SUPREME COURT NO. 96408-4
COURT OF APPEALS NO. 50083-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE ARNOLD,

Petitioner.

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

The Honorable Kathryn J. Nelson, Judge

PETITION FOR REVIEW

RITA J. GRIFFITH
Attorney for Appellant

RITA J. GRIFFITH, PLLC
4616 25th Avenue NE, #453
Seattle, WA 98105
(206) 547-1742

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A. IDENTITY OF PETITIONER

Michael Arnold, petitioner here and appellant below, asks this Court to accept review of the decision designated in Part B of this motion.

B. DECISION

Mr. Arnold seeks review of the decision of the Court of Appeals, Division Two, filed in his case on September 25, 2018, which affirmed his convictions for two counts of child molestation.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Does a trial court's instruction which includes: "in order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated" constitute a judicial comment on the evidence in violation of Article 4, section 16 of the Washington Constitution?

2. Does so-called expert testimony that disclosure is delayed from days to years in 95% of sexual abuse cases and that fear is the main reason for delay where there is a family relationship – testimony based entirely on a child interviewer's personal experience and informal conversations with colleagues and not on any scientific theory or meaningful empirical data – deny the accused his state and federal constitutional rights to a jury trial and due process of law where there was a significant delay of many years in his case?

Is the error in admitting the testimony manifest constitutional error which can be raised for the first time on appeal?

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[1] The Pierce County Prosecutor's Office charged appellant Arnold with six counts of first degree child molestation. CP 3-6. He was convicted of two counts; the prosecutor dismissed one count and the jury was unable to agree on three. CP 99-107; RP 225. The later three counts were resolved by a plea to one count of third degree assault in which Arnold did not admit guilt. CP 154-164; RP 376-377

3. Does a prosecutor commit misconduct in arguing to the jury in closing and in the closing PowerPoint presentation -- that the only two possibilities were either that the alleged victims were telling the truth or that they had made up their allegations -- deny an accused his state and federal constitutional rights to the presumption of innocence, to a correct statement of the burden of proof and to due process of law?

Is the misconduct a manifest constitutional error which can be raised for the first time on appeal?

C. STATEMENT OF THE CASE

1. Trial evidence

Michael Arnold is the second from the oldest of the eleven children of the Arnold family who lived together in a four-bedroom home growing up; the charges against Arnold arose from accusations by two of his younger sisters, S. and C., about his alleged behavior toward them 16 or 17 years earlier. RP 41-45, 100, 140, 142, 208, 210. C. and then, a week and a half later, S. told their cousin of alleged sexual touching and the police were contacted. RP 94-97, 83. At the time of trial, Michael was 30 years old; S. was 20 years old and C. was 18. RP 38, 41, 44, 139.

S. testified that on three occasions when she was 4 or 5, while the children were watching movies on Friday night and sleeping in a communal downstairs room, Michael touched her on her vagina underneath her underwear. RP 56-60, 83-89, 100. S. said, the first time, she was sleeping on a big round couch in the downstairs living room and awoke when she felt Michael touch her. RP 82-84. S. described the

second and third incidents as being much like the first. RP 85-87. She testified that she did not tell anyone about the touching because she was afraid of Michael.[2] RP 92. When nothing happened initially after the later reports of abuse to the police, S. tried unsuccessfully to get a restraining order against Arnold. RP 989-99, 119.

C. testified that when she was 2, 3, 4 or 5, she remembered sitting on the floor in the boy's bedroom watching television when Michael displayed himself and asked her to touch his penis. RP 169-170. She said that it got harder when she touched it. RP 170. She could not remember how long she touched him or why she stopped. RP 170. She testified that it happened again when she was outside with Michael and he asked her to go inside to his room. RP 171-172. He had her touch his penis again with her hand. RP 173. He threatened her; she was not sure when, but believed it was after this. RP 173-174. On another occasion she had to get up in the night to go to the bathroom; Michael was awake and went in with her. RP 174. He made her get undressed. RP 174. C. could not recall what happened or if Michael took his clothes off.[3] RP 176.

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[2] The jury was unable to agree on any of the three counts arising from S.'s allegations. CP 102-107.

[3] The charge based on this alleged incident was dismissed by the state after C. testified. CP 99-100; RP 225.

The children's mother, Kimberly Arnold, confirmed the ages of the children; and testified about their living arrangements, their home schooling and sports classes, and the fact that S. and C. had made disclosures about Michael to the police. RP 207-211, 213-216. Police witnesses confirmed that they interviewed S. and C. after their disclosures about what they said happened many years earlier. RP 227-234, 234-236, 239; 270-274.

Keri Arnold, a child interviewer for the Pierce County Prosecutor's office, who knew nothing about the Arnold family or the details of the case, testified as a state's expert witness on delayed disclosure. RP 249-251. Keri Arnold testified that she had no special training in "delayed disclosure," but that it was a topic that came up at training and conferences. RP 243. Based on this, she testified that in at least 95% of cases or more, there is a delay in reporting, "frequently of at least days, and generally weeks, months or years." RP 244. She testified it is most frequently a delay of months or years, depending – in some degree – on the relationship between the alleged victim and the alleged perpetrator. RP 244. According to Keri Arnold the closer the relationship is -- a close family member or family friend -- the more likely the alleged victim is to delay disclosure. RP 244. She testified that fear causes the delay – fear of what will happen to the perpetrator, the family or them. RP 245.

