Supreme Court No. 95949-8
COA No. 75700-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAMANVEER BAINS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ramanveer Bains was the appellant in COA No. 75700-8-I.

B. COURT OF APPEALS DECISION

Bains seeks review of the April 23, 2018 decision (Appx A, B).

C. ISSUES PRESENTED ON REVIEW

1. Does the Court of Appeals decision conflict with Supreme Court and Court of Appeals case law, by wrongly holding that Petrich unanimity error is not "manifest" under RAP 2.5(a)(3), where the issue whether multiple acts were placed before the jury is assessed based on the entire record of the case, and where the prosecutor in this case, as shown by opening statement, the evidence phase, and closing argument, plainly placed multiple acts of "communication with a minor" before the jury?

2. Did the court abuse its discretion when it denied Raman Bains' request for a jury instruction on diminished capacity, where the defense expert, Dr. Johansen, testified that Bains' mental disorders impaired and impeded his ability to act intentionally, including because of his prescribed treatment and his self-medication directed toward those disorders?

3. Did the Court of Appeals decision conflict with Supreme Court and Court of Appeals case law, by wrongly rejecting appellant's argument that the prosecutor committed flagrant, incurable misconduct in the evidence phase and in closing argument, where the Court of Appeals

ignored the appellant's argument that misconduct occurred when, *inter alia*, the prosecutor interjected during trial that he worked at Dawson Place where victim statements [inadmissible in this case] are assessed for prosecution, where the prosecutor elicited comments on credibility including an officer's statement that Dawson Place provides a children with a comfortable atmosphere to make their statements [inadmissible in this case], unlike the difficult atmosphere of the courtroom where the victim was unable to testify in detail, and then told the jury in closing that prosecutors like him who stand up for actual victims do not get to go to "central casting" to choose victims who will perform well in the courtroom?

D. STATEMENT OF THE CASE

1. Procedural history -- investigation and inadmissible child hearsay interview of J.C. at Dawson Place.

Ramanveer ("Raman") Bains, age 25, was charged with first degree child molestation, and communication with a minor for immoral purposes, allegedly committed by Raman at his parents' house, where he lived. The complainant was J.C., who lived in the same Everett-area neighborhood. CP 150-51 (information). According to the affidavit of probable cause and the State's trial brief, Snohomish County Sheriff's Deputy Daniel Tenbrink responded to a dispatch call in Everett and spoke with the mother of J.C., on September 2, 2013, at their home. CP 152-55. J.C.'s mother told the

deputy that J.C., age 11, had told her that he was wrongfully touched by a young man named Raman Bains, who lived in the neighborhood with his parents. Then, the second day, J.C. did not come home, so she telephoned the Sheriff. CP 152-55. Deputy Tenbrink located Ramanveer Bains' home, and spoke with Bains, who stated that J.C. had forced himself into the house. The deputy then saw J.C. walk out from the back side of the house, and he returned him to his mother. Bains spoke freely with the deputy, and denied any allegations of touching. Deputy Tenbrink did not arrest Bains. CP 152-55. Instead, Tenbrink arranged for a forensic interview of J.C. at Dawson Place, a facility of the Special Investigations Unit for child sex offenses. Specialist Gina Coslett successfully elicited a detailed statement from him, which was set forth in the affidavit of probable cause and the State's trial brief. Following the forensic interview, the Snohomish Sheriff's office then executed search warrants at the Bains family home and arrested Bains, on September 19. CP 152-55.

Prior to trial, Bains' competency was repeatedly evaluated; he was ultimately deemed competent. See CP 117, 118-19, 120-38, 139-41, 144-46; 5/16/16RP at 10-13; 5/17/16RP at 164.

2. Limited testimony of J.C., and testimony of Bains' parents.

At trial, J.C.'s mother testified that around September 2, 2013, J.C. talked to her and said that Mr. Bains had "touched my penis." 5/17/16RP at

86-87. The day after that, J.C. disappeared and she could not find him. 5/17/16RP at 87-88. J.C. testified, but his testimony was extremely limited, particularly in comparison to his forensic interview, which was by that time plainly understood to be inadmissible because of J.C.'s age. RCW 9A.44.120; 5/17/16RP at 116-47. On the witness stand, after being allowed to write certain words down on paper before he said them, J.C. stated that Mr. Bains had touched his private area, or his "dick" area, over his clothing. 5/17/16RP at 127-28; 142-45.

J.C. had met Mr. Bains in the neighborhood, through another boy named Shane, and he was interested in a motorized bike that Bains was riding. 5/17/16RP at 119-21. At some point, J.C. stated, he was at the house where Mr. Bains lived with his parents, in Bains' bedroom. He claimed that Bains was using a pink "dick" device that he was putting in his own "ass." 5/17/16RP at 131-33. He also said Mr. Bains was masturbating. 5/17/16RP at 133-35, 141.

When asked if the defendant asked him to touch him, J.C. said "maybe," and then said that he didn't know. 5/17/16RP at 139-40. J.C. stated that he saw videos on a laptop computer that grossed him out; Bains showed him the videos, and J.C. testified that they were: "Porn." 5/17/16RP at 134-36, 139. Mr. Bains was on his bed with the laptop computer when J.C. saw the videos. 5/17/16RP at 140. J.C. said he was

grossed out by the video, so he left the room, and then came back two minutes later. 5/17/16RP at 140-41. Mr. Bains was masturbating and something came out of his penis. 5/17/16RP at 141. J.C. answered "Uh-uh" when asked if he knew his mother was going to call the police. 5/17/16RP at 142. When J.C. was then asked why he went back to Bains' house, he said he guessed he wanted the bike. 5/17/16RP at 142.

The prosecutor asked J.C. to say or clarify what had occurred on the first day. 5/17/16RP at 141-42. J.C. said yes when he was asked if he was touched, and said it was in the "shed" in the back of Bains' house. 5/17/16RP at 142-43.[1] The alleged touching, over the clothing, supposedly lasted for about 5 seconds. 5/17/16RP at 145.

