72913-6

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November 30, 2015
Court of Appeals
Division I
State of Washington

No. 72913-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAREN MORALES,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in sentencing Daren Morales for child molestation in the first degree, where the jury verdict declared him guilty of child molestation in the second degree.

2. The trial court erred in changing the jury's verdict under the guise of correcting a clerical error.

3. The trial court's decision to sentence Mr. Morales for an offense different than what the jury declared him guilty of violated Mr. Morales' constitutional right of trial by jury under the Sixth Amendment and Art. I, Sec. 21.

4. The trial court erred in keeping Mr. Morales' expert witness from testifying that the shoddy way in which the police interviewed the complainant prevented the expert from evaluating whether what the child spoke about represented a real memory.

5. The trial court erred in excluding this expert witness testimony as misleading and confusing to the jury.

6. The trial court's order keeping the expert's complete forensic opinions from the jury denied Mr. Morales his right to present a defense under the Sixth Amendment and his right to due process under the Fourteenth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington State Constitution provides that "[t]he right of trial by jury shall remain inviolate...." Art. I, Sec. 21. Even if it appears to be inconsistent or the product of mistake, a jury's verdict is unimpeachable, and a sentencing judge is strictly bound by the jury's finding. Here, the verdict expressed in writing and confirmed on the record to be the collective and individual judgment of the twelve jurors, declared Daren Morales guilty of child molestation in the second degree. CP 131 (attached as Appendix A); 8RP 93.

In ruling that it was correcting a clerical error when it handed down a sentence for the crime of child molestation in the first degree – the charge pressed against Mr. Morales – did the trial court violate Mr. Morales' constitutional right to a jury trial? Should the sentence be set aside because the jury's verdict does not support it?

2. As a part of the right to present a defense under the Sixth and Fourteenth Amendments to the United States Constitution, the defendant has the right to present relevant, admissible evidence on his behalf. As emphasized in State v. Jones,[1] relevant evidence offered by

[1] 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

the accused can only be excluded if the State establishes that it is so prejudicial as to disrupt the fairness of the trial fact-finding process.

Here, relying on general ER 702 concerns about misleading or confusing the jury, the trial court barred a renowned forensic expert from testifying that the faulty manner in which the police interviewed the complainant took away the expert's ability to determine whether what the child said had the features of a real memory.

Did the limits placed by the trial court on the defense expert's testimony prevent Mr. Morales from presenting a defense, thus entitling him to reversal of his conviction?

C. STATEMENT OF THE CASE

1. *The filed "first degree" child sexual assault charges.*

This appeal follows the prosecution of Daren Morales in King County Superior Court on charges of rape of a child in the first degree and child molestation in the first degree, naming his niece G.C. (DOB 7/8/01) as the complainant. CP 6-7. The State alleged December 1, 2012, to April 30, 2013, as the charging period. CP 6-7.

2. *First the mother's threat, then the ensuing accusations.*

G.C. was seven years old when she moved to the United States from the Philippines with her mother Vanessa Medrano and younger

sister. 3RP 87; 6RP 149.[2] The three of them shared a room in Vanessa's[3] father's house on Angel Place in Seattle. 3RP 89; 6RP 150-51.

Daren Morales is Vanessa's first cousin and he periodically lived at the same Angel Place home. 3RP 77, 94; 5RP 132-34; 6RP 97-98.[4] Between 2008 and 2011, he would stay there but go back and forth to the Philippines to visit his own wife and children. 4RP 42. Daren returned to Angel Place in December of 2012. 3RP 96; 4RP 7-8. At Vanessa's request, he helped look after his nieces when she was at work. 3RP 80, 92-93; 4RP 47; 6RP 100-03. At times, he put the girls to bed when Vanessa was not there. 3RP 98; 6RP 156. At the end of April

[2] The references to multiple volumes of the record track how the court reporter grouped the record:

1RP 9/17/14 + 11/4/14 + 11/5/14 + 11/6/14 +11/10/14
2RP 11/12/14
3RP 11/13/14
4RP 11/17/14
5RP 11/18/14
6RP 11/19/14
7RP 11/20/14
8RP 11/21/14 + 11/24/14

[3] For clarity, with no disrespect intended, first names of members of the Morales/Modrano family are used herein.

[4] The grandfather David Medrano lived there, with his mother Estella, and ex-wife Zenaida, 5RP 146.

2013, Daren again returned to the Philippines to be with his immediate family.[5] 3RP 81.

Daren's older niece, G.C., had been bullied in middle school, was known to take out her anger on her mother, and generally had "a really bad attitude." 3RP 86, 101; 4RP 45; 6RP 138, 140; 7RP 10-11. These anger outbursts began before Daren started taking care of G.C. 4RP 44. To help manage the anger issues, G.C. was sent to mental health counseling. 4RP 33-34, 41, 83.

Vanessa testified that not long before Daren returned to the Philippines in April of 2013, she saw him leaning over G.C. as he was putting her to bed. 3RP 104-05; 5RP 26. He had bent down and hugged G.C. 5RP 23. His hand was near G.C.'s shoulder area. 5RP 24-25. Vanessa was uncomfortable. 3RP 105. She asked Daren about what she saw and he told her he had done nothing. 3RP 105; 4RP 10-11.