The trial court imposed a term of 84 months based on the jury's determination that Arnold's had his younger sister C. touch his penis on two occasions when he was a teenager, and likely a juvenile CP183-184.

2. Closing arguments and the prosecutor's PowerPoint

The prosecutor's PowerPoint slides included a series of slides proclaiming and developing the theme that there were only two possibilities in the case:

> POSSIBILITIES
>
> 1. S.A. and C.A. are telling the truth
>
> 2. S.A. and C.A. made it up on their own

CP 75-98. There were two ensuing slides saying, "No evidence to collude [sic] a sinister plot against their brother," and a slide saying "No credible evidence to support the conclusion they made it up on their own. The slide series ended:

> The only conclusion supported by the EVIDENCE is that they are telling the TRUTH about being touched (S.A.) or touching him (C.A.).

CP 75-98. On a slide with the title "Abiding belief in the truth of the charges," there are three bullet points, including "No reasonable argument the abuse didn't occur." CP 75-98.

The prosecutor's verbal argument followed the theme that there were only two possibilities, S. and C. were "making the whole thing up" or "telling the truth" (RP 293-294), and that they had no reason to lie. RP 294. The prosecutor argued: Why would C. make it up? What reason other than it really happened? RP 302. They aren't making this up. RP 303. There is no evidence that they colluded in a sinister plot. RP 306.

The prosecutor used Keri Arnold's testimony to support the arguments that delayed disclosure is common and that C.'s reasons for not telling for 16 years were valid. RP 302-303. The prosecutor argued that credibility is not reduced by the long delay because disclosure was delayed in 95% of the cases which Keri Arnold saw, a phenomenon which the prosecutor described as choosing to push down the events and not say anything because of fear. RP 308-309.

Defense counsel disagreed with the "conclusions and assumptions" of the prosecutor; counsel noted, in particular, that while corroboration is not mandatory, this does not automatically mean that the statements are truthful. RP 311-312. Counsel noted that there was no physical or forensic evidence, just allegations that something had happened fifteen years earlier. RP 314.

Counsel pointed out that the fact that Michael moved back into the house and had not been the nicest of brothers could provide a motive to

lie, or perhaps they misremembered an event involving someone else or incorrectly remembered an incident. RP 319-321. In spite of the fact that S. and C. might now believe something happened when they were 4 years old, counsel argued, they might have been confused or misremembered what happened many years earlier. RP 324-325.

In rebuttal the prosecutor argued that the jurors should not consider the possibilities, other than lying, enumerated by defense counsel because there was nothing in evidence to support them. RP 327-328.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B) (3) AND (4); THE TRIAL COURT'S GIVING OF AN INSTRUCTION THAT TOLD JURORS THAT THE ALLEGED VICTIM'S UNCORROBORATED TESTIMONY WAS SUFFICIENT TO CONVICT ARNOLD UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE AND CONSTITUTES A SIGNIFICANT QUESTION OF LAW WHICH THIS COURT SHOULD RESOLVE.

Over defense objection the trial court instructed the jury that "[i]n order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility." CP 108-138.

Mr. Arnold is asking this Court to accept review, overrule State v. Clayton, 32 Wn.2d 571, 202 P.922 (1949), and hold that in all cases this

instruction unconstitutionally comments on the evidence in violation of Article 4, section 16 of the Washington constitution, which provides that "judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law." At the least, this Court should so hold under the facts of this case.

In Clayton, the Court upheld the giving of a non-corroboration instruction, reasoning that even though the trial court had "singled out" the testimony of the complaining witness, the court had expressed "no opinion as to the truth or falsity of the testimony of the prosecutrix" in the particular case and was telling the jury only that generally "a defendant may be convicted upon such testimony alone":

> It is true that, in the instruction of which complaint is here made, the trial court in a sense singled out the testimony of the prosecutrix. However, what the court thereby told the jury was not that the uncorroborated testimony of the prosecutrix in the instant case was sufficient to convict the appellant of the crime with which he was charged, but, rather, that in cases of this particular character, a defendant *may be* convicted upon such testimony alone, provided the jury should believe from the evidence, and should be satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged.

Clayton, 32 Wn.2d at 573-574.

In State v. Zimmerman, 130 Wn. App. 170, 182-183,121 P.2d 1216

(2005), review denied, 161 Wn.2d 1012 (2007),[4] the Court of Appeals followed Clayton, as controlling authority, but questioned its correctness. The Court, in Zimmerman, noted that the instruction is not included in the Washington Pattern Criminal Jury Instructions (WPIC) and quoted the Washington Supreme Court Committee on Jury Instructions' recommendation against the instruction:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

Zimmerman, at 183 (quoting 11 WPIC, § 45.02, cmt. at 561 (2nd ed.1994)). The Zimmerman court then concluded, "[a]lthough we share the Committee's misgivings, we are bound by Clayton." Id.

