it is quite common for an accused not to give a confession and the lack of a confession does not mean the accused did or did not commit the crime. What if an eyewitness has failed to identify the defendant? Certainly it might be useful for the state to help the jury address this 'discrepancy' by calling a witness to testify that this is also common and that identifications do not always follow even when there was ample opportunity for a witness to see the defendant and there are a myriad of potential reasons for the same.

A reasonable doubt may arise from a lack of evidence.[17] Proof beyond a reasonable doubt can only be established after a full, fair, and careful consideration of all the evidence *as well as the lack of evidence*.[18] The sole reason for the state to call a witness to opine that the lack of evidence in a given case is common and that there may be reasons for such lack of evidence is to dilute the burden of proof and encourage the jury not to consider a lack of evidence in making their determination. This is very much a significant question of law as well as an issue of substantial public interest that warrants the attention of this court.

2. The state's repeated argument that if the jury believed KM then Mr. McMahon was necessarily guilty of all counts, disapproved by this Court some thirty years ago, was sufficiently flagrant and ill-intentioned to warrant reversal absent a timely objection from defense counsel.

This Court has repeatedly and recently held that an argument inviting the jury to decide a case based on who the

17 WPIC 4.01.
18 *Id.*

jurors believe is telling the truth improperly shifts the burden away from the State.[19] And yet, such arguments persist, especially in child sex abuse prosecutions. Why? Is it not fair to presume that trained and experienced prosecutors would only risk appellate reversal by engaging in known improper trial tactics because they are perceived as being necessary to sway the jury in an otherwise close case? This Court should take this opportunity to note the obviously flagrant and ill-intentioned nature of this type of improper argument, which was made long after established precedent identifying it as such.[20]

Here, the State was not only aware of existing, long-established precedent declaring their arguments improper, they were also on notice from the trial court's pretrial rulings which they deliberately circumvented herein. The trial court ruled *in*

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19 *See, State v. Crossguns,* 199 Wn.2d 282, 298, 505 P.3d 529 (2022); *citing, State v. Fleming,* 83 Wn. App. 209, 213, 921 P.2d 1076 (1996) ("This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken.").

20 *Fleming,* 83 Wn. App. at 214 (noting improper argument was made over two years after another decision disapproving of the same and concluding, "[w]e therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.").

limine that the state would not be permitted to argue the jury must conclude KM was lying in order to find Mr. McMahon not guilty. CP 55. The state deliberately twisted this ruling by repeatedly arguing that the jury must find Mr. McMahon guilty if they believed KM. 2 RP 736 line 12-15, 739 line 14-15.

The state's arguments misrepresented the burden of proof in a way that was both flagrant and ill-intentioned. This misrepresentation could not have been remedied by any additional instruction. With this argument, the state created a framework whereby the only question was whether the jurors could believe KM's testimony—regardless of what they thought of the other evidence in the case, as well as the lack of evidence in the case. This is precisely the type of flagrant and ill-intentioned misconduct that should be prominently noted and called out, even in the absence of trial counsel's timely objection.

F. CONCLUSION

Any particular prosecution may present proof problems —for the state and/or for the defense. For example, Mr. McMahon was forced in this case to defend against often vague claims concerning events allegedly occurring decades prior to his trial. Obviously, it is particularly difficult for an accused to refute very general negative claims. An accused who asserts, 'I never sexually abused my daughter' will lack proof in the same way as a person who asserts that ghosts do not exist. The fact that child sexual assault cases may be difficult, for both the state and the defense, does not mean that the standards for admissibility of evidence should be different or that otherwise improper arguments should be allowed.

This Court should grant review because Mr. McMahon's case presents these significant questions of law and involves an issue of substantial public interest that should be determined by the Supreme Court.

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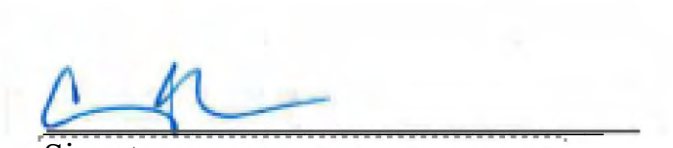
February 27, 2023. Respectfully submitted,



Signature
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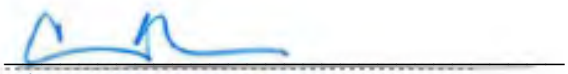
CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2023, I electronically filed this Petition for Review with Appendix the Washington State Appellate Courts' Secure Portal which will serve the same on opposing counsel. I also served a copy of this Petition for Review on the petitioner, Michael McMahon, via regular U.S. mail postage prepaid to Michael D. McMahon, DOC No. 428902, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, WA 98001-2049.