G.C. had a Skype account her family used to talk to relatives in the Philippines. 4RP 18-19. Vanessa knew that G.C. and Daren kept in touch via Skype after he left. 3RP 108-09. In May of 2013, she saw a message between G.C. and her uncle she found concerning. 4RP 13.[6]

[5] Vanessa testified Daren's leaving was unrelated to the case. 5RP 29.

[6] In the message, G.C. referred to Daren as "boyfriend." CP 10.

She confronted her eleven-year-old child about the message. 4RP 21-22, 29. Vanessa's feelings were hurt and she cried. 4RP 22-23, 26.

At first, G.C. denied her mother's suggestion that something inappropriate had happened with her uncle, so Vanessa decided she had to convince G.C. to talk. 5RP 29-31. Vanessa threatened G.C. that she would leave her in the United States and not return. 5RP 31-34, 49; 7RP 88. They talked for half an hour, Vanessa tried to "sweet-talk" G.C., but her daughter "was still not admitting" that anything had happened between her and Daren. 4RP 27; 5RP34. Vanessa repeatedly asked G.C. if Daren had touched her breasts or private parts. 5RP34-35.

G.C. does not like it when Vanessa gets mad. 7RP 76. G.C. would fear her mother leaving her and never coming back. 7RP 76. At trial, G.C. remembered that her mother asked "a lot" about her uncle touching her. 7RP 87-88. She also remembered that her mother threatened her in these conversations. 7RP 88. G.C. gave in and told Vanessa that Daren had touched her breasts. 5RP 30.

Vanessa then took G.C. to a series of other people to have her talk about her uncle. Each of them testified at trial about the bits and pieces of what G.C. said out-of-court and the common thread in these declarations was that G.C., while consistently reluctant to talk about her

older uncle, was reporting having been sexually assaulted by him. These reports varied in terms of when, where, and how she said this allegedly occurred.

Vanessa first brought G.C. to her mental health counselor, Claire Deleon. Before G.C. spoke for herself, Vanessa "explained" what her daughter had said, for approximately half an hour. 4RP 33, 36, 69-71; 5RP 42; 4RP 67. The counselor observed that "when [the counselor] ask[s] questions, [G.C.] always look[s] at mom to answer." 4RP 68, 87. At first, the counselor did not speak with G.C. directly and had G.C. and Vanessa return. 4RP 72, 86. When they did talk, G.C. remained "very clingy with mom," and Vanessa stayed in the room. 4RP 73-74. G.C. remained quiet and relied on her mother to talk to the counselor. 4RP 75-76. When the mother cried, G.C. would respond. 4RP 76-77. The counselor heard G.C. accuse Daren of touching her.[7] 4RP 89. The counselor then took the family – including grandfather David – to a police station. 4RP 78, 80.

[7] Later during the trial, a different State's witness, pediatrician Dr. Rebecca Wiester, testified that the standard practice for sexual assault centers is to interview a child away from a parent. 5RP 66. Dr. Wiester also testified that questions should be open-ended, not suggestive, and that a non-talkative child should not be threatened. There should be no "implying danger if things aren't, you know, talked about." 5RP 67.

At the precinct, also in an unrecorded meeting, Officer Sylvia Parker spoke with the Medrano family. 7RP 97-98, 108. The trial court allowed Officer Parker to testify that G.C. said "she had been touched on her breasts and her genitals by her uncle" and also that "he had told her that he had a gun and was threatening to kill her family if she didn't do what he wanted her to." 7RP 112.[8]

Next, Detective Roger Ishimitsu spoke with G.C., who made the decision to interview the child on his own, rather than use the available forensic child interviewer. 6RP 15, 52, 85. G.C. seemed "very quiet and shy" and stayed that way as the detective spoke with her. 6RP 19, 23. G.C. told him about two incidents involving her uncle. 6RP 58, 68-71. G.C. could not remember the first and only said she thought Daren touched her after the detective asked her directly if he had done that. 6RP 59. G.C. told the detective she was sitting – not laying down as reported earlier – during one of the incidents and even agreed with the detective's suggestion as to how she was sitting. 6RP 61-63. The detective acknowledged that he led the child in the interview. 6RP 79.

[8] The record does not specify why the trial court overruled contemporaneous defense objections as to hearsay. The trial court may have been treating these statements as "prior consistent statements," and thus non-hearsay under ER 801(d)(1)(ii).

Last, G.C.'s family took her to see Dr. Rebecca Wiester. 5RP 60, 88-89. Vanessa told the physician that Daren had attempted penile penetration, but that is not what G.C. said to the doctor. 5RP 90, 117. Likewise, Vanessa said Daron had scared G.C. with a knife, but G.C. did not endorse that either. 5RP 90, 117. Dr. Wiester observed that G.C. was reluctant and needed help talking. 5RP 122.

At trial, G.C. testified that her uncle once told her to undress, undressed himself, and then told her to touch him. 7RP 14-18.[9] She testified she ran out and locked herself in the bathroom where she fell asleep. 7RP 17. She testified there was a different time when her uncle was putting her and her younger sister to sleep and touched her breasts, stomach, and vagina. 7RP 20-25. G.C. testified her mother came in and told him to go, yet she did not talk to her mother or sister about it. 7RP 26, 29-31.[10] Finally, G.C. claimed that once, at her grandfather's house, Daren "threatened [her] with a gun." 7RP 54. She testified her uncle literally put a "black gun" to her head. 7RP 54-56.