The trial court's instruction clearly and explicitly conveyed to the jurors that the uncorroborated testimony of the alleged victims was sufficient

[4] The Supreme Court granted review in Zimmerman on the issue of whether reference to the victim's age in an instruction was a comment on the evidence, and reversed and remanded the case for consideration in light of State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006), State v. Zimmerman, 157 Wn,2d 1012m 135 P.3d 113 (2006). The Court of Appeals again held that including age in the instruction was a comment on the evidence but harmless. State v. Zimmerman, 135 Wn. App. 970, 146 P.3d 1224 (2006). Review of this decision was denied at 161 Wn.2d 1012 (2007).

to find Arnold guilty – inferentially notwithstanding other evidence presented to them. Nothing in the instruction suggests that it is a general comment on cases involving sexual misconduct, as Clayton found; it is an instruction to guide the jury's determination of guilt under the facts in the particular case. This is contrary to Article 4, section 16 of the Washington State Constitution.

The purpose of Article 4, section 16 is "to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight or *sufficiency* of the evidence." State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (quoting State v. Jacobsen, 78 Wn.2d 491,495, 477 P.2d 1 (1970) (emphasis added)). A judge comments on the evidence "if [he or she] conveys or indicates to the jury a personal opinion or view . . .regarding the credibility, weight, or *sufficiency* of some evidence introduced at trial." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (emphasis added); State v. Theroff, 95 Wn.2d 385, 3880389, 622 P.2d 1240 (1980. It is sufficient to constitute a comment on the evidence if the judge's personal opinion is implied; it need not be stated expressly. Levy, at 56 Wn.2d at 721; State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Moreover, it is irrelevant whether the court intended the statement to be a comment. Lampshire, 74 Wn.2d at 893. A comment on the evidence is presumed to be prejudicial on appeal. Levy, 156 Wn.2d at 723. (1968).

Even if – for the sake of argument -- the instruction could be considered not to be a comment in some cases, here the state's case was uniquely limited to the testimony of the complaining witnesses, the alleged victims in the case. The testimony of the police officers merely confirmed that the alleged victims had made the accusations they said they had made. RP 231-234, 267-273. Their mother confirmed only a few non-incriminating facts of her family's life. RP 207-220. None of these witnesses claimed to have any knowledge of the allegations or the alleged incidents. Under these circumstances an instruction, that to convict did not require corroboration of the alleged victims' testimony, could be only be interpreted by jurors as an opinion that the testimony of S. and C. was sufficient to establish guilt.

In fact, this is exactly what the prosecutor argued in closing. The prosecutor told the jurors that they were not allowed to hear what the police or other people were told, and that it all came down to whether S. and C. were telling the truth or lying. RP 293-294. The prosecutor then told the jurors that the sisters' recollections were enough for conviction, without corroboration. RP 301. In these circumstances, the instruction that the testimony of the alleged victims did not need to be corroborated for conviction was the same as saying that S. and C.'s uncorroborated testimony was sufficient for conviction. Accordingly, the instruction was a comment on the evidence in this case.

2. REVIEW SHOULD BE GRANTED UNDER RAP 13.44(B) (1), (2), (3) AND (4); ARNOLD WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW BY THE IMPROPER ADMISSION OF TESTIMONY: (1) THAT IN 95% OF CASES OF SEXUAL ABUSE DISCLOSURE IS DELAYED, (2) THAT THE CLOSER THE RELATIONSIP BETWEEN PERPETRATOR AND VICTIM THE LONGER THE DELAY, AND (3) THAT THE REASON FOR DELAY IN REPORTING IN CASES INVOLVING FAMILY RELATIONSHIPS IS FEAR. THIS WAS A MANIFEST CONSTITUTIONAL ERROR WHICH COULD BE RAISED ON APPEAL AND THE DECISION AFFIRMING THE INTRODUCTION OF THE EVIDENCE IS IN CONFLICT WITH OTHER DECISIONS, IS OF CONSTITUTIONAL MAGNITUDE AND IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The testimony of Keri Arnold, a child interviewer from the Pierce County Prosecutor's office, that 95% of disclosures of child abuse are "delayed disclosures"; that the closer the relationship between an alleged abuser and an alleged victim, the longer the delay; and that the reasons for delay in the case of a family relationship are fear of the alleged victim for the perpetrator, the family or themselves was improper. RP 244-245, 249. Ms. Arnold's testimony about delayed disclosure was not shown to be based on any legitimate scientific theory or meaningful empirical data, and improperly vouched for the credibility of S. and C.; it denied Mr. Arnold his right to a jury trial and due process of law.

Ms. Arnold's testimony told the jury that, in her expert opinion, S. and C.'s delayed disclosure made them credible; the delayed disclosure put them in a category with most people who disclose sexual abuse and a narrower category where, as in Michael Arnold's case, there is alleged abuse between family members where delay could be explained by fear for the discloser's brother, family or self. The prosecutor used Ms. Arnold's testimony as evidence that S. and C.'s were credible; there was no other purpose for the testimony. RP 308-309.