Returning to the topic of the second day, the prosecutor asked J.C. about the bike. J.C. said, "Yeah" when the asked if J.C. went back to the house because of the bike. 5/17/15RP at 146. J.C. was then asked, "What about the bike?," and he answered, "I don't know. I thought it was cool." He said that Mr. Bains did not say anything to him. 5/17/16RP at 146.

Raman Bains' mother testified that what she observed that day was their young neighbor J.C., at the keyboard of the computer in Raman's room, alone, while Raman was outside smoking. 5/18/16RP at 239-40. She

[1] Defense counsel argued in closing that there did not appear to be any shed on the defendant's property, as shown by State's exhibits 1, 2 and 3. 5/19/16RP at 351, 355-58.

told J.C. to go home, but he did not leave the property, and instead Mrs. Bains found him outside with a lighter, lingering in the area of the garbage cans where the bike with the motor was kept. 5/18/16RP at 240-42. Raman Bains' father also saw J.C. in the family home without permission, and had to tell J.C. he needed to go home to his parents. 5/18/16RP at 252-54. Contrary to what J.C. stated before trial, authorities found no shirt in Raman's room that said "child molester" on it, and no tattoo on Raman Bains that supposedly said the same thing. 5/19/16RP at 354-55 (defense closing); see 5/18/16RP at 211-14 (testimony of deputy executing warrant).

3. State's closing argument.

The State told the jury, among other things, that prosecutors who "stand up" for victims like J.C. who had difficulty testifying in court do not get to pick them from "central casting." 5/19/16RP at 339. The prosecutor's closing argument also relied on extensive, improper opinions on credibility elicited from Deputy Tenbrink and Detective Dittoe during trial, which referenced J.C.'s forensic interview, and asserted that J.C.'s overall allegations could be trusted, including because the interview offered more detailed statements than J.C. was able to utter in court. 5/19/16RP at 340, 342, 344, 346-47, 362-64.

Regarding the alleged molestation, the State argued that Raman Bains had touched J.C. on his penis, and the next day, Bains had masturbated, and played pornography. 5/19/16RP at 340-42.

E. ARGUMENT

(1). The Court of Appeals failed to perceive the manifest error that Bains' right to Petrich unanimity was violated on the charge of communication with a minor.

(a). Review is warranted. Review is warranted under RAP 13.4(b)(3) because the Petrich issue is one of constitutional magnitude. The right to unanimity applies where the evidence contains more than one act as a basis for the count charged (as here), but the prosecutor (as here) does not elect a specific act in closing argument, and there was no unanimity jury instruction (as here), all of which is true in this case. Wash. Const. art. 1, § 22; State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The issue may be appealed as manifest constitutional error. RAP 2.5(a)(3); State v. Love, 80 Wn. App. 357, 360 and n. 2, 908 P.2d 395 (1996). It is harmless only if the evidence as to each of the multiple acts was both overwhelming, and uncontroverted. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich); see, e.g., State v. Coleman, 159 Wn.2d 509, 513, 150 P.3d 1126 (2007).

(b). The *Petrich* unanimity error is manifest in the record, where it is clear that the prosecution offered multiple acts, and reversal is required.

i. Communication with a minor – bike theory.

The gross misdemeanor offense of communication with a minor for immoral purposes under RCW 9.68A.090(1) is committed where a person "communicates with a minor for immoral purposes[.]" The crime is intended to prohibit communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct. State v. Hosier, 157 Wn.2d 1, 9, 133 P.3d 936 (2006). It specifically proscribes making an invitation or inducement to engage in sexual contact. State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). For purposes of the statute, "communicates" includes conduct as well as words. Hosier, 157 Wn.2d at 9.

The State's theory of communication with a minor, at least as claimed as one of multiple theories placed before the jury, was that Raman Bains had expressly or implicitly offered a bike to J.C. for sexual conduct, or somehow used it to induce him. CP 152-55 ("[T]he defendant offered a young boy a motorbike in order to gain access to him."); see 5/17/16RP at 593-95 (Opening Statement, arguing that the defendant took advantage of J.C.'s "singular fascination" with defendant's motorbike, an item that J.C.

was "fascinated with."). And in closing argument (among other theories of communication), the prosecutor argued:

> I told you when we began that this case would present what happens when the singular fascination of a child meets up with somebody in a perfect storm that is willing to take advantage of that.

5/19/16RP at 339 (Closing argument).

ii. Communication with a minor – pornography/masturbation theory.

The State offered another theory of communication with a minor. At certain times the prosecutor contended in argument that the bike was a pivotal fact:

> We do not judge the people for how they should have acted, especially victims, because, in this case, all the victim wanted was to see that bike again. And instead, a crime was committed.

5/19/16RP at 347. But at another juncture, the prosecutor argued that the communication for immoral purposes statute was satisfied by showing pornography and masturbating, arguing:

> The defendant showing an 11-year-old child pornography, masturbating in front of him, doing all those things, that's immoral. By anybody's definition, that's immoral.

5/19/16RP at 346. The prosecutor also told the jury, "Please do not send out a jury question that says what does immoral purposes mean."

5/19/16RP at 346.

And in rebuttal closing argument, the prosecutor again defended the communication charge by arguing that Raman Bains "had the wherewithal that he knew he wanted to watch porn and masturbate, even though there was an 11-year-old child in his room." 5/19/16RP at 362.

iii. The Petrich error was reversible error.

Ultimately, it was apparent that the State did not know for itself what its particular theory of communication was, so it tossed a series of multiple possible acts toward the jury. This is the very essence of unanimity error.

Reversal is required under the constitutional error standard of Coleman, supra. The evidence was not overwhelming and uncontroverted that Raman Bains offered J.C. a bike, expressly or implicitly, or held out the bike as some enticement or inducement. The testimony showed that J.C. liked or wanted a bike that Raman had, or thought that it was cool, and he later stated he went back to the Bains' house on the second day, because of the bike. 5/17/16RP at 119-21, 142, 146. J.C. twice stated, "No" when he was asked by the prosecutor if Raman ever promised him the bike, or even whether he ever thought he was going to get the bike. 5/17/16RP at 127.

