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STATE OF WASHINGTON

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NO. 34212-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

BENJAMIN PATRICK CLOSE,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated Washington Constitution, Article 4, § 16 when it used jury instruction no. 10 because this instruction constituted a judicial comment on a question of fact.

2. Trial counsel's failure to object when the state commented on the credibility of its key witness, when it elicited opinion evidence on guilt and when the state elicited comments on the defendant's exercise of his right to silence denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate Washington Constitution, Article 4, § 16 if it employs a jury instruction that constitutes a judicial comment on a question of fact?

2. Does a trial counsel's failure to object when the state comments on the credibility of its key witness, when it elicits opinion evidence on guilt and when the state elicits comments on the defendant's exercise of his or her right to silence deny a defendant the right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

On August 16, 2003 Bobbie McGarry and her live-in boyfriend Sean were married in Richfield and then held a reception at their home in Vancouver. RP 37-38. At the time, three other people were living with them: Bobbie's 15-year-old daughter Consuela (known as "Connie"), Bobbie's older son, and the defendant Benjamin Patrick Close. RP 38, 78. The defendant had been living with them for a few months at the invitation of Bobbie's husband after the defendant had broken up with his girlfriend and had found himself with no place to stay. RP 38-39. The defendant slept on the couch or in a recliner and there had been no problems between him and the family. RP 39, 78-79. At the time the defendant was 28 or 29-years-old. RP 112.

According to Connie McGarry, she stayed up until about 2:30 in the morning following the reception in order to help clean the house. RP 42-44. When she went to bed she immediately fell asleep. RP 44. However, she stated that sometime during the night she awoke to find the defendant pulling down her pajama bottoms. RP 45-46. Being frightened she feigned sleep. *Id.* The defendant then penetrated her with his finger and tongue. *Id.* While the defendant was doing this she moved and when she did the defendant got up and went into the bathroom. *Id.* As he shut the bathroom door Connie got

up, went into the living room, and lay down on one of the couches. RP 47 Her cousin was sitting on the other couch awake. *Id.* However she did not tell him what had happened because she was frightened. RP 48. According to Connie she did not call out to her mother, brother, or step-father or tell them later because she was frightened. RP 50

The next day Connie went over to her friend Ashley Montgomery's house and told her what had happened. RP 50. Ashley later told her own mother what Connie told her, and one week after the alleged incident Ashley's mother then called Bobbie McGarry to tell her what Connie had claimed. RP 51-52, 84. After speaking with Ashley's mother, Bobbie asked Connie what had happened and Connie told her that the defendant had pulled her pants down in the middle of the night and penetrated her although she did not claim any oral-genital contact. RP 84-85. Bobbie then told her husband, who immediately confronted the defendant. RP 53, 86. According to the three of them, the defendant became upset and began to cry when confronted, saying that he didn't know if he did it but he knew he had to quit drinking. *Id.* When he said this, Sean told the defendant that he had to leave the next day. *Id.* No one called the police to report the incident. RP 87.

About one week later, as Connie was coming home from school with her friend Stephanie, she noticed that the defendant's truck was parked in front of her house. RP 53-54. In response, she left before entering the house

and ended up staying the night in Portland with Stephanie. *Id.* Unknown to her, the defendant had dropped by for about 20 minutes to get his possessions. RP 87-88. The next day Bobbie reported Connie missing to the police. RP 89-91. By the time a police officer responded that afternoon Bobbie had returned. RP 90-91, 206. When she told the police officer what had happened he took her to her biological father's house, where she stayed for about a month and a half. RP 57, 207-208.

In October Bobbie took Connie for an examination with Dr. Laurie Metzger, a pediatrician at Southwest Washington Medical Center. RP 91. Dr. Metzger had previously performed hundreds of examinations in cases of alleged sexual abuse of children. RP 145-148. Her physical examination of Connie revealed no evidence of abuse, although she would not have expected any given the allegations. 148-160. In addition, during the interview portion of the examination Connie denied that the defendant had either digitally penetrated her or had oral-genital contact with her. RP 157. In fact, Dr. Metzger did not use the term "digital penetration" during the interview. RP 177-178. Rather, she asked whether or not the defendant had put his finger in her. *Id.* Similarly, she did not use the term "oral-genital contact." *Id.* Rather she asked whether or not the defendant had placed his mouth anywhere on her body. *Id.*

Procedural History

By information filed December 11, 2003, the Clark County Prosecutor charged defendant Benjamin Patrick Close with one count of first degree rape of a child. CP 1-2. The case later came on for trial with the state calling five witnesses: Connie McGarry, Bobbie McGarry, Dr. Laurie Metzger, Ashley Montgomery and Officer Thomas Dennison. RP 36, 77, 140, 194, 199. The defense did not call any witnesses. RP 210. These witnesses testified to the facts contained in the preceding factual history. *Id.*

At the beginning of the trial in front of the jury, the state called Connie McGarry as its first witness. The state's third question went as follows:

Q. Connie, I know this is tough for you, but I'm going to ask you to speak up. You have a very soft voice. Can you tell me how old you are right now.