Ms. Arnold had no scientifically-accepted theory of delayed disclosure. RP 243. Further, her definition of "delay" as being from "at least days" through "weeks, months and years " -- essentially *any* length of time– undercut any relevance of the statistic, even if it had a legitimate empirical basis. RP 244. There was no way a juror could know from her testimony of a 15-or 16- year delay was common or uncommon or what percent of cases had such long delays. RP 24. In fact, Ms. Arnold's testimony that she interviewed "children ages three through 15," RP 240, demonstrates that she had *no* experience with delays of 16 or 17 years and that the disclosures of the younger children she interviewed could not have been similar to the delay at issue at trial. It denied Arnold his state and federal constitutional rights to due process and to a jury trial.

The Court of Appeals agreed that it is "generally improper for a witness to offer testimony concerning the credibility of another witness" and that such testimony "is unfairly prejudicial and invades the exclusive province of the jury." Slip op. at 4 (citing State v. Demery, 144 Wn.2d 753, 758-759, 30 P.3d 1278 (2001). This is well-established in federal as well as state law. United States v. Alcantara-Castillo, 788 F.3d 1156, 1197 (9th Cir. 2015); United States v. Harding, 585 F.3d 1155, 1158 (9th Cir. 2009)l United States v. Sanchez, 176 F.3d 1214, 1219 (9th Cir. 1999); United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005).

The Court of Appeals also agreed that an explicit or "'near-explicit' opinion on the defendant's guilt or a victim's credibility can constitute manifest error," which can be raised for the first time on appeal. Slip op. at 4 (citing State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007)). See also State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005). The Court of Appeals, however, concluded that Ms. Arnold "did not state any opinion about Arnold's guilt or S. and C.'s veracity" and that it was sufficient "she had experience with the subject of delayed disclosure, experience she gleaned over the course" of her career as a child interviewer. Slip op. at 7. The Court of Appeals erred in these conclusions.

Ms. Arnold's testimony about her own experience was insufficient to give rise to any valid inference relevant to the case. Her testimony lumped all delays – even those of a few days – together. The average delay in disclosure might have been 2 months or 3 years. Her testimony did not inform the jury of anything helpful to their deliberations beyond her conclusion that a delay did not detract from the credibility of the complaining witness and supported the guilt, by inference, of the accused.

. Contrary to the conclusions of the Court of Appeals, Ms. Arnold's testimony was akin to the testimony in State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), and cases cited in Black, whether Ms. Arnold directly testified that Michael Arnold fit the profile or left that inference for the jury. Slip op. at 7. Here, the profile/category described was of sexual contact in a family situation where disclosure was delayed by fear. In Black, the testimony was about "rape trauma syndrome." In State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983), the testimony was about the characteristics of sexually abused children; and in State v. Stewart, 34 Wn. App. 221, 222-224, 660 P.2d 278 (1983), the testimony was about the propensity of babysitting boyfriends to inflict child abuse. There is no suggestion in these cases that the testimony, which was found to be reversible error, would have been any less objectionable if the

witness had said he or she was relying on experience and had not been asked if the defendant fit the category or profile.

The admission of Ms. Arnold's testimony was manifest constitutional error.

3. REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(B) (1)-(4);THE DECISION OF THE COURT OF APPEALS ON THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENTS AND THE POWERPOINT PRESENTATION, WHICH CONVEYED TO THE JURORS THAT THEY MUST CONVICT UNLESS THEY FOUND THE COMPLAINING WITNESSES WERE LYING, IS IN CONFLICT WITH OTHER REPORTED DECISIONS AND DENIED ARNOLD HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE, A CORRECT STATEMENT OF THE BURDEN OF PROOF AND DUE PROCESS OF LAW. A COMPREHENSIVE ARTICULATION OF WHAT CONSTITUTES MISCONDUCT IN THIS CONTEXT IS A CONSTITUTIONAL ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE WHICH SHOULD BE DECIDED BY THIS COURT.

The prosecutor's PowerPoint presentation, shown during closing argument, unambiguously told the jury that there were only two possibilities open to them: either S. and C. were telling the truth or they made up their accusations against Arnold. CP 75-98. The ensuing slides asserted that there was no credible evidence they made up their accusations, and concluded with a slide that read that the only conclusion

supported by the evidence was that they are telling the truth. CP 75-98. The prosecutor made the same points verbally. RP 293-294, 302-306.

After Mr. Arnold's attorney suggested other possibilities -- a possible motive to falsely accuse Mr. Arnold or the middle-ground possibilities that S. or C. may have misremembered or confused their memories with events involving someone else (RP 319-321), the prosecutor argued in rebuttal that the jurors should not consider these possibilities or possibilities other than lying because there was no evidence to support them. The prosecutor never suggested that the jury's determination of credibility was relevant to anything other than whether S. and A. were lying. The prosecutor directly and unconstitutionally placed the burden of proof on Arnold to prove they weren't truthful. RP 327-328.

The Court of Appeals nevertheless held that this argument, oral and in the PowerPoint presentation, was not akin to telling the jurors that in order to acquit they would have to find that S. and C. were lying, the misconduct found to be reversible error in State v. Fleming, 83 Wn. App. 209, 313-314, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997) and other cases. Slip op. at 10-11. The Court of Appeals reasoned that because the prosecutor discussed how the jurors had to decide the credibility of S. and C., the argument that either S. and C. were telling the truth or lying with no in-between possibilities was not really telling the

jurors that in order to acquit they would have to find S. and C. were lying. Slip op. at 11.