And no evidence showed that the defendant affirmatively showed J.C. pornography attempting to use it as an invitation or solicitation of prohibited conduct. Further, such a notion was sharply controverted, when

Raman Bains' mother testified that she saw J.C. at the keyboard of the computer in Raman's room, alone, without permission, while Raman was outside smoking. 5/18/16RP at 239-40. Mrs. Bains' testimony regarding the bike was that she later found J.C. outside, lingering near the bike, with a lighter in his hand. 5/18/16RP at 240-42.

Because unanimity error requires reversal unless all the possible acts are supported by a quantum of evidence that is overwhelming and uncontroverted, reversal is required.

(2). Bains was entitled to an instruction on diminished capacity.

(a). Review should be granted. Under RAP 13.4(b)(1) and (2), this Court should accept review of the trial court's ruling denying the defense motion to instruct the jury on the diminished capacity defense. 5/19/16RP at 320-24 (argument and ruling), 5/19/16RP at 338 (exception). The Court of Appeals decision rejecting the appellant's argument is contrary to decisions of the Court of Appeals and this Court, as argued infra.

(b). Contrary to the case criteria, the trial court refused the jury instruction on ground that the defense expert had failed to show that the defendant's diminished capacity was a result solely of his disorders, as distinct from his disorders and their treatment or medication.

Following the testimony and written report of a defense expert, forensic psychologist Dr. Steven Johansen, the trial court denied the defense motion to instruct the jury on the diminished capacity defense. 5/19/16RP at 320-24 (argument and ruling), 5/19/16RP at 338 (exception).

The defense had noted that the diminished capacity instruction was exactly warranted by the doctor's testimony about the myriad of disorders that Bains suffered from, which could not be divorced from the medications, including his self-medication, that were an integral part of his disorders. 5/19/16RP at 323. However, the trial court reasoned that Dr. Johansen had not made the required connection that the defendant "would have done this as a result of the disease or defect, if that's what it is, alone, without having taken anything" or if "he had just taken the prescribed medication and not taken the marijuana and the Steel Reserve [alcohol]." 5/19/16RP at 324.

The Court of Appeals, in a conclusory manner, stated that it did not view the record as supporting the appellant's argument that the the trial court refused the jury instruction on ground that the defense expert had failed to show that the defendant's diminished capacity was a result solely of his disorders, as distinct from his disorders and their treatment or medication. Decision, at p. 9.

Here, Dr. Johansen emphasized that his finding was that Raman, at the time of the offense, suffered from a mental state that was compromised such that he would be unable to fully recognize the nature of his actions and/or comprehend the consequences of his actions. 5/19/16RP at 301. When cross-examined by the State and challenged that his testimony merely

suggested that Raman had poor impulse control, Dr. Johansen emphasized that it was this history of mental disorder, and the range of treatments and substances, that influenced him to the point where he had his "judgment and mental state impaired and impeded." (Emphasis added.) 5/19/16RP at 314-15. This adequately warranted the instruction.

The Court of Appeals was also wrong to accept the State's contention that the defense expert merely testified to facts showing "irresistible impulse," a mental defense that involves acting in a fit of impelling cause. Decision, at pp. 9; SRB, at p. 15. This is not the nature of the defense Mr. Bains' expert testified to. Although the expert did state that there was poor impulse control, he also testified that Bains' mental state was impaired and impeded, and the evidence must be viewed in the light most favorable to the party seeking the instruction. AOB, at Part D.1(c) (citing cases).

The trial court was also wrong to require proof that the disorder, if isolated from all treatment and related or even unrelated medications, would alone create diminished capacity. See, e.g., State v. Griffin, 100 Wn.2d at 419 (error to not give instruction where defense produced evidence of diminished capacity stemming from catatonic-type paranoid schizophrenia and chronic alcoholism). Although voluntary intoxication and diminished capacity are similar defenses, "[i]f there is substantial evidence to support

either, the jury should be given instructions which allow the defendant to argue the defense." State v. Furman, 122 Wn. 2d 440, 454, 858 P.2d 1092, 1101 (1993) (citing Griffin, 100 Wn.2d at 419).

In contrast, a mental disorder caused specifically by preceding substance abuse is not diminished capacity. State v. Hansen, 46 Wn. App. 292, 299-300, 730 P.2d 706 (1986) (no error in refusing diminished capacity instruction where evidence was that Hansen's drug intoxication *produced* a mental disorder).

But that is not what the expert testified to here. Dr. Johansen made clear that the disorder and its subsequent treatment – including self-medication -- were interrelated in their affect on Raman's capacity. 5/19/16RP at 303, 315. In the light most favorable to the moving party, the requirements for the instruction were met.

(3). Reversal is required for flagrant prosecutorial misconduct in the trial phase and in closing argument, and improper, manifest comments on credibility, including misconduct by their elicitation.

(a). Review should be granted. Under RAP 13.4(b)(3), this Court should accept review of the errors assigned in the Opening Brief. The questions of flagrant incurable prosecutorial misconduct, and comments on credibility, are issues of constitutional magnitude under Fourteenth Amendment Due Process, and the Sixth Amendment, as argued herein.

(b). Prosecutorial misconduct and manifest constitutional error.

In this case, misconduct, including the extensive elicitation of officer opinions on J.C.'s believability which itself was manifest constitutional error, pervaded the entire case, was flagrant and incurable, and reversal is required. See State v. Boehning, 127 Wn. App. 511, 514, 522-24, 111 P.3d 899 (2005) (prosecutor's repeated references to hearsay that bolstered the complainant's credibility was flagrant and incurable, allowing appeal and requiring reversal); State v. Kirkman, 159 Wn.2d 918, 927-28, 936–37, 155 P.3d 125 (2007) (nearly explicit comments on credibility are manifest constitutional error under RAP 2.5(a)(3); U.S. Const. amend. 6; Wash. Const. art. I, § 21.

With regard to vouching and personal opinions uttered by prosecutors, including in closing argument, making out error requires a showing of "a 'clear and unmistakable' expression of the deputy prosecutor's personal opinion.'" State v. McKenzie, 157 Wn.2d 44, 56, 134 P.3d 221 (2006) (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

That is what occurred here, from trial through to argument. A prosecutor's use of personal pronouns such as "I" or "we" is misconduct when a prosecutor uses them to vouch for witness veracity, or to suggest that the government has special knowledge of evidence not presented to the

jury. See generally State v. Robinson, 189 Wn. App. 877, 894-95, 359 P.3d 874 (2015) (and noting that the use of personal pronouns is not indicative of misconduct where the prosecutor merely uses them to marshal the evidence).