In advance of trial, G.C. had not claimed to having had a gun put to her head, but only that Daren talked about a gun. 5RP 106, 147,

[9] G.C.'s full testimony is at 6RP 147-57 and 7RP 7-90.

[10] G.C. also claimed in court that Daren tried to put his penis in her. 7RP 69. In a pretrial defense interview, she said that never happened. 7RP 131-32.

7RP 112. Notably, the grandfather never saw Daren with a gun, and the police found no evidence that Daren, who cooperated with the police,[11] ever had a gun. 5RP 147; 6RP 77-78. G.C. testified this was a recent memory which she had forgotten when talking to Dr. Wiester and Detective Ishimitsu. 7RP 72.

3. *Limits on defense expert testimony.*

At trial, Mr. Morales presented expert witness testimony from forensic psychologist Dr. John Yuille. 2RP 19-95; 3RP 25-72. Dr. Yuille has 50 years expertise researching memory and is an expert in proper child witness interviewing techniques. 2RP 20-25. Pretrial, the State conceded Dr. Yuille is a qualified expert and uses an approach generally accepted within the scientific community, but challenged the admissibility of Dr. Yuille's opinions regarding the police interview with G.C. as improper opinion as to credibility. 1RP 167; CP 41-56.

In an offer of proof, Dr. Yuille explained that research has shown that "there are certain qualities to memories that are based on experience that are much less likely to be found in memories that are based on invention or coaching." 1RP 128. He, and others, use a

[11] Daren did not testify at trial and the State did not use his statement to the police in its case.

"content based criteria analysis" to determine whether a particular statement has the features of a real memory. 1RP 128-34. Dr. Yuille explained that a poorly done interview may not produce sufficient detail necessary to allow an evaluator like himself to assess whether the memory is based on an actual experience of the speaker. RP 131-35. With a badly done interview, the child's assertions "may not be a memory based on experience or that the child wasn't given an opportunity to provide these qualities." 1RP 135, 138.

In Dr. Yuille's opinion, Detective Ishimitsu's interview of G.C. lacked detail and was of such poor quality that he could not apply the content based content analysis to assess whether what G.C. was recorded saying referred to a memory based on experience. 1RP 139; CP 48-55. The trial court excluded this expert opinion testimony, ordering that Dr. Yuille "will not be allowed to testify about his conclusion[:] It is not possible to assess the credibility of the child's allegation based upon such a poor-quality interview… A non-conclusion is not helpful to the trier of fact." 1RP 167-75 (excluding testimony relating to pages 3 through 8 of Dr. Yuille's report, located at CP 48-55).

4. *Jury declares its verdict and the trial court changes it.*

After deliberation on the evidence surrounding the accusations, the jury declared Daren not guilty of the crime of rape of a child in the first degree. 8RP 93; CP 130. The jury declared him guilty of the crime of child molestation in the *second* degree. 8RP 93; CP 131. (This was not a proposed lesser-included offense, but that is how the verdict form given to the jury is written.) The twelve jurors were polled and each confirmed this was their individual – and collective – verdict. 8RP 93-96. They were thanked and dismissed. 8RP 98.

Prior to sentencing, defense pointed out the fact that the jury declared Daren guilty of child molestation in the *second* degree and moved for a new trial under CrR 7.5. CP 132-36. The State requested that the trial court rely on CrR 7.8(a) and alter the jury's verdict as a "clerical mistake." CP 162-64. The trial court agreed with the State and "corrected" the jury's verdict. CP 165-66; 8RP 105-11. The first page of the judgment and sentence indicates that Daren "was found guilty on 11/24/2014 by Jury Verdict of: Count No. II Child Molestation in the First Degree," while the actual verdict form declares him guilty "of the crime of Child Molestation in the Second Degree as charged in Count II." CP 150, 131. (Appendix A.) This timely appeal followed.

D. ARGUMENT

1. In sentencing Mr. Morales for child molestation in the *first* degree – where the jury entered a guilty verdict on child molestation in the *second* degree – the trial court violated his constitutional right to a jury trial.

a. The constitutional right to a trial by jury is inviolate.

The Washington State Constitution provides that "[t]he right of trial by jury shall remain inviolate...." Art. I, Sec. 21. "The term 'inviolate' connotes deserving of the highest protection" and "indicates that the right must remain the essential component of our legal system that it has always been." Davis v. Cox, 183 Wn.2d 269, 288-89, 351 P.3d 862 (2015) quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). The constitutional right of trial by jury "must not diminish over time and must be protected from all assaults to its essential guaranties." Id. "The right to a jury trial may not be impaired by either legislative or judicial action." Geschwind v. Flanagan, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993) citing Brandon v. Webb, 23 Wn.2d 155, 159, 160 P.2d 529 (1945).

The "right to have a jury make the ultimate determination of guilt has an impressive pedigree." United States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). This right was

designed "to guard against a spirit of oppression and tyranny on the part of rulers," and "was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." 2 J. Story, Commentaries on the Constitution of the United States 540-41, (4th ed. 1873). See also Duncan v. Louisiana, 391 U.S. 145, 151–154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (tracing the history of trial by jury).