The Court of Appeals also distinguished the prosecutor's argument in Arnold's case from the argument found to be misconduct in State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007) – the argument that "if one [version of events] is true, the other cannot be" and "in this case you have no choice because you have two conflicting versions of events." Id. (Miles, at 890). According to the Court of Appeals, Miles "was different" because the prosecutor's argument "precluded the middle ground" and in Arnold's case the prosecutor argued that the credibility of S. and A. should be central to the case -- even though in his case the prosecutor tied the credibility determination exclusively to the lying or not determination.

The Court of Appeals concluded that the prosecutor's incorrect argument that the jurors had only two possibilities: (1) S. and C. were telling the truth or (2) S. and A. made it up, did not constitute misconduct because this "did not imply what the jury should do if it had a reasonable doubt about S.A.'s and C.A.'s testimony. " Slip op. at 12.

What the Court of Appeals overlooks is that the prosecutor never discussed acquitting if it had a reasonable doubt about the statements of S. and C. and that the prosecutor excluded any possibility of a middle ground or decision based on something other than a determination of lying or

telling the truth. The PowerPoint slide that addressed reasonable doubt assumes the same false choice, that the witnesses must be telling the truth because they are not lying:

> Abiding belief in the truth of the charges. . . [the reasonable doubt standard]
> -- No motive to make it up
> -- No motive or evidence of coaching
> -- No reasonable argument the abuse didn't occur.

Slip op. at 11 (emphasis added). The prosecutor's argument to the jurors on why they should find S. and C. credible simply does not change the underlying false premise that they had to find that S.and C. were lying in order to acquit Arnold – the argument rejected in State v. Fleming, 83 Wn. App. 209, 313-314, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997) and other cases. State v. Barrow, 60 Wn. App. 869, 874-75, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); State v. Riley, 69 Wn. App. 349, 353 n.5, 848 P.2d 1288 (1993); State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010).

An articulation by this Court of the correct standard for reviewing cases where the prosecutor's argument denies the accused the presumption of innocence and misstates the burden of proof is of substantial public importance. As the Johnson court explained, the presumption of innocence is the "bedrock upon which [our] criminal justice system stands," and

misstating it "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Johnson, at 685-686. The number of cases on the issue demonstrates the need to protect this right in light of evolving arguments which undermine the presumption.

Here, the prejudice of the misconduct was substantial. The trial took place many years after the alleged incidents. This made it very difficult to convey to the jury what was happening in the family at that past time or any outside factors which might have influenced the sisters. What the jury heard relevant to their decisions was the testimony of S. and C. and the opinion testimony of Keri Arnold. The misconduct in misstating the burden of proof was overwhelmingly and unfairly prejudicial.

F. CONCLUSION

Petitioner asks that review be granted and his convictions reversed and remanded for retrial.

DATED this 10th day of October, 2018.

Respectfully submitted,

_____/s/_____

RITA J. GRIFFITH
Attorney for Appellant

Filed
Washington State
Court of Appeals
Division Two

September 25, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL W. ARNOLD, Appellant.	No. 50083-3-II UNPUBLISHED OPINION

BJORGEN, J. — Michael W. Arnold appeals his convictions on two counts of child molestation.

He argues that (1) he was denied his state and federal constitutional right to a fair jury trial and due process of the law by the improper admission of expert testimony, (2) the State committed prosecutorial misconduct during closing argument based on the presentation of a false choice, (3) the trial court improperly commented on the evidence by allowing the State's non-corroboration jury instruction, and (4) the cumulative effect of the errors deprived him of a fair trial. Arnold also requests a ruling on appellate costs.

We affirm the superior court.

FACTS

The Arnold family consists of 11 siblings, and Arnold is the second oldest. His sisters, S.A. and C.A., are approximately 10 and 12 years younger than him, respectively.[1, 2] S.A. testified that when she was about 4 or 5 years old, Arnold molested her three times as she slept. C.A. testified that she was probably between the age of 3 and 5 when Arnold molested her and described at least two incidents of molestation.

When C.A. was about 8 or 9 years old, she told S.A. that Arnold had done something to her. S.A. told her something had also happened to her. Although C.A. did not specifically describe what happened, S.A. testified she knew that C.A. had been molested based on her similar experience with Arnold.

In 2014, S.A. and C.A. both lived with their cousin, Jodie Holman. C.A. was about 15 years old at the time. C.A. told Holman about the alleged molestation, and Holman convinced C.A. to tell her parents and the police. Approximately a week and half later, S.A. also told Holman that Arnold had molested her. The police interviewed C.A. in November 2014 and S.A. in December 2014, and again in December 2015.

The State charged Arnold with six counts of first degree child molestation with domestic violence enhancements. On December 7, 2016, Arnold's case went to trial. Both S.A. and C.A. testified at trial. The State also called Keri Arnold,[3] a forensic child interviewer from the Pierce County Prosecutor's Office, to provide expert testimony on the subject of delayed disclosure,

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[1] At trial, Arnold was 30 years old; S.A. was 20 years old; and C.A. was 18 years old.