RP 36.

The defense made no objection to the prosecutor's comment that he "knew how tough this was for her." *Id.* Indeed, the defense was also silent when the prosecutor again expressed the following similar sentiment in front of the jury during Connie McGarry's direct examination when juror apparently signaled that they could not hear her testimony. RP 45.

Q. I'm sorry to have to ask you, Connie, but I have to ask some more specifics about what happened. When you say you felt him touch you, where did you feel him touch you?

A. My vagina.

RP 39.

In addition, the defense did not object when the state elicited the following response during Bobbie McGarry's direct testimony.

Q. What happened as a result of telling the police?

A. He said that Connie couldn't be home with me because he didn't know for sure that Ben would not return, and so Connie had to go and stay with her biological father for about three weeks.

RP 91.

The defense also made no objection when the state elicited this evidence a second time through Officer Dennison. RP 207-208.

Q. All right. And did you then speak separately with her mother, Bobbie McGarry?

A. Yes, I did.

Q. During -- at the end of those interviews, what did you do?

A. At that time I'd decided it was -- it was best that I take Connie to her father's house, and I then released her into his custody.

RP 207-208.

Finally, the defense had no objection when the state elicited evidence from Officer Dennison that he couldn't find the defendant. RP 208. This occurred with the following exchange.

Q. Did -- what's the procedure on allegations of child sexual abuse after you take the initial report?

A. I would generally make -- try to make contact with the -- the person that the allegations are against and get a general -- a first statement from them, and then refer the -- the case to Child Abuse Intervention Center.

Q. And is that the standard protocol on sexual abuse cases --

A. Yeah.

Q. -- of children?

A. Pretty much. I mean, they're all -- they're different individually, but, yeah, overall that's -- that's the -- what we do.

Q. All right. Once you made that referral to the child abuse center, that was the end of your involvement in the case?

A. Yeah. I had made another attempt to contact Ben in this case, and -- and that was the end of my involvement in -- in the case.

Q. All right.

RP 208-209.

By contrast, the defense did object at the end of the trial to the use of jury instruction No. 10, which stated as follows:

Instruction No. 10

A finger can be an "object" for purposes of the definition of sexual intercourse.

CP 41.

Following deliberation in this case the jury returned a verdict of guilty. CP 44. The court later sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 66-83, 89.

ARGUMENT

I. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16 WHEN IT USED JURY INSTRUCTION NO. 10 BECAUSE THIS INSTRUCTION CONSTITUTED A JUDICIAL COMMENT ON A QUESTION OF FACT.

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s attitude toward the merits of the case, or would infer the court’s evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crofts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crofts, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision.

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, “[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment”. *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

For example, in *State v. Jackman*, 125 Wn.App. 552, 104 P.3d 686 (2004), the state charged the defendant with a number of counts of sexual exploitation of a minor, communication with a minor for immoral purposes, patronizing a juvenile prostitute, furnishing liquor to a minor, and recording private communications. Each of these offenses except for the last requires the element that the other party involved was under a particular age. At the end of the jury trial on these charges, the court gave “to convict” instructions that included the age element, the name of the minor, and included a statement of the minor’s date of birth. The jury convicted the defendant on all counts, and he appealed, arguing that the court’s inclusion of each minor’s date of birth in the “to convict” instructions constituted a charge “with respect

to [a] matter[] of fact, in violation of Washington Constitution, Article 4, § 16. The prosecution responded that the instruction was not error and that, on the contrary, it was harmless beyond a reasonable doubt. The defense replied that the error was structural and per se prejudicial.

In addressing the defendant's claims, the court first examined two cases: *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997) and *State v. Primrose*, 32 Wn.App. 1, 645 P.2d 714 (1982). In *Becker*, the state charged the defendants with delivery of cocaine within a school zone. At trial, the court gave the jury a special verdict form that specifically stated that the program was a school. The Washington Supreme Court later reversed the enhancement, ruling that the state had the burden of proving that the "youth Education Program" was a school. Thus, the special verdict violated Washington Constitution, Article 4, § 16 because it instructed the jury on an issue of fact (whether the program qualified as a school). Similarly, in *Primrose*, the trial court instructed the jury as a matter of law in a bail jump case that the defendant had introduced no evidence of lawful excuse, the absence of which was an element of the crime. The Court of Appeals later held that in doing so, the "court impermissibly relieved the state of its burden of proving an essential element of the crime . . ." *Jackman*, 125 Wn.App. at 559-560 (explaining *Primrose*).

Under the decisions in *Becker* and *Primrose*, the court in *Jackman*

held that it was error for the trial court to use an instruction that stated the birth dates of the minors because it constituted a comment on a factual determination that the jury had to make: that the defendant had committed the alleged crimes with minors and not adults. The court then went on to address the state's argument that under the decision in *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), the failure to instruct the jury on all of the elements of an offense was subject to a claim of being harmless beyond a reasonable doubt. Ultimately, the court rejected this argument also. The state then sought and obtained review by the Washington Supreme Court. In a decision filed in April of this year, the court decided that (1) the court of appeals was correct in its holding that the instruction violated Washington Constitution, Article 4, § 16 as a comment on the evidence, (2) the court of appeals was incorrect when it held that the harmless error analysis did not apply, and (3) the ultimate decision of the court remanding for a new trial was correct because under the facts of the case the error was not harmless beyond a reasonable doubt. *State v. Jackman*, 76574-0 (Wash. 4-13-2006).