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. VI. "In some circumstances, our state constitution provides greater protection for jury trials than the federal constitution." State v. Williams-Walker, 167 Wn.2d 889, 896, 225 P.3d 913 (2010), citing to State v. Smith, 150 Wn.2d 135, 151, 75 P.3d 934 (2003) and City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982). "[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." Williams-Walker, at 896 (reversing a sentence for a firearm enhancement where the jury returned a special verdict as to a deadly weapon only).

b. Even when a verdict seems to be inconsistent, or based on mistake or nullification, judicial review is limited to determining whether sufficient evidence supports it.

A jury verdict is not subject to challenge even if it appears erroneous:

> That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.

Dunn v. United States, 284 U.S. 390, 394, 52 S. Ct. 189, 76 L. Ed. 356 (1932).

"As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict." State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). "The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict." State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) citing State v. Crowell, 92 Wn.2d 143, 594 P.2d 905 (1979); State v. McKenzie, 56 Wn.2d 897, 355 P.2d 834 (1960); Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962).

Neither the State nor the defense is allowed to attack a verdict with a claim that it appears at odds with the evidence or instructions: "Inconsistent verdicts therefore present a situation where 'error,' in the sense that the jury has not followed the court's instructions, most

certainly has occurred, but it is unclear whose ox has been gored." United States v. Powell, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). The Double Jeopardy Clause prevents the State from making an attempt to change such a verdict. Id., citing Green v. United States, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Kepner v. United States, 195 U.S. 100, 130, 133, 24 S.Ct. 797, 49 L.Ed. 114 (1904). Review of inconsistent verdicts at the defendant's behest is likewise inappropriate because such verdict "inconsistencies often are a product of jury lenity." Powell, 469 U.S. at 65.

Washington appellate courts follow Dunn and Powell and "do not further assess inconsistencies that are unexplained and/or produced by jury lenity, mistake, or nullification." State v. Wilson, 113 Wn. App. 122, 134, 52 P.3d 545 (2002). This is a firm rule: "We refrain from second-guessing the jury where lenity provides a plausible explanation for the inconsistency." State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004). "[T]he very nature of inconsistent verdicts is that they are irrationally inconsistent; this alone does not render inconsistent verdicts void." Id at 737. Rather, '[w]hen inconsistent verdicts call into question a guilty verdict, the reviewing court must verify that the guilty verdict

was supported by sufficient evidence." Id.; United States v. Powell, 469 U.S. at 67–68.

c. The trial court decision to change the jury's verdict under CrR 7.8(a) was error because a verdict is not subject to 'clerical' modification.

CrR 7.8(a) states:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

CrR 7.8(a) may be used to fix "a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." In re Marriage of King, 66 Wn. App. 134, 138, 831 P.2d 1094 (1992) (error in mathematical calculation on a financial worksheet deemed clerical and thus subject to correction). Contrary to how the trial court acted below, CrR 7.8(a) cannot be used to override a jury verdict, even where the verdict appears inconsistent.

In State v. Rooth, 129 Wn.App. 761, 770, 121 P.3d 755 (2005) this Court analyzed the conflict between the "inviolate" constitutional right to a trial by jury and the ministerial function of CrR 7.8(a) and

rejected the State's invitation that an apparently inconsistent or mistaken jury verdict can be meddled with under the guise of a clerical correction. Rooth controls and the Court should now do the same in Mr. Morales' case.

Rooth was charged with two weapons offenses, unlawful possession of a 9 mm handgun in Count I, and unlawful possession of a .22 caliber handgun in Count II. Id. at 766, 769. The "to convict" instructions given to the jury reversed the order of the charges, with the Count One instruction now referring to "a .22 caliber revolver" and the Count Two instruction referring to "a 9mm semi-automatic pistol." Id. at 769. The State "conceded in closing argument that it had not presented sufficient evidence for the jury to convict Rooth of possession of the .22 caliber." Id. at 769.

The jury returned verdicts declaring Rooth not guilty of possession of a firearm "as charged in Count One" and guilty of possession of a firearm "as charged in Count Two." Id. at 770. As such, the verdicts acquitted Rooth of possession of the 9 mm semi-automatic and convicted him of possession of the .22 caliber gun, which was the opposite of what the State expected. In an attempt to salvage a

conviction, the State sought a modification of the verdicts under CrR 7.8.

This Court ruled: "[C]ontrary to the State's assertion, the erroneous jury instructions were not a clerical error" and thus not subject to correction under CrR 7.8. Id., at 770. Citing to State v. Snapp, 119 Wn.App. 614, 626, 82 P.3d 252, *review denied,* 152 Wn.2d 1028, 101 P.3d 110 (2004) and Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996). The Rooth court explained that "to determine whether an error is clerical or judicial… [t]he court looks at whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." Id at 770 (internal quotations omitted).

However, the Court stressed that at issue was a *jury* verdict, not a judicial act subject to interpretation: "[h]ere, the trial court's judgment followed a jury trial, not a bench trial," and minced no words in declaring that "[t]he error in the instructions and the judgment and sentence were judicial errors, not clerical errors." Id. at 771.