[2] *See* General Orders of Division II, 2011-1 *In Re The Use of Initials Or Pseudonyms For Child Witness In Sex Crime Cases*.

[3] Keri Arnold is unrelated to Arnold. Because they share the same last name, we use her first name for clarity. No disrespect is intended.

among other matters. In the course of trial, the State amended the charges to five counts of first degree child molestation. During closing argument, the State used a PowerPoint presentation to buttress its argument that there were only two possibilities in determining the outcome of the case: (1) S.A. and C.A. are telling the truth or (2) S.A. and C.A. made it up on their own. The defense did not object.

After closing arguments, the judge proceeded to the jury instructions. Defense counsel objected to the State's proposed instruction that the testimony of an alleged child molestation victim need not be corroborated. Defense counsel argued that the jury had already been adequately instructed, the proposed instruction was inappropriate, and that this particular instruction placed undue emphasis on the fact that corroboration is not required and improperly highlighted that an alleged victim's testimony alone is enough for conviction. The trial court allowed the State's proposed jury instruction.

On December 16, 2016, a jury found Arnold guilty on counts IV and V, related to the molestation of C.A. However, the jury was unable to reach a verdict on counts I, II, and III, related to the molestation of S.A. Counts I, II, and III were later amended to third degree assault as part of an agreed resolution to which Arnold pled guilty.

Arnold appeals.

ANALYSIS

I. OPINION TESTIMONY

Arnold argues that he was denied his state and federal constitutional right to a fair jury trial and due process of the law by the improper admission of expert testimony. We disagree.

A. Legal Principles

In general, appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *see* RAP 2.5(a). However, a party may raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. *Id*. at 926. The defendant must show the constitutional error actually affected his rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. *Id*. at 926-27.

To demonstrate actual prejudice, the appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Our Supreme Court has made clear that "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." *Id*. at 99-100. Absent such a showing, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

It is generally improper for a witness to offer testimony concerning the credibility of another witness. *See State v. Demery*, 144 Wn.2d 753, 758-59, 30 P.3d 1278 (2001). Such testimony is unfairly prejudicial to a defendant and invades the exclusive province of the jury. *Id*. at 759. However, the fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993).

An explicit or "nearly explicit" opinion on the defendant's guilt or a victim's credibility can constitute manifest error. *Kirkman*, 159 Wn.2d at 936. Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury,

and is based on inferences from the evidence is not improper opinion testimony. *Heatley*, 70 Wn. App. at 578.

B. Arnold's Challenge Not Preserved for Appeal

Arnold argues that Keri, the child interviewer from the Pierce County Prosecutor's Office, provided improper opinion testimony. Specifically, Arnold claims that the following testimony provided an improper opinion: (1) that 95 percent of cases involving sexual abuse involve delayed disclosure, (2) that the closer the relationship between the perpetrator and victim, the longer the delay, and (3) that the reasons for delay in reporting in cases involving family relationships are fear of the perpetrator, fear for the family unit, or the victim's fear for him or herself.

The State points out that Arnold failed to object to this testimony at trial. However, because an opinion regarding the defendant's guilt or a victim's credibility can infringe on a defendant's constitutional rights, a party can raise this error for the first time on appeal if the error is manifest. *Kirkman*, 159 Wn.2d at 926; RAP 2.5(a)(3). We turn, then, to whether the claimed error is manifest under *O'Hara* and *Kirkman.*

Arnold argues that Keri's testimony about delayed disclosure was not shown to be based on any legitimate scientific theory or meaningful empirical data and improperly vouched for the credibility of S.A. and C.A. Specifically, Arnold points to Keri's testimony explaining her experience with delayed disclosure. Keri testified, in pertinent part, as follows:

> [State]: Are you familiar with delayed disclosure? Is that a specific topic?
>
> [Keri]: I can't say that I've had a training specifically just on delayed disclosure, but it is a topic that comes up in a lot of the conferences and trainings that I've attended as well as it's something that is discussed just even in the interviewing protocols themselves.

[State]: Is it something you've experienced in your 16 years as a child interviewer?

[Keri]: Or 13 years as a child interviewer.

[State]: Oh, I'm sorry. Thank you for correcting me.

[Keri]: Yes, I have experienced that a great deal.

[State]: Can you please explain to the jury what delayed disclosure is?

. . . .

[Keri]: *The majority of the interviews that I do are in sexual abuse cases or involve sexual abuse allegations, and I couldn't give you an exact number but I can tell you it's at least 95 or more percent of cases where there is a delay. It's frequently a delay of at least days, and it's generally weeks, months or years.* Most frequently, it's a delay of months or years from when the alleged abuse began to when the disclosure has taken place.

[State]: Does the relationship between the alleged perpetrator and alleged victim have an impact on that, in your experience?

[Keri]: Yes.

[State]: And what is that impact?