Further, the making of personal and institutional guarantees to the jury that the case was sound was flagrant misconduct. See State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (prosecutor improperly argued to the jury that the "system has incredible safeguards that would not allow a case like this to come to court" if there was no "probable cause" to go forward). It has long been established that prosecutors may not express a personal opinion regarding the guilt of the defendant, or otherwise give a personal assurance that the defendant is guilty. State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984); see also State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

Put another way, it is improper for the prosecutor to "vouch" for the victim's credibility, including by personal opinion. Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness. State v. Thorgerson, 172 Wn.2d 438, 443-44, 258 P.3d 43 (2011); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

In this case, the trial deputy prosecutor *interjected himself* into the case, by eliciting from a detective that he also was one of the professionals

that worked at Dawson Place, a child interview center where J.C. was interviewed before the case.

> A: Dawson Place is our sexual assault center where it houses nurses, our detectives, child interview specialists.
> **Q: <u>In fact, do I work there</u>?**
> A: Yes. And prosecutors.

(Emphasis added.) 5/17/15RP at 155-56. This passage was part of a far lengthier examination, of both detectives, eliciting testimony about how Dawson Place was a place where specialists can obtain reliable statements from children because it is a more comfortable place than speaking in a courtroom. Thus Detective Dittoe contrasted the accuracy of Dawson Place interviews to the difficult circumstances of in-court questioning -- he explained that forensic interviews are not conducted by means of "a direct questioning type of situation <u>like this</u>," but instead, at Dawson Place the child is asked open-ended questions. (Emphasis added.) 5/18/16RP at 214-15. <u>See</u> AOB, at pp. 32-33

The prosecutor's nearly express implication to the jury, from this preceding testimony and the prosecutor's closing argument, was clear – J.C. testified meagerly but I, the prosecutor, am a part of the expert team that gets reliable statements from children and we stand up for those abuse victims, even though some of them perform poorly in court, like J.C. did.

Despite Mr. Bains' emphasis on this misconduct in the appellant's briefing – argued to be specific (a) misconduct in the "evidence phase," i.e.,

the "trial phase" of the case, and on its significance for the arguments of preserved error, and to be one of several factors that rendered the police officer's credibility-opinion testimony manifest error under RAP 2.5(a)(3) and contributed to cumulative error, the Court of Appeals merely briefly described the prosecutor's conduct in a manner that portrayed it as a mere aside by the witness, stating that Deputy Tenbrink gave testimony on various topics including testifying that various people worked at Dawson Place "including the prosecutor in this case." Decision, at p. 14; see AOB at pp 1-2, 28-29 (assignments of error 4 and 8), 31, 37 (summarizing the combined effect of the errors), Reply, at p. 8-14.

Notably, the Court of Appeals was wrong when it concluded that it was not error for the two detectives to testify about the "interview protocol" that was followed by the child specialists at Dawson Place in questioning alleged victim J.C., so the "jury could assess the reasonableness . . . of the responses." Decision, at pp. 12-14 (citing State v. Kirkman, 159 Wn.2d 918, 928, 931, 155 P.3d 125 (2007) and State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)).

In the cases cited, the interview statements of the child were *admitted*. Kirkman, 159 Wn.2d at 922-24; see State v. Kirkman, 126 Wn. App. 97, 101, 107 P.3d 133 (2005); Demery, 144 Wn.2d at 756-57.

But in this case, J.C.'s Dawson place interview was not admitted. It

was inadmissible, because J.C. was age 11, and thus did not fall within this statutory exception to the rule against hearsay.

Importantly, the Court's contrasting statement that no content of the child's interview was admitted (see Decision, at p. 14) placed form over function. The State did not need to elicit from the witnesses that J.C. made specific statements. The entire thrust of the two detectives' testimony over the course of two trial days was that J.C. had spoken reliably and consistently at Dawson Place. The jury did not need to hear any particular statements that J.C. made, it only needed to hear from the detectives that J.C. gave an interview that had more detail consistent with the State's allegations than his minimal trial testimony, and that the detectives believed the Dawson Place expert team elicits reliable interviews - and to hear from the deputy prosecutor himself that he, the prosecutor – who later told the jury in closing that he stands up for child sex victims even if they can't perform well in court -- was a *part of that expert Dawson Place team*.

The officers' comments on credibility, and the misconduct, were manifest constitutional error under RAP 2.5(a)(3), see AOB at pp. 1 (assignments of error 6 and 7), 35-37; and flagrant incurable prosecutorial misconduct, see AOB at pp. 1 (assignment of error 8), 35-40), because the comments were not merely uttered by two police witnesses but they so pervaded the entire case as to be explicit or nearly explicit opinions on

credibility, including because of the fact that the prosecutor interjected the information that he worked at Dawson Place -- described by the detectives as a location staffed by professionals where a child could feel more comfortable and give a more complete interview compared to the difficulty of testifying in court. Then, the improper credibility opinions, and the trial misconduct, was capped when, in closing, the prosecutor told the jury that prosecutors standing up for child sex victims cannot choose their victims from central casting. Opening Brief, at pp. 35, 37-38. Manifest error and flagrant misconduct pervaded this entire case.

F. CONCLUSION

Based on the foregoing, this Court should accept review and reverse Raman Bains' judgment and sentence.

Respectfully submitted this 7TH day of June, 2018.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 75700-8-I
Respondent,	)	DIVISION ONE
v.	)	
RAMANVEER SINGH BAINS,	)	UNPUBLISHED
Appellant.	)	FILED: April 23, 2018

Cox, J. — Ramanveer Bains appeals his convictions for communication with a minor for immoral purposes and child molestation. The evidence is sufficient to support the communication conviction. The trial court did not abuse its discretion by refusing to give a diminished capacity instruction. There was no prosecutor misconduct warranting reversal. We affirm.