The Rooth opinion correctly explained that altering the jury verdict would be a forbidden attack: "what the State desires requires that the two verdicts be changed; such a change is referred to as

'impeach[ing]' the verdict." Id., citing State v. Ng, 110 Wn.2d at 43. "[J]urors' intentions and beliefs are all factors inhering in the jury's thought processes in arriving at its verdict… any evidence that a juror misunderstood or failed to follow the court's instructions inheres in the verdict and may not be considered." Rooth at 772, citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn2d 747, 768-69, 818 P.2d 1337 (1991). As such, the Rooth Court categorically refused the State's request to lean on CrR 7.8 to change what the jury had decided: "the verdicts here cannot be impeached." Id.

Likewise, here, there is a jury verdict and it declared Mr. Morales guilty of child molestation in the *second* degree. CP 131; 8RP 93 (Appendix A). The right to a jury trial is inviolate and inconsistent verdicts – including ones which may be based on mistake – cannot be challenged by either the State or the defense. Attempting to decipher the jurors' intent is forbidden. Certainly any attempt to do that would not be a task "mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney." In re Marriage of King, 66 Wn. App. at 138.

It is unfortunate that the parties – and the trial court – limited their analysis to the State v. Imhoof, 78 Wn. App. 349, 898 P.2d 852

(1995) opinion, which predates the more on point ruling in State v. Rooth, or how State v. Williams-Walker shapes this analysis. The Imhoof opinion is sufficiently different as to be of very limited use.

Imhoof was prosecuted for attempted possession of marijuana with intent to manufacture or deliver, but declared guilty of the substantive crime of possession in a verdict form that lacked the word "attempted." Imhoof, 78 Wn. App. at 350. Apparently making an Art. I, Section 22 argument that he was not given sufficient notice of the accusation against him, he challenged the verdict. Id.

The trial court refused, and relying on CrR 7.8, entered a judgment of guilt on the inchoate charge that Imhoof had faced. On appeal, this Court found the trial court's action to have been "within the bounds of its discretion in correcting a clerical mistake under CrR 7.8(a)," largely because there was "nothing in the record to indicate that the misworded verdict form prejudiced Imhoff." Id., at 352. In the twenty years since the Imhoof decision came down, this holding has remained in isolation. In the meantime, jurisprudence affirming the constitutional right to a trial by jury has flourished.

d. The trial court can only impose a sentence that is supported by the jury's verdict.

"[U]nder both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the jury trial right requires that a sentence be authorized by the jury's verdict." Williams-Walker, 167 Wn.2d at 896. In Williams-Walker, the Supreme Court considered three consolidated appeals, where five-year *firearm* enhancements were imposed on defendants whose juries "were instructed and asked to find by special verdict whether the defendants were armed *with a deadly weapon*." Id. at 892. The Supreme Court held that the imposition of a sentence not supported by a jury verdict was error and error not subject to a harmless error analysis. Id.

For example, Williams-Walker was tried for first degree robbery and first degree murder, with a firearm enhancement. The jury heard evidence that he (or his accomplice) shot another with a pistol, which most certainly constituted sufficient evidence that a *firearm* had been used.[12] However, the jury was provided a special verdict that asked if

[12] "[F]rom an evidentiary view, no dispute exists that the deadly weapon was a firearm." Id at 901.

he was "armed with a *deadly weapon* at the time of the commission of the crime…?" Id.

On review, the Williams-Walker Court discussed the importance of both the State and Federal constitutional provisions granting the accused the right of trial by jury and the fundamental principle that "the jury trial right requires that a sentence be authorized by the jury's verdict." Id. at 896; Art. I, Sec. 21; Sixth Amendment. The opinion makes no mention of any attempt by the State to ask that the special verdicts be "corrected" under CrR 7.8. There is every indication that the Court – which rejected the application of a harmless error to this constitutional right to a jury trial violation – would have likewise rejected any such a proposal out-of-hand.

> The fact that the State provided notice in the information to each of the defendants that it would seek a firearm enhancement does not control in cases where a deadly weapon special verdict form is submitted to the jury. When the jury is instructed on a specific enhancement and makes its finding, the sentencing judge is bound by the jury's finding.

Id. at 899 (emphasis added).

The Court was clear the verdicts were not error: "the errors in the cases before us occurred during sentencing, not in the jury's determination of guilt… because the trial court's errors occurred after

the jury verdicts were reached, the harmless error doctrine does not apply." Id.

Like in Rooth, the trial court below was wrong to have relied on CrR 7.8 to alter the jury verdict. CP 165-66. Like in Williams-Walker, the trial judge here erred when imposing a sentence against Mr. Morales "not authorized by the jury's express findings." Id., at 901; Compare CP 150 (judgment and sentence predicated upon a claim of jury finding of guilt for child molestation in the *first* degree) and CP 131 (actual jury verdict announcing guilt for child molestation in the *second* degree). Like in Williams-Walker, the error is not subject to harmless error analysis.

e. Mr. Morales' conviction must be set aside.