[Keri]: Frequently, children would report fear motivations for why they delayed disclosing. *Oftentimes, the closer the relationship to the alleged perpetrator, so if it's a close family member, close family friend, somebody that is very connected to them and to their family, they are more likely to delay their disclosure. They often report fear-motivated reasons* such as fear of what's going to happen to the alleged perpetrator, fear of what's going to happen to their family if this is, say, a parent or stepparent or, you know, someone who's a primary provider for the family. They have fears of what's going to happen to their family, if they're going to lose their home, you know, things like that. Fear of what's going to happen to them, fear of being believed even because this is somebody who is a close family member or fixture in their family.

Verbatim Report of Proceedings (VRP) (Vol. V) at 243-45 (emphasis added).

Arnold primarily relies on *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) to support his argument. In *Black*, an expert witness testified about a profile for rape victims, known as "rape trauma syndrome," and testified that the victim in that case fit the profile. *Id.* at 340. Our Supreme Court held that testimony that the victim fit the profile invaded the province of the jury and, therefore, constituted improper opinion testimony. *Id*. at 348-50. Still, we distinguish *Black* because Keri did not express any opinion as to whether S.A. and C.A. fit the profile of a molestation victim, whereas the expert in *Black* directly commented that the victim fit the profile of a rape victim.

In this case, Keri did not state any opinion about Arnold's guilt or S.A.'s and C.A.'s veracity; in fact, Keri testified she had never met Arnold, S.A., or C.A. Instead, Keri testified about her qualifications as an expert and the nature of and reasons for delayed disclosure. She testified she had experience with the subject of delayed disclosure, experience she gleaned over the course of her 13 year career as a child interviewer.[4] She also testified about the difference between episodic memory and script memory. When read in context, Keri's testimony clearly shows that she based any opinion she had regarding delayed disclosure generally on her experience working as a child interviewer. Keri did not provide any opinion as to the delayed disclosure at issue in this case.

As noted, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence, is not improper opinion testimony. *Heatley*, 70 Wn. App. at 578. Keri's testimony

[4] When asked what she does as a child interviewer, Keri testified that she "conduct[s] forensic interviews of children ages three through 15 who are alleged to be a victim or witness to violent crimes." VRP (Vol. V) at 240.

was not a direct comment on the defendant's guilt or the veracity of a witness. The jury could make inferences regarding delayed disclosure and its application to the facts of this case. The jury also could make inferences regarding whether S.A.'s and C.A.'s testimony comprised episodic or script memory. Thus, Keri's testimony helped the jury understand these general ideas regarding sexual abuse and their application to the facts of the case. The fact that Keri's testimony was based on her general experience, not on inferences from the facts of this case, distances even more her testimony from that of an opinion on guilt or veracity.

For these reasons, Arnold has not shown a manifest error regarding this testimony. Under *O'Hara*, *Kirkman*, and RAP 2.5(a), he has not preserved this claim of error for appeal.

II. PROSECUTORIAL MISCONDUCT

Arnold next argues that the State committed prosecutorial misconduct during closing arguments. We disagree.

A. Legal Principles

We review allegations of prosecutorial misconduct under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial to the defendant's right to a fair trial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant establishes the prosecutor's conduct was improper, we will then determine whether the defendant was prejudiced. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Prejudice is established only if there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *Id.* at 760.

Where, as here, a defendant fails to object to alleged prosecutorial misconduct, he is deemed to have waived any error unless he shows the misconduct "was so flagrant and ill

intentioned that an instruction could not have cured the resulting prejudice." *Id*. at 760-61. To meet this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. *Id.*

We accord a prosecutor wide latitude to argue reasonable inferences from facts in evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008). When analyzing prejudice, we do not look at the comment in isolation, but in the context of the entire case, including the arguments, the issues in the case, the evidence, and the instructions given to the jury. *Thorgerson*, 172 Wn.2d at 443.

B. False Choice

In closing argument, the prosecutor told the jury that, in the State's view, there were only two possibilities in determining the outcome of the case: (1) S.A. and C.A. are telling the truth or (2) S.A. and C.A. made it up on their own. Arnold urges that this argument impermissibly suggested that the jury should only acquit if it determined the State's witnesses were lying.

As a threshold matter, Arnold failed to object after the prosecutor presented the challenged argument at trial. Therefore, under *Emery*, 174 Wn.2d at 760-61, Arnold must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.

We begin by examining whether the prosecutor's conduct was improper. *Id*. at 760. Arnold characterizes the impropriety as the presentation of a false choice, which misstates the burden of proof, as well as the jury's role, by misleading the jury into thinking that acquittal requires the conclusion that the prosecution's witnesses are lying. Arnold primarily relies on

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) and *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010) in support of his argument.

Fleming and *Johnson*, however, may be readily distinguished from Arnold's case. In *Fleming*, the prosecutor explicitly told the jury that they must disbelieve the State's witnesses in order to acquit the defendant, and, here, no such statement was made. 83 Wn. App. at 213-16. In *Johnson*, the defendant argued that the prosecutor's statements required the jury to disbelieve his testimony in order to acquit. 158 Wn. App. at 683. However, the court concluded that the prosecutor's remarks provided an accurate statement of the law and, therefore, were not improper. *Id*. at 683-84.