On September 1, 2013, J.C. went to Bains's house where Bains touched J.C.'s genitals through his clothing. Bains was 25 years old at the time, and J.C. was 11.

J.C. returned the next day to the same house and went into Bains's bedroom where Bains was present. Bains showed J.C. pornography on his computer, and masturbated with the aid of a sex toy.

Concerned for her child's whereabouts, J.C.'s mother called the police. Deputy Daniel Tenbrink responded to the call and found J.C. at Bains's house. He took J.C. home.

Detective Thomas Dittoe was assigned to investigate. He arranged for J.C. to be interviewed by a child interview specialist. Based on that interview and Detective Dittoe's investigation, the State charged Bains with one count of first degree child molestation and one count of communication with a minor for immoral purposes. A jury found Bains guilty of both crimes.

He appeals from the court's judgment and sentence.

SUFFICIENCY OF THE EVIDENCE

Bains argues that insufficient evidence supported his conviction for communication with a minor. We disagree.

RCW 9.68A.090 makes it unlawful to "communicate[] with a minor for immoral purposes." Communication includes conduct as well as words.[1] It requires both transmittal by the defendant and receipt by the victim, but the victim need not understand the sexual nature of the communication.[2] And "immoral purposes" refers to a "'predatory purpose of promoting [a minor's] exposure to and involvement in sexual misconduct.'"[3] "An invitation or inducement to engage

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[1] State v. Hosier, 157 Wn.2d 1, 11, 133 P.3d 936 (2006).

[2] Id. at 9.

[3] Id. (quoting State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)).

in behavior constituting indecent liberties with or without consideration, for example, would also satisfy the statute."[4]

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the elements of the relevant crime proven beyond a reasonable doubt.[5] In challenging sufficiency of the evidence, the defendant "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[6]

Here, the evidence is more than sufficient to allow a rational trier of fact to find that Bains communicated with a minor within the meaning of RCW 9.68A.090. He engaged in extensive communicative conduct with a minor. First, Bains touched J.C.'s genital area through his pants. The next day, he showed the victim pornography. While the video played, and in the victim's presence, Bains masturbated with the use of a sex toy.

The jury could further find that such communication was for the purpose of exposing J.C. to, and involving him in, sexual misconduct, either by enticing him to touch Bains sexually, or by exposing him to an act of indecent exposure.[7]

Bains argues that RCW 9.68A.090 requires a defendant to induce a minor into sexual misconduct by some form of consideration. Specifically, he contends that the State presented the theory that Bains held out a motorbike to J.C. as

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[4] McNallie, 120 Wn.2d at 934.

[5] State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

[6] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[7] See RCW 9A.88.010(1).

consideration to induce him into sexual misconduct. He argues that the State had the burden to prove this theory and that sufficient evidence does not support it. This argument misconstrues this record and the elements of the crime.

The legislature defines the elements of a crime, not the State in its probable cause affidavit or closing arguments.[8] As stated, "[a]n invitation or inducement to engage in behavior constituting indecent liberties with or without consideration" satisfies the statute.[9]

The State noted once in its closing argument that J.C. may have approached Bains because he wanted to see the motorbike. But the State never asked the jury to find that Bains held out the motorbike in order to induce J.C. into sexual misconduct. Rather, the closing arguments of the parties focused on the "to convict" instruction, which defined the elements of the crime as follows:

> (1) That on a specific date between the 1st of August, 2013, through the 3rd day of September, 2013 the defendant communicated with J.M. for immoral purposes of a sexual nature;
> (2) That J.M. was a minor; and
> (3) That this act occurred in Snohomish County.[10]

This instruction did not ask the jury to find that Bains held out any sort of inducement. Thus, any failure to prove beyond a reasonable doubt that Bains held out the motorbike as consideration was irrelevant to the jury's verdict.

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[8] State v. Gonzalez-Lopez, 132 Wn. App. 622, 626, 132 P.3d 1128 (2006).

[9] McNallie, 120 Wn.2d at 934.

[10] The parties and the record variably name the victim J.M. and J.C. Clerk's Papers at 71.

Relatedly, Bains argues that the trial court improperly failed to give a unanimity instruction. The State correctly contends that this claimed is waived.

This court does not consider a claimed error raised for the first time on appeal, unless it is a "manifest error affecting a constitutional right."[11] An error is "manifest" if it "actually affected the defendant's rights at trial."[12]

Bains properly identifies an issue of constitutional dimensions. Article 1, section 21 of the Washington constitution gives the defendant the right to a unanimous jury verdict before he is convicted.[13] When the State charges a single count but introduces evidence of more than one criminal act, the danger arises that a conviction may not be based on a unanimous jury decision as to any single act alleged.[14]

In such instance, the court must instruct the jury that it must find unanimously which act or acts were proved, or else the State must elect a single act upon which it will rely for conviction.[15]

This court reviews de novo the trial court's failure to give an instruction if based on a question of law.[16]

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[11] State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

[12] Id. at 926-27.

[13] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

[14] Kitchen, 110 Wn.2d at 411.

[15] Petrich, 101 Wn.2d at 569.

[16] State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015).

But Bains otherwise fails to show that an error concerning this right is "manifest" by actually affecting the right to a unanimous verdict at trial. Because inducement is not an element of the crime, the State never alleged that Bains separately committed the crime of communication with a minor by holding out the motorbike for this purpose.

Instead, the State alleged a single act for this count. That act concerned Bains's encounter with J.C. on the second day. It included exposing J.C. to Bains's masturbation and pornography. Any issue regarding the motorbike was immaterial to whether this single act satisfied the elements of the crime. In short, the claimed error is not manifest.

DIMINISHED CAPACITY INSTRUCTION

Bains argues that the trial court abused its discretion by refusing to give a diminished capacity instruction. Because there was insufficient evidence to support giving one, we disagree.

The defendant is "entitled to have the jury instructed on his theory of the case if there is evidence to support it."[17] "If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his or her theory of the case."[18] The trial court must examine the evidence and draw all inferences favorable to the requesting party when determining whether the evidence supports an instruction.[19]

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[17] State v. Hansen, 46 Wn. App. 292, 299, 730 P.2d 706 (1986).