The child molestation in the first degree conviction must be set aside because there is no guilty verdict to support a judgment of guilt against Mr. Morales for that crime. The trial court should not have decreed on the judgment and sentence that the jury found Mr. Morales guilty of child molestation in the *first* degree where the record does not support that assertion. The jury returned a "not guilty" verdict with respect to rape of a child in the first degree and a "guilty" verdict only with respect to child molestation in the *second* degree. That is what the

twelve jurors confirmed when polled on the record. 8RP 93-96. Under Williams-Walker, the sentence imposed against Mr. Morales violates his constitutional right to a trial by jury.

Under Dunn and Powell, inconsistent verdicts – be they based on compromise or error – are unimpeachable. Judicial review of an apparently inconsistent verdict is limited to a sufficiency analysis. State v. Goins, 151 Wn.2d at 737. On these facts, no conviction for child molestation in the *second* degree can stand either.

The Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Where additional elements are added to the "to convict" instruction, and the State does not object, the additional element becomes the "law of the case" and must be proved beyond a

reasonable doubt. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

Child molestation in the second degree is defined as sexual contact with another who is under 14 years old but more than 12 years old by someone who is at least three years older than that child. RCW 9A.44.086. With a birthdate of July 8, 2001, G.C. was just less than twelve years old even at the conclusion of the charging period, which ended April 30, 2013. CP 6-7. Accordingly, a conviction for child molestation in the second degree cannot be entered because it would not be supported by sufficient evidence.

2. The limits placed on the defense expert's testimony, including the order that he not testify that the police interview of G.C. was of such poor quality as to make it impossible to determine whether what the complainant said related to a real memory, violated Mr. Morales' constitutionally protected right to present a defense.

c. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony.

It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present witnesses in one's defense is a fundamental

element of due process of law. United States v. Whittington, 783 F.2d 1210, 1218 (5th Cir., 1986), citing Washington v. Texas, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); State v. Ellis, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); accord Washington, 388 U.S. at 19 ("The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts.")

Washington defines the right to present witnesses as a right to present material and relevant testimony. Const. Art. I § 22; State v. Roberts, 80 Wn. App. 342, 350-51, 908 P.2d 892 (1996). The defense bears the burden of proving materiality, relevance, and admissibility. Id.

The right to present a defense includes the ability to question the reliability and accuracy of the prosecution's allegations. Eliciting facts having a tendency to show a witness's credibility flaws is "generally a matter of right." State v. Roberts, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980); See also Davis v. Alaska, 415 U.S. 308, 318, 948 S.Ct. 1105,

39 L.Ed.2d 347 (1974) (reversing conviction where defense not allowed to expose jury to facts from which jurors could have drawn inferences as to a witness's credibility). Where a single witness's allegations are central to a prosecution, the veracity of that witness "must be subject to close scrutiny." Roberts, 25 Wn.App. at 834.

Whether a witness may have been influenced by others is a valid and appropriate avenue of exploring the witness's credibility. State v. Allen S., 98 Wn.App. 452, 470, 989 P.2d 1222 (1999), rev. denied, 140 Wn.2d 1022 (2000). A party is entitled to test whether leading or suggestive questions influenced the witness, "particularly" when "the witness is a child who may have been influenced by adults." Id. This right to question the accuracy, reliability, or truthfulness of a witness's allegations is not limited to cross-examination, but includes the right to present one's own witnesses. Maupin, 128 Wn.2d at 924.

The right to present a defense is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Holmes, 547 U.S. at 324-25, citing United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), quoting Rock v. Arkansas, 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

Although the trial court has discretion to determine whether to admit expert testimony, that discretion must be exercised with an understanding of the fundamental constitutional rights implicated by denying the defense a meaningful opportunity to pursue its theory. Alcala v. Woodford, 334 F.3d 862, 880 (9th Cir. 2003). The defense evidence should be "of at least minimal relevance." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

If the evidence is relevant, the burden shifts to the State to prove "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. (emphasis added); Accord State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014) (trial court's exclusion of other-suspect evidence violated defendant's constitutional right to present witnesses on his own behalf); State v. Cayetano-Jaimes, 2015 WL 5547450,__ P.3d __ (2015) (refusal to allow defendant to present the testimony of the victim's mother by telephone violated his constitutional right to present a defense).

d. Dr. Yuille's expert opinion about G.C.'s interview was relevant and should have been admitted in full because it would have been helped the jury assess the State's case and not disrupted the fairness of the fact-finding process.

Expert testimony is admissible if the theory or principle is generally accepted, and if the information would be helpful to the jury. ER 702; Frye v. United States, 293 F. 1013, 1014 (1923); State v. Janes, 121 Wn.2d 220, 232, 850 P.2d 495 (1993). Expert witness testimony on child interview techniques and suggestibility is governed by ER 702 and requires a case by case inquiry. State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004) (case resolved in State's favor on ER 702 grounds and without consideration of the constitutional right to present a defense).

Young children's recollections of sexual abuse may be tainted by suggestive or coercive influences and their allegations may be unreliable. In re the Dependency of A.E.P., 135 Wn.2d 208, 230, 956 P.2d 297 (1998). The Court in A.E.P. found a defendant was entitled to present evidence that a child's memory of events has been corrupted by improper interview techniques. Id. A.E.P. relied upon other courts' cases in recognizing the reliability of a child's allegations may suffer from outside influences. Id. at 227–30. Here, Mr. Morales attempted to

put on this very type of evidence through Dr. Yuille. Given G.C.'s varying accounts – and claims of a memory she had not previously had – the evidence was highly important.