In the case before us, the prosecutor argued, in pertinent part, as follows:

> [T]here's two possibilities, ultimately. One, they're telling the truth, or two, they're making this whole thing up. The State submits to you that they're telling the truth and that they have no reason to lie about this. Again, that goes to credibility, and I'll get into that a little bit more here in a second, but the evidence that you have that these kids are telling the truth.

VRP (Vol. V) at 294. The prosecutor reflected this argument with a number of PowerPoint slides. One slide read,

> Possibilities
>
> 1. S.A. and C.A. are telling the truth
>
> 2. S.A. and C.A. made it up on their own

CP at 85. A few slides later, the State used another slide that read,

> The only conclusion supported by the
> EVIDENCE is that they are telling
> the TRUTH
> about being touched (S.A.) or
> touching him (C.A.)

CP at 93.

The two "possibilities" presented by this argument, viewed alone, can logically imply that to acquit, the jury must believe that S.A. and C.A. made it up. This message would improperly shift the burden of proof to Arnold. However, in its context the choice posed in the prosecutor's argument reflected the nature of the jury's determination as one based on credibility. The jury needed to either believe S.A. and C.A. or believe Arnold. That determination, in turn, controlled its ultimate decision. Read in context, the prosecutor's statements are more accurately described as characterizing the case as hinging on credibility and arguing that the evidence supports S.A. and C.A., which the prosecutor has wide latitude to do in closing argument. *See State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Although Arnold did not cite *State v. Miles*, 139 Wn. App. 879, 162 P.3d 1169 (2007), that decision must be considered. In *Miles*, the prosecutor told the jury that because the defense and the State had presented two conflicting versions of events "if one is true, the other cannot be" and "in this case you have no choice because you have two conflicting versions of events. One is not being candid with you." *Id.* at 889-90. We held that the prosecutor's argument constituted misconduct because it presented the jurors with a false choice: they could find the defendant not guilty only if they believed his evidence. *Id.* at 890. We reasoned that the jury did not have to believe the defendant to acquit him; it "had only to entertain a reasonable doubt as to the State's case." *Id.*

The choice posed by the prosecutor in *Miles* was different than that posed here. In *Miles*, the jury was told it must believe either the defense witnesses or the State's witnesses, but not both. This improperly precluded the middle ground of reasonable doubt and shifted the burden to the defendant. In the present case, the State argued instead that S.A.'s and C.A.'s credibility should be central to the jury's consideration of the case and that the jury should believe them.

This argument implied that if the jurors believed S.A. and C.A., they should convict. It also implied that if they disbelieved S.A. and C.A., they should acquit. This argument, though, did not imply that disbelieving S.A. and C.A. would be the only way for the jury to find reasonable doubt. The prosecutor's argument did not imply what the jury should do if it had a reasonable doubt about S.A.'s and C.A.'s testimony.

In sum, the prosecutor's closing argument and PowerPoint slides did not tell the jury that they must disbelieve S.A. and C.A. in order to acquit Arnold. Rather, the State's argument was that the case depended on credibility and that the jury should believe S.A. and C.A. This argument is not improper. With that, Arnold has not shown prosecutorial misconduct.

III. JURY INSTRUCTION

Arnold maintains that the trial court improperly commented on the evidence by instructing the jury, over his objection, that the testimony of an alleged child molestation victim need not be corroborated. We disagree.

A. Standard of Review

We review de novo whether a jury instruction is legally correct. *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. *Id.*

B. Non-corroboration Instruction

Arnold challenges the following jury instruction as an impermissible comment on the evidence:

> In order to convict a person of child molestation in the first degree, as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

CP at 127.

The State points out that the instruction is based on RCW 9A.44.020(1), which states, "In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." The instruction provided an accurate statement of the law. Further, Arnold concedes this instruction has been upheld as not constituting a comment on the evidence. E.g., *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949); *State v. Zimmerman*, 130 Wn. App. 170, 180-83, 121 P.3d 1216 (2005); *see also State v. Malone*, 20 Wn. App. 712, 714, 582 P.2d 883 (1978); *State v. Johnson*, 152 Wn. App. 924, 936, 219 P.3d 958 (2009); *Chenoweth*, 188 Wn. App. at 538.

Under both the general principles just noted and the decision in *Clayton*, 32 Wn.2d 571, we hold that the jury instruction does not constitute an impermissible comment on the evidence.

IV. CUMULATIVE ERROR

Arnold argues that the cumulative effect of the errors he has identified deprived him of a fair trial. We disagree.

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of trial errors denied him a fair trial, even if each error alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Id*. at 279. Because we do not reach the challenge to Keri's testimony and find no error otherwise, Arnold's claim of cumulative error must fail.

V. APPELLATE COSTS

Arnold requests a ruling on appellate costs. The State has not indicated whether it intends to seek costs. Under RAP 14.2, if the State decides to file a cost bill, Arnold may challenge that on the basis of inability to pay. We therefore decline to reach this issue.

CONCLUSION

We affirm.

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

Bjorgen, J.

Bjorgen, J.

We concur:

Johanson, J.

Johanson, P.J.

Sutton, J.

Sutton, J.

October 10, 2018 - 11:06 AM

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