[18] State v. Webb, 162 Wn. App. 195, 208, 252 P.3d 424 (2011).

[19] Id.

A defendant is entitled to a diminished capacity instruction when substantial evidence shows that the defendant has a diagnosed mental condition "and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged."[20] "It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder."[21] Rather, any expert testimony "concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state" at the time of the crime.[22]

Notably, a defendant's diminished capacity to form the culpable mental state is distinct from his mental inability to resist the impulse to commit an act.[23] The former is a defense justifying an instruction under the proper circumstances. The latter is not.[24]

"If the claim of diminished capacity is premised wholly or partly on the defendant's voluntary consumption of drugs or alcohol, however, one instruction can be adequate to permit the defendant to argue defendant's theory of the case."[25] The supreme court has held that a voluntary intoxication instruction is

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[20] State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).

[21] State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626 (2001).

[22] Id. at 918.

[23] State v. Edmon, 28 Wn. App. 98, 105, 621 P.2d 1310 (1981).

[24] Id.

[25] State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993).

sufficient to allow the defendant to argue his theory of the case when the diminished capacity claim is based on voluntary intoxication.[26]

This court reviews for abuse of discretion a trial court's refusal to give jury instructions based on a factual question.[27]

Here, Dr. Steven Johansen testified about Bains's diagnosed mental disorders and substance usage. He diagnosed Bains as suffering from unspecified depressive disorder, unspecified personality disorder, schizophrenia spectrum, and alcohol and cannabis disorders in earlier remission. He also noted Bains's "history of very impulsive actions." As a result, Bains had been prescribed as treatment for these disorders tazodone, Zoloft, propranolol, Risperdal, and Atarax. These drugs would have produced a sedative and disorienting effect, exacerbated by Bains's heavy use of marijuana and alcohol. Notably, these substances would also disinhibit his impulse control. Dr. Johansen testified that Bains was taking a combination of substances that "would impede his awareness. It would impede his judgment. . . . [I]t impedes his – increases his impulsivities in a lot of ways." And as a result, it could have caused him to act on his desires more than he would have sober.

Bains proposed both a diminished capacity instruction and a voluntary intoxication instruction. The trial court found that Dr. Johansen had testified "all about substances and not about a mental disease or defect at all, or at least certainly not primarily." It further concluded that although Dr. Johansen noted

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[26] Id.

[27] Condon, 182 Wn.2d at 315-16.

Bains's diagnoses, he did not connect them to any diminishment of capacity. Accordingly, it declined to give a diminished capacity instruction.

But it did give a voluntary intoxication instruction based on the same evidence. This allowed Bains to argue his theory of voluntary intoxication, which addresses whether one has the requisite intent to commit the crime charged.

The trial court did not abuse its discretion in concluding that a diminished capacity instruction was inappropriate in light of the evidence. While Dr. Johansen testified that he could diagnose Bains as suffering from several mental disorders, he could not "reasonably relate [these disorders] to impairment of the ability to form the culpable mental state."[28] Instead, he testified about the effect of certain prescription and nonprescription substances. Several of these had a disinhibiting effect, provoking the sort of irresistible impulse that is no defense.

The evidence shows that if Bains's mental state was compromised, it was by intoxicating substances and not a mental disorder. Thus, the trial court properly instructed the jury on voluntary intoxication rather than diminished capacity.

Bains argues that the trial court refused to instruct the jury on diminished capacity on the improper basis that Bains's mental disorders ***alone*** did not diminish his capacity. We do not read the record in the way he does. The denial of the requested instruction was proper, as we discussed.

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[28] Atsbeha, 142 Wn.2d at 918.

Bains argues that the failure to instruct the jury on diminished capacity was reversible error. He relies for this contention on State v. Cienfuegos.[29] But his reliance is misplaced.

In that case, Guillermo Cienfuegos appealed his conviction for escape, claiming that he received ineffective assistance of counsel.[30] He argued that his counsel should have proposed an instruction on diminished capacity, and that the failure to do so had prejudiced him.[31]

The supreme court agreed that Cienfuegos was entitled to this instruction.[32] But it concluded, under Strickland v. Washington,[33] that Cienfuegos failed to show "the existence of a reasonable probability" that but for counsel's error, the result would have been different.[34]

The court emphasized that the jury had been instructed on the State's burden to prove knowledge and intent, from which counsel for both sides had argued about Cienfuegos's ability to have such knowledge or form the requisite intent.[35] The court held that this instruction allowed the jury to take into account

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[29] 144 Wn.2d 222, 25 P.3d 1011 (2001).

[30] Cienfuegos, 144 Wn.2d at 224.

[31] Id. at 227.

[32] Id.

[33] 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[34] Cienfuegos, 144 Wn.2d at 229.

[35] Id.

any alleged mental impairment.[36] "The diminished capacity instruction would have highlighted that fact and should have been given, but even without it defense counsel was able to argue his theory of the case."[37]

Here, the trial court provided this instruction on voluntary intoxication:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with the purpose of sexual gratification as to Count I or for immoral purposes of a sexual nature as to Count II.[38]

This instruction was sufficient to allow Bains's counsel to argue that his substance use, as shown in the record, affected his ability to act with the requisite purpose. This is sufficient.

PROSECUTOR MISCONDUCT

Bains argues that reversal is required for flagrant prosecutorial misconduct that raises manifest constitutional error. We disagree.

A defendant who fails to object, waives his argument as to prosecutorial misconduct unless the challenged conduct was "so 'flagrant and ill intentioned' that it cause[d] enduring and resulting prejudice that a curative instruction could not have remedied."[39]

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[36] Id. at 230.

[37] Id.

[38] Clerk's Papers at 73.

[39] State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

"A witness may not testify about the credibility of another witness."[40]

The supreme court has recognized that a law enforcement officer's testimony as to the victim's credibility "often carries a special aura of reliability" that may especially prejudice the defendant.[41] But the court has also recognized that a law enforcement witness does not impermissibly testify to the victim's credibility by simply testifying to the "interview protocol he used to obtain [the victim's] statement" without testifying to whether the victim told the truth in that interview.[42] Such a witness "'merely provide[s] the necessary context that enabled the jury to assess the reasonableness of the . . . responses.'"[43] Such testimony may be helpful, for example, in explaining interview protocols used to educate minors on how to tell the truth.[44]

"[E]ven if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it. Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary."[45]

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[40] State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003).