As Dr. Yuille testified, human memory of personally-experienced past events "is reconstructive in nature" and when "we're reconstructing memories, we can make errors." 2RP 27-28. Research has shown that because memory is reconstructive, it is possible, through suggestion, to "get someone to construct a memory, a complete memory, of something that hadn't happened to them." 2RP 31. The person who would take on a memory that was not their own would not be aware that their memory had been shaped or created. 2RP 35.

In part because of these contamination concerns, there is agreement in the scientific community that forensic interviews should be conducted in an open-ended, non-leading manner. 2RP 36-38; 5RP 67 (state expert Dr. Wiester admitting the same). Correctly conducted forensic interviews of children seek to minimize adverse impact to the child from the process. 2RP 38. Second, such interviews maximize the information obtained from the child, but "in a way that doesn't influence, change or contaminate the child's memory." 2RP 38. Third,

the interviews strive to meet the needs of law enforcement or child-protection systems. 2RP 38.

In his expert work reviewing child forensic interviews, Dr. Yuille testified that he uses a "statement analysis" method to gauge whether a statement is consistent with a memory based on an actual experience. 2RP 44-46, 65-67. However, Dr. Yuille was not allowed to explain what the object or purpose of the statement analysis is or how the method was researched and field-tested. 2RP 45, 46, 65 (trial court sustaining State's objections); 2RP 50-51 (trial court declaring this information irrelevant). The trial court allowed him to enumerate the criteria that comprise statement analysis, but forbade him from testifying that Detective Ishimitsu's interview of G.C. was done so badly as to make it impossible to determine whether what the child said had the features of a real memory. 2RP 53-55.[13]

Pretrial, Dr. Yuille clearly explained that research shows that "there are certain qualities to memories that are based on experience that are much less likely to be found in memories that are based on

[13] Dr. Yuille did testify that Detective Ishimitsu's interview of G.C. was of "poor-quality." Dr. Yuille criticized the lack of structure, the use of leading questions in the interview, and the failure to give G.C. the opportunity to give her version of the events. 2RP 68-76. He was allowed to testify that after a leading or suggestive question is asked, creating the possibility of contaminating memory, that contamination cannot be cured. 2RP 71, 78.

invention or coaching," but that Detective Ishimitsu's interview of G.C. was so badly done that a specialized evaluator like himself could not even assess whether G.C.'s assertions were a memory based on experience. 1RP 128-139; CP 48-55. The trial court refused to admit this evidence. 1RP 167-75.

In a New York Family Court proceeding, which also focused on allegations of sexual abuse, the State presented that exact type of evidence. In re Nikita W., 77 A.D.3d 1209, 1210-11, 910 N.Y.S.2d 202 (2010). There, the New York State's expert – a "validation expert" – employed Dr. Yuille's approach:

> Based on, among other things, the child's spontaneous, coherent, logical, detailed and contextually embedded accounting of the incident, Arp, through her application of the Yuille Step Wise Protocol for interviewing alleged victims of sexual abuse, concluded that the statements of abuse made by the child during the interview were "consistent with accounts of known sexual abuse victims."
> …
> To the extent that Arp referred to the child's "credibility," she explained that that term was "loosely used," and that her analysis does not involve a credibility determination, but rather a determination as to whether certain elements found in accounts of known sexual abuse victims are also present in the alleged victim's account.

Id. at 1210-11 (emphasis added).

In Mr. Morales' trial, the same type of evidence was ruled inadmissible, in part because Dr. Yuille was measured in how he

analyzed the impact of the faulty police procedure. In rejecting Dr. Yuille's testimony, the trial court complained that a "non-conclusion is not helpful to the trier of fact." 1RP 167-75. This was a mistake; expert testimony need not include a conclusive opinion on the issues involved in the trial to be helpful to the jury. United States v. Rahm, 993 F.2d 1405, 1412 (9th Cir. 1993). In Rahm, the trial court refused an expert's testimony because the expert said she could not form an opinion regarding the defendant's mental state. Id. at 1411. The Ninth Circuit reversed, chastising the trial court for ignoring the "key concern," which was whether the expert's testimony would "assist the trier of fact in drawing its own conclusion as to a 'fact in issue.'" Id. at 1411.

Here, Dr. Yuille was essentially opining that shoddy police work spoiled fragile evidence (G.C.'s account of the allegations) and that the evidence should have been handled much more carefully. Mr. Morales should have been allowed to present this evidence, because the police work in the case was at issue, as was the reliability of G.C.'s varying accounts.

Inconclusive expert opinions are routinely admitted at trial and communicate to the jury the limits of scientific knowledge.[14] In fact, in child sexual assault prosecutions, physicians regularly give testimony that medical examinations are *inconclusive*. For example, in State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007), the doctor who examined a suspected victim of rape of a child testified the exam was inconclusive: "I found nothing on the physical examination that would make me doubt what she'd said, or was there anything that would necessarily confirm it."

An expert does not have to declare a definite opinion for the testimony to be admissible. State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998); see also State v. Mitchell, 102 Wn.App. 21, 28, 997 P.2d 373 (2000) (reversing because jury should have been allowed to draw own conclusion after hearing expert's testimony even though expert could not reach conclusive opinion). Relevance is what matters. Rahm, 992 F.2d at 1411-12; Hudlow, 99 Wn.2d at 15; State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994) (relevance is central question in determining "helpfulness" under ER 702).