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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

February 7, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL DENNIS MCMAHON, Appellant.	No. 56660-5-II DIVISION TWO UNPUBLISHED OPINION

BIRK, J.* – Michael McMahon appeals his convictions for three counts of first degree rape of a child, two counts of first degree child molestation, and one count of attempted second degree rape of a child. He alleges evidentiary error, prosecutorial misconduct, and sentencing error. The State concedes the sentencing error. We affirm McMahon's convictions, but accept the State's concession and remand for resentencing.

I.

McMahon is KM's adoptive father. McMahon and KM's mother married in 1994, when KM was four years old. McMahon and KM's mother have four additional children together.

In 2015, KM reported to police in Texas that McMahon had sexually abused her as a child when the family lived in Vancouver, Washington. Following an investigation, in 2018 the State charged McMahon with three counts of first degree rape of a child, three

* Judge Birk is serving in Division II of this court pursuant to RCW 2.06.040.

counts of first degree child molestation, and one count of attempted rape of a child in the first degree.

A.

At trial, KM testified that when she was a young child she would lay in bed with her mother and McMahon. After her mother got up, McMahon would touch her vagina and have her touch his penis. She testified this happened consistently for a year. KM also testified about taking showers with McMahon and that he would put his penis inside her mouth. This happened more than once.

KM testified that when she was in kindergarten, she and McMahon would go to Dairy Queen about once a week and McMahon would pull his truck over in a remote area and have KM put her mouth on his penis. KM also testified that she would go with McMahon to his office and he would have her put her mouth on his penis in the elevator.

KM testified that McMahon had an office in their home and he would have KM come into his office and watch pornography with him. McMahon would then touch KM on her vagina while they watched pornography. KM recalled an incident on the living room floor where McMahon tried to put his penis inside her vagina. She told him that it hurt and, after trying one more time, he stopped.

KM testified that she told her mother about the abuse in 2011. She claimed that McMahon then told her it was her fault and that she was going to ruin the family if she reported it. In 2015, KM decided to report the abuse to the authorities because she was worried her mother was not protecting her younger siblings.

Dr. Kimberly Copeland, a pediatrician with experience working with cases of child abuse or allegations of child abuse, testified for the State. McMahon had previously filed a motion in limine to exclude her testimony under ER 403 because it would confuse the jury because Dr. Copeland had not physically examined KM. The trial court allowed her to testify. The trial court ruled that McMahon would have a standing objection to Dr. Copeland's testimony.

Dr. Copeland testified that when adults report childhood sexual abuse, a physical examination generally does not show evidence of abuse because of the time that has elapsed since the abuse. She testified that studies have shown that penetrative sexual assault of children results in physical findings in a medical examination only about four to five percent of the time. Dr. Copeland testified that she would not expect to see any injuries if abuse happened 10 to 15 years before the examination and the abuse was primarily touching and minor penetration. When asked about delayed disclosure, Dr. Copeland testified that it was not uncommon and that there were many variables as to why a child may wait to report abuse.

KM's mother testified for the defense. She testified that during the time KM alleged she was abused, McMahon was never alone in the house with KM, never drove her places in his car, and never took her to work. 2RP 653-54.

McMahon also testified, denying ever abusing KM. He testified that KM made the abuse allegations after he and KM's mother cut off KM's financial support in 2014.

B.

During closing arguments, the prosecutor told the jury that the State has the burden of proving each of the elements of the charged crimes beyond a reasonable doubt. The prosecutor went through each charge and told the jury, "So, ladies and gentlemen, if you believe [KM], every single one of the elements we just talked about is met. If you believe [KM], then [McMahon] is guilty of all counts. So how do we know [KM] is telling the truth? That comes down to credibility." The prosecutor continued, "You do not need corroboration to believe [KM] . . . . If you believe [KM], then [McMahon] is guilty.