[41] Kirkman, 159 Wn.2d 928.

[42] Id. at 931.

[43] Id. (quoting State v. Demery, 144 Wn.2d 753, 764, 30 P.3d 1278 (2001)).

[44] Id.

[45] Id. at 928.

This court reviews for abuse of discretion the trial court's admission of testimonial evidence.[46]

Detective Dittoe and Deputy Tenbrink both testified, without objection, regarding the practices of Dawson Place, a nonprofit sexual assault center hosting the multidisciplinary special investigations unit.

Detective Dittoe testified that he was assigned to the special investigations unit, and received specialized training for this purpose. He explained that the unit included Sheriff's office detectives, nurses, counselors, social workers, and prosecutors. He described it as a "child safe, child friendly environment that allows victims to come to one location to obtain services rather than [being] sent all over the county to hospitals, maybe a police agency that seems to be a little cold or uninviting for minors."

According to his testimony, a child interview specialist and not a law enforcement officer would serve as the child victim's "contact point." The interview specialist is trained "to interview the younger children in a way that's nonleading and nonsuggestive and just gather what the child wants to say." Detective Dittoe was present at J.C.'s interview. The interview specialist is employed to ensure police "gather the most accurate statement" possible.

Detective Dittoe contrasted this safe, open model to that presented by the probing atmosphere of trial. He explained that "the child during the interview has the choice whether they even want to answer the question or not . . . it's not a direct questioning type of situation like [trial] where specific questions are being

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[46] Id. at 927.

asked in order to have a direct answer." And by interviewing the child in such an environment early in the investigation, police can avoid the risk of "time going by, whether an individual was going to forget information or just emotionally not recall."

Deputy Tenbrink gave similar testimony. He explained that the special investigations unit at Dawson Place was "better equipped, better trained than patrol deputies are to interview" child sex crime victims. He noted that alongside law enforcement, nurses, and child interview specialists, Dawson Place also housed prosecutors, including the prosecutor in this case. He did not testify regarding J.C.'s specific interview.

Here, neither Detective Dittoe nor Deputy Tenbrink improperly testified as to J.C.'s credibility. They simply explained the interview protocol used to obtain J.C.'s earlier testimony. They noted its child-focused structure, based around a feeling of safety and open-ended questioning. In no way did either witness suggest that J.C.'s statements in that environment or on trial would be more credible as a result. Neither did they testify to the content of those statements.

We need not further discuss this argument.

Bains next argues that the prosecutor committed flagrant misconduct by personally vouching for J.C.'s credibility. We again disagree.

A defendant "must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial" to show prosecutorial misconduct.[47] To show

[47] Boehning, 127 Wn. App. at 518.

prejudice, the defendant must show a "'substantial likelihood the instances of misconduct affected the jury's verdict.'"[48]

"A prosecutor commits misconduct by vouching for a witness's credibility."[49] The prosecutor may do so in two ways, either by "plac[ing] the prestige of the government behind the witness or [by] indicat[ing] that information not presented to the jury supports the witness's testimony."[50] A prosecutor does not commit misconduct by drawing an inference from evidence at trial that a witness had no motivation to lie.[51]

This court reviews a prosecutor's comments in closing argument in light of the "total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions."[52] The prosecutor may draw and express reasonable inferences from the evidence and instructions.[53] But the prosecutor may not make comments "that are unsupported by the evidence and prejudice the defendant."[54]

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[48] Id. (quoting State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)).

[49] State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015).

[50] Id. at 893.

[51] Id.

[52] Boehning, 127 Wn. App. at 519.

[53] Id.

[54] Id.

For example, a prosecutor cannot comment in closing that a victim's "out-of-court statements were consistent with her statements at trial and that she had disclosed ***even more*** pretrial when such disclosures were ruled inadmissible.[55]

A defendant who fails to object, waives his argument as to prosecutorial misconduct unless the challenged conduct was "so 'flagrant and ill intentioned' that it cause[d] enduring and resulting prejudice that a curative instruction could not have remedied."[56]

Here, the prosecutor argued in her closing argument that "[t]he prosecutors that stand up for victims of sexual assault in court don't get to choose their victims. It's not a TV show. We don't get to go to central casting."

The prosecutor stated that J.C.:

> could not conceive that this is where he would end up, that he would have to tell the same story the way he did to his mother, to a forensic interviewer overheard by the detective, to a defense attorney, to a prosecutor, over and over telling this story about what happened, the same story consistently. He could not conceive [that] this is where it would end up. So what possible reason would he have to fabricate it?[57]

The prosecutor noted J.C.'s anxiety "as he was trying to tell you what happened, talking about how he didn't like the 20 of you looking at him." And she noted that evidence found on investigation of Bains's house corroborated J.C.'s trial testimony.

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[55] Id. at 522.

[56] Id. at 518 (quoting Russell, 125 Wn.2d at 86).

[57] Report of Proceedings Vol. 4 (May 19, 2016) at 340.

In rebuttal closing arguments, the prosecutor responded to Bains's argument that J.C. had lied to deflect blame from breaking curfew. She suggested that it was not reasonable for J.C. to repeat his difficult story for three years simply to evade blame for this infraction.

The State neither placed the government's prestige behind the witness, nor indicated that it had information not presented that supported the witness's credibility. The prosecutor made a generalized rhetorical statement that certain prosecutors prosecute sex crimes, and that they cannot choose the victims. Such a statement does not imply any victim is especially credible or that sex crime prosecutors bring some special prestige.

The prosecutor also did not reference out-of-court evidence. Testimony at trial showed that J.C. had been interviewed regarding his interaction with Bains and had discussed the matter with his mother. And J.C. testified at trial to that same conduct. Thus, the prosecutor relied only on evidence before the jury to state that J.C. had told his story repetitively. She drew a reasonable inference from that evidenced to suggest that J.C. had no motive to fabricate his story.