[14] E.g. State v. Bander, 150 Wn. App. 690, 718, 208 P.3d 1242 (2009) (appellant's contention that "evidence of inconclusive [DNA] test results without accompanying statistical calculations is irrelevant and therefore inadmissible" rejected as "without merit"); State v. Brunson, 128 Wn.2d 98, 102, 905 P.2d 346 (1995) ("police collected fingerprints, but they were inconclusive").

Here, it was the absence of Dr. Yuille's full opinion that was problematic, not its inconclusive nature. The State even acknowledged as much, complaining that the absence of specifics of Dr. Yuille's opinions was misleading for the jury: "the only thing that they can infer is that Dr. Yuille has not found this child credible." 3RP 51-52. If the State was correct, then Mr. Morales was also prejudiced by the ensuing speculation as to Dr. Yuille's opinion. Dr. Yuille did not hold the opinion that G.C. had told Detective Ishimitsu about a memory that was not a real one, his opinion was more measured than that. The trial court ruling prevented Mr. Morales from letting the jury know that the expert testifying on his behalf was a reasonable scientist willing to accept uncertainty.

Finally, expert testimony that touches upon the statement reliability issues – yet leaves the ultimate determination of credibility to the jury – may still be relevant and admissible despite the general rule that a witness's expression of personal belief about the veracity of another witness is inappropriate opinion testimony. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); Accord In re Nikita W., 77 A.D.3d at 1210-11 (statement validity testimony properly admitted). For example, in State v. Ciskie, 110 Wn. 2d 263, 278-79,

751 P.2d 1165 (1988), a sexual assault case where delayed reporting was at issue, it was decided that a trial court acted within its discretion in allowing a psychologist to testify that a failure to immediately report an assault was explainable as a characteristic of a person suffering from the battered woman syndrome. In State v.Kirkman, the same examining physician who testified about an inconclusive physical examination, also commented that the child's description of what she said had happened was "clear and consistent." Kirkman, 159 Wn. 2d at 930. That testimony was not viewed to be an impermissible opinion on her credibility, and certainly not one that usurped the jury's role:

> Dr. Stirling's statement that A.D.'s account was "clear and consistent" does not constitute an opinion on her credibility. A witness or victim may "clearly and consistently" provide an account that is false. The jury properly was instructed to determine the facts.

The trial court's concerns over the possibility that Dr. Yuille's offered testimony would impose on the jury's role were exaggerated. The jury was instructed that they remained the "sole judges of the credibility of each witness... the sole judges of the value or weight to be given to the testimony of each witness." CP 106. This instruction that the jurors themselves "determine the credibility and weight" of evidence was repeated in the instruction dealing with expert witness

testimony. CP 111. On these facts, the State cannot show that the Mr. Morales' request to admit Dr. Yuille's full opinion would have been "so prejudicial as to disrupt the fairness of the fact-finding process at trial." State v. Jones, 168 Wn.2d at 720.

c. The court's error in limiting expert testimony about G.C.'s interview was not harmless error.

Since precluding Mr. Morales from a meaningful opportunity to pursue his defense is a violation of a constitutional right, the erroneous exclusion of defense testimony is presumed prejudicial. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). It requires reversal unless the prosecution proves the error is harmless beyond a reasonable doubt. This, the State cannot do.

The State did not present overwhelming evidence of Mr. Morales' guilt. G.C. denied being a victim until her mother threatened to go to the Philippines alone and leave G.C. alone in the United States. 5RP 31-34, 49. It should go without saying that a non-talkative child should not be so threatened. 5RP 67. The mother was ever-present when the child – reluctantly – spoke to others about her uncle. 4RP 33, 36, 73-74; 5RP 88-90; 7RP 97-98. There was no eyewitness or physical evidence to corroborate the charges and the jury acquitted Mr. Morales

of rape, presumably because out of concerns regarding the reliability of G.C.'s claims.

Here, the State cannot prove beyond a reasonable doubt that the outcome of the trial would have been the same. The error in excluding Dr. Yuille's proffered testimony was not harmless and Mr. Morales is entitled to reversal of the conviction.

E. CONCLUSION

For the reasons stated, Mr. Morales requests this Court reverse and dismiss his conviction, reverse and remand for a new trial, or grant any other remedy it sees fit.

DATED this 30th day of November 2015.

Respectfully submitted,

__S/ MICK WOYNAROWSKI_____
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No. 72913-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAREN MORALES,

Appellant.

APPENDIX A:

Jury verdict form at CP 131

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 14-1-01498-4 SEA
vs.	)	VERDICT FORM B
DAREN M. MORALES Defendant.	)	

We, the jury, find the defendant DAREN M. MORALES GUILTY (write in "not guilty" or "guilty") of the crime of Child Molestation in the Second Degree as charged in Count II.

11/24/14
Date

Presiding Juror

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

STATE OF WASHINGTON, Respondent, v. DAREN MORALES, Appellant.	)))))))))	NO. 72913-6-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] DAREN MORALES 380199 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2015.

X_____

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