In rebuttal, the prosecutor told the jury that KM had no motive to lie and then discussed the pros and cons of testifying. This was ostensibly responsive to McMahon's closing argument, consistent with his denial that any abuse had occurred, that the jury should not believe KM's testimony, as McMahon's counsel argued in summary, "there are lots of reasons to doubt [KM's] constructive fiction." Discussing whether KM had reason to lie, the prosecutor stated, "Let's go with the cons. That loss of time and energy. It's been six years since she reported. Six years of police interviews, defense attorney interviews, court hearings, flying out from Texas, and finally testifying in front of strangers about the abuse." Later, the prosecutor stated that KM "continues to suffer today by being alienated from her family for sticking to her truth and having to deal with this legal process that's dragged on for six years." McMahon did not object at any time during the State's closing argument.

C.

The jury found McMahon guilty of three counts of first degree rape of a child (from 1994 to 2001), two counts of first degree child molestation, and one count of the lesser-included offense of attempted second degree rape of a child. The jury found McMahon not guilty of attempted first degree rape of a child and not guilty of one of the counts of first degree child molestation.

At sentencing, the trial court relied on a seriousness level of XII for the first degree rape of a child convictions, with a standard range of 240 to 318 months. The court imposed a total sentence of 240 months.

McMahon appeals his judgment and sentence.

II.

McMahon contends (A) the trial court erred by admitting Dr. Copland's testimony because her testimony was irrelevant and not helpful to the jury; (B) the prosecutor committed misconduct during closing arguments by telling the jury that it was required to return a guilty verdict if it believed KM, and by commenting on McMahon's Sixth Amendment rights to a jury trial and to confront witnesses; and (C) the trial court used the wrong seriousness level for first degree rape of a child when sentencing him.

A.

We review a trial court's decision to admit expert testimony for an abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Similarly, we review a trial court's application of ER 403 for an abuse of discretion. *State v. Barry*, 184 Wn. App. 790, 801-02, 339 P.3d 200 (2014). An abuse of discretion occurs only when the

court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009)

Expert testimony is admissible if "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). "Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading." *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011). Courts interpret possible helpfulness broadly and favor admissibility in doubtful cases. *Id.*

McMahon frames the issue on appeal as whether Dr. Copeland's testimony was helpful to the jury under ER 702. However, McMahon's argument is not aimed at whether Dr. Copeland's testimony about the incidence of physical injury on examination following sexual assault and delayed reporting of abuse were "helpful" in the sense of being beyond the common knowledge of the average layperson. Rather, McMahon argues these opinions did not tend to establish any element of the State's case given the absence of any examination, and therefore any examination with negative findings needing to be explained, and given most counts being premised on acts not likely to cause observable physical injury. McMahon's argument fits more neatly into the framework he argued in the trial court, ER 403, in that he maintains any probative value of the opinions was at best slight such that on balance they tended only towards unfair prejudice. Under ER 403, evidence is properly excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

In *Kirkman*, an expert testified about his examination of a child victim of sexual assault. 159 Wn.2d at 931. He testified that it is the "norm" to find "no physical evidence of sexual conduct." *Id.* at 931-32. Our Supreme Court held that the testimony was "particularly relevant" to help the jury address the apparent discrepancy between the child's allegations of rape and the lack of medical evidence. *Id.* at 933.

This case concerns a significant amount of time between KM's report and the last alleged sexual incident. McMahon argued in his motion in limine that Dr. Copeland had not examined KM, so her testimony would confuse the jury. Dr. Copeland then explained at trial that a physical examination was not likely to show physical injury given the time between the alleged abuse and the disclosure. This information was probative because it explained why the State did not offer physical evidence of abuse. This provides tenable grounds to allow the evidence.

We hold that the trial court did not abuse its discretion in allowing Dr. Copeland to testify regarding physical examinations of adults who report childhood abuse.

B.

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the record and all of the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). When the defendant fails to object at trial, we apply a heightened standard of review requiring that the defendant must also show that the prosecutor's misconduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Id.* at 709 (alterations in original) (quoting *State v. Loughbom*, 196 Wn.2d

64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in incurable prejudice." *Zamora*, 199 Wn.2d at 709 (emphasis omitted).

During closing argument, it is improper for a prosecutor to misstate the State's burden of proof. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). It is also improper for a prosecutor to misstate the jury's role during deliberations. *State v. Crossguns*, 199 Wn.2d 282, 297, 505 P.3d 529 (2022). For example, a prosecutor cannot "ask the jury to decide who was telling the truth." *Id.* " 'The jury's job is not to determine the truth of what happened . . . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.' " *Id*. at 298 (alteration in original) (quoting *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012)).