In explaining the burden of proof beyond a reasonable doubt, the prosecutor suggested that the jurors might "have questions because I didn't – I didn't think to ask the right question. Maybe you have questions because we weren't allowed. But you can only have questions about things that are contained within the elements of these crimes." This argument was not improper. Rather than urging the jury to focus on facts not in evidence, it urged the jury to do just the opposite. Bains merely speculates otherwise.

State v. Boehning[58] is instructive. In that case, Randy Boehning appealed his conviction for molesting a child in his foster care.[59] Prior to trial, the child victim had disclosed to a subsequent foster parent that Boehning "had made her do 'nasty' things."[60] The subsequent foster parent reported these statements to the child's caseworker.[61] Three years later, the child again disclosed the abuse to her family's social worker who informed police.[62]

A police detective interviewed the child, and based on that interview, Boehning was arrested.[63] The State charged him with three first-degree rape counts and three first-degree child molestation counts.[64] The subsequent foster parent, social worker, and police detective all testified at trial to the child's earlier statements.[65] But because the child victim would not testify to certain incidents, the State dismissed the rape counts and amended the information accordingly.[66]

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[58] 127 Wn. App. 511, 111 P.3d 899 (2005).

[59] Id. at 513.

[60] Id. at 514.

[61] Id.

[62] Id.

[63] Id. at 515.

[64] Id.

[65] Id.

[66] Id. at 516.

In closing arguments, the prosecutor argued that the child

> was not able to 'talk with this group of strangers ***as well as she was able to do it one-on-one in the past***' and that there were '***some other charges, those charges aren't present anymore because she didn't want to talk about this as much as she was willing to talk about it before.***'[67]

The prosecutor further stated that, because the child victim would have felt safer in the pretrial conversations than at trial, "'***it's reasonable that this child might have gone a little farther in discussing what happened to her in a safer environment.***'"[68] The prosecutor explicitly remarked that the child had told her story in detail to other witnesses before trial.[69] The prosecutor also asked the jury to think about whether the child victim would have a reason to lie and submitted that the child's trial testimony was consistent with earlier pretrial statements.[70] The jury found Boehning guilty on all charges, and he appealed to Division Two of this court.[71]

Boehning argued that the prosecutor had committed misconduct by improperly focusing on facts outside the evidence, including the child's out of court statements, and the uncharged rape counts.[72] Division Two of this court

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[67] Id. at 517.

[68] Id.

[69] Id.

[70] Id. at 521.

[71] Id. at 518.

[72] Id. at 519.

agreed.[73] It held that the prosecutor committed flagrant misconduct by arguing that the child's out-of-court statements, inadmissible at trial, were consistent with her trial testimony.[74] This conduct was exacerbated by the prosecutor's repeated suggestions that the child had earlier disclosed more serious allegations that would have supported the dismissed rape charges.[75]

The court emphasized that:

> In arguing that [the child's] out-of-court statements were consistent with her statements at trial and that she had disclosed ***even more*** [pre trial] . . . the prosecutor left the jury with the impression that [other] witnesses 'had a great deal of knowledge favorable to the State which, but for the court's rulings, would have been revealed.'[76]

This "repeated attempt" constituted misconduct.[77]

The court also discussed how the prosecutor had shifted the burden by attacking Boehning's failure to establish inconsistencies between the child's pretrial and trial statements.[78] And it noted that no other witnesses or physical evidence were available to corroborate the child's testimony.[79] In such circumstances, where "the evidence arguably supported either party's version of

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[73] Id. at 521.

[74] Id.

[75] Id.

[76] Id. at 522 (quoting State v. Alexander, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992)).

[77] Id. at 523.

[78] Id.

[79] Id.

events," the court could not conclude that a rational jury would have returned the same verdict absent the improper remarks.[80]

Here, the prosecutor's remarks were not similar. The prosecutor did not rely on inadmissible evidence. She did not suggest that such evidence would have provided additional support for the charges brought or others that could have been brought. Rather, she stated that J.C. had told his story, and had been forced to tell it repeatedly. The message was not that J.C. had testified before to key information not present in his trial testimony. Rather, it was that a child, forced for several years to retell a traumatizing story, had continued to do so. The prosecutor reasonably asked the jury to infer that J.C. would not have done so based on a fabrication. And J.C.'s story was corroborated by police testimony regarding the investigation of Bains's bedroom.

Bains further argues that if no individual error is sufficient to require reversal, the cumulative effect of all alleged errors so requires. He is wrong.

"[R]eversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless."[81] This analysis depends on the nature of the errors. Constitutional error is harmless if "the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the

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[80] Id.

[81] Russell, 125 Wn.2d at 93.

error."[82] Nonconstitutional error, by contrast, "requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial."[83]

As discussed above, there were no errors. Thus, there can be no cumulative errors.

COSTS

Bains argues that if he should fail to prevail in this appeal, this court should not impose costs. Absent new evidence to the contrary, we agree.

RCW 10.73.160(1) gives appellate courts discretion to decline to impose appellate costs on appeal.[84] Under State v. Sinclair, there is a presumption that indigency continues unless the record shows otherwise.[85] The finding remains in effect unless the commissioner or clerk determines by a preponderance of the evidence that the defendant's financial circumstances have significantly improved since the last determination.[86]

Here, the trial court found that Bains is indigent. Nothing in this record overcomes this presumption. Thus, an award of costs would be inappropriate at this time. If the State subsequently obtains information documenting a significant

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[82] Id. at 94.

[83] Id.

[84] State v. Nolan, 141 Wn.2d 620, 629, 8 P.3d 300 (2000).

[85] 192 Wn. App. 380, 392-93, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

[86] RAP 14.2.

improvement in Bains's financial circumstances, it may file a cost bill with the commissioner.

We affirm the judgment and sentence, and deny any award of costs.

Cox, J.

WE CONCUR:

FILED
5/23/2018
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. RAMANVEER SINGH BAINS, Appellant.	No. 75700-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Ramanveer Bains, has moved for reconsideration of the opinion filed in this case on April 23, 2018. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

For the Court:

Cox, J.

Judge

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75700-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Mary Kathleen Webber
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Snohomish County Prosecuting Attorney

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: June 7, 2018

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