The Sixth Amendment provides a criminal defendant with the right to a jury trial and to confront witnesses. *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854-55, 456 P.3d 869(2020). A prosecutor may not comment on a defendant's exercise of his or her Sixth Amendment rights. *See State v. Sundberg*, 185 Wn.2d 147, 153, 370 P.3d 1 (2016).

Prosecutors have wide latitude in closing argument to argue reasonable inferences from the evidence at trial, including evidence regarding the credibility of witnesses, but their argument must not misstate the applicable law. *Crossguns*, 199 Wn.2d at 296-97. Defense counsel's failure to move for a curative instruction or a mistrial for an allegedly improper remark, "strongly suggests the argument did not appear [irreparably prejudicial] in the context of the trial." *State v. Negrete*, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

Here, the prosecutor explained the burden of proof, and went through the elements of each charge. The prosecutor then stated, "[H]ow do we know [KM] is telling the truth? That comes down to credibility." The prosecutor continued, "You do not need corroboration to believe [KM]. . . If you believe [KM], then [McMahon] is guilty. In context, the prosecutor was arguing that given the elements of the charges that were not the focus of dispute—namely Washington situs, McMahon's and KM's relative ages, and KM's age at the time of the charged conduct—belief in KM's statements that the charged acts occurred would lead to the conclusion that "every single one of the elements" of the charged conduct would be "met." The context of the argument shows that the prosecutor did not suggest that the jury could substitute the choice whether to believe KM in place of finding each element of the charged crimes beyond a reasonable doubt.

In rebuttal, the prosecutor told the jury that KM had no motive to lie and then discussed the pros and cons of testifying. The prosecutor stated, "Let's go with the cons. That loss of time and energy. It's been six years since she reported. Six years of police interviews, defense attorney interviews, court hearings, flying out from Texas, and finally testifying in front of strangers about the abuse." Later, the prosecutor stated that KM "continues to suffer today by being alienated from her family for sticking to her truth and having to deal with this legal process that's dragged on for six years. On appeal McMahon portrays these arguments as commentary on McMahon's Sixth Amendment right to trial and to confront witnesses. The context shows that the challenged rebuttal statements were in response to McMahon's closing argument that KM's accusations of abuse were "fiction." The context of the rebuttal argument was that a conclusion that KM had

fabricated the accusations of abuse was not likely given the burdens KM's report created for her and the absence of any counterbalancing advantage.

These comments do not amount to a misstatement of the State's burden of proof or the jury's role in deciding credibility. Additionally, pointing out that it was not easy for KM to testify to such a difficult subject matter is not an improper comment on McMahon's Sixth Amendment rights. But even if these statements were improper, McMahon did not object. And he has failed to show that an instruction could not have cured any prejudice. Had McMahon objected, " 'the court could have properly explained the jury's role and reiterated that the State bears the burden of proof and the defendant bears no burden. Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks.' " *Crossguns*, 199 Wn.2d at 300 (quoting *Emery*, 174 Wn.2d at 764).

We hold that McMahon's prosecutorial misconduct claim fails.

C.

Between 1994 and 1997, the seriousness level for first degree rape of a child was XI. Former RCW 9.94A.320 (Table 2) (1990). In 1997, the seriousness level changed to XII. Former RCW 9.94A.320 (Table 2) (1997). The trial court imposed a sentence for McMahon's three counts of first degree rape of a child based on a seriousness level of XII for the entire charging period of 1994 to 2001. The State concedes error. We accept the State's concession and remand for resentencing with the correct seriousness level. *See State v. Gurrola*, 69 Wn. App. 152, 158-59, 848 P.2d 199 (1993) (remanding for

resentencing because seriousness level for first degree rape of a child was increased in the course of the charged actions).

IV.

Because McMahon fails to show evidentiary error or prosecutorial misconduct we affirm his convictions. We accept the State's concession of sentencing error and remand for resentencing consistent with this opinion.

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

Birk, J.

We concur:

Glasgow, C.J.

Che, J.

LAW OFFICES OF CASSANDRA STAMM, PLLC

February 27, 2023 - 11:12 AM

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Appellate Court Case Title:	State of Washington, Respondent v. Michael Dennis Mcmahon, Appellant
Superior Court Case Number:	18-1-00296-6

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