In the case at bar, the trial court gave the following instruction over defense objection.

A finger can be an "object" for purposes of the definition of sexual intercourse.

CP 41.

As was mentioned above, an instruction or comment on the evidence occurs when a reasonable juror hearing the statement in the context of the case would infer the court's attitude toward the merits of the case or would infer the court's evaluation relative to the disputed issue. *State v. Hansen, supra*. In this case, one of the key disputed issues was whether or not the defendant digitally penetrated Connie McGarry. Connie McGarry testified that the defendant did. Dr. Laurie Metzger testified that Connie McGarry specifically denied any such digital penetration. In addition, the trial court also gave the following instruction defining "sexual intercourse."

INSTRUCTION NO. 7

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight and any penetration of the vagina however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex except when such penetration is accomplished for medically recognized treatment or diagnostic purposes and any act of sexual contact between persons involving the sex organs of one person and the mouth of another whether such persons are of the same or opposite sex.

CP 38.

Under this definition, there is no way that a jury could fail to find that a finger did not qualify under the "any penetration of the vagina however slight, by an object." Thus, if the jury believed Connie McGarry's testimony,

this instruction bound it to find that “sexual intercourse” had occurred as alleged. This instruction comes directly out of the Washington Patterned Instructions and the defendant herein does not dispute that it correctly states the law and that it was appropriate to give it in the case at bar. However, since this instruction clearly tells the jury that penetration with any object qualifies as “sexual intercourse” including penetration with a finger, then what was the jury to make of instruction number 10? The response is that a reasonable juror would interpret instruction number 10 as the court’s method of emphasizing the fact that the defendant had penetrated Connie McGarry with his finger.

In reviewing these two instructions in the context of the issues presented in this case, it is apparent that instruction number 7 is clearly a statement of law. It tells the jury and it does not address the specific facts of the case. In other words, it gives a general definition and leaves the jury to decide what the facts are and whether those facts fit in the court’s definition of sexual intercourse. By contrast, instruction number 10 specifically comments on the facts of the case and speaks to Connie McGarry’s claim that the defendant digitally penetrated her. It emphasizes this claim and implies to the jury that the court is inclined to believe Connie McGarry’s testimony. If this were not the case then why would the court even give instruction number 10 when instruction number 7 effectively informed the jury on the

law? Thus, this instruction did have the tendency, in this case, to convey the court's attitude toward the merits of the case or to convey the court's evaluation relative to the disputed issue of digital penetration. As a result, in the context of this case, instruction number 10 violated Washington Constitution, Article 4, § 16.

In this case, the jury was presented solely with an issue of credibility. Specifically the jury had to decide whether or not it believed Connie McGarry's claims. Her credibility was seriously called into question by two facts: (1) Dr. Metzger's testimony that Connie McGarry denied any digital penetration or oral-genital contact, and (2) the state's failure to have Connie McGarry explain the conflict to the jury. Under these circumstances, one cannot say that the error in giving instruction 10 was harmless beyond a reasonable doubt. Thus, the defendant is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE COMMITTED MISCONDUCT BY VOUCHING FOR THE CREDIBILITY OF ITS KEY WITNESS AND WHEN THE STATE ELICITED COMMENTS ON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO SILENCE DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for

judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based

upon trial counsel's failure to object when (1) the prosecutor committed misconduct by vouching for the credibility of his key witness, and (2) the prosecutor elicited evidence on the defendant's exercise of his right to silence. The following sets out these arguments.

(1) The Prosecutor Committed Misconduct by Vouching for the Credibility of his Key Witness and Eliciting Opinion Evidence of Guilt.

Under the Sixth Amendment right to a fair trial by an impartial jury, a defendant is entitled to have his or her case decided upon the evidence adduced at trial, not upon the opinions of attorneys, the courts or the witnesses concerning the credibility of witnesses, the evidence, or the guilt of the defendant. *State v. Casteneda-Perez*, 61 Wn.App. 354, 360, 810 P.2d 74 (1991). Thus, it is improper for the prosecutor to assert a personal opinion about a witness' credibility. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

In addition, as part of the due process rights guaranteed under both the Washington Constitution and the United States Constitution, the state must prove every element of a crime charged beyond a reasonable doubt. *City of Seattle v. Slack*, 113 Wn.2d 850, 784 P.2d 494 (1989); *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). Thus, neither the court (through comment or instruction) nor the state (by argument) may make any comment or argument that shifts the burden of proof. *State v. Crediford*, 130 Wn.2d

747, 927 P.2d 1129 (1996).

An example of the former principle is found in *State v. Horton*, 116 Wn.App. 909, 68 P.3d 1145 (2003), where the defendant was charged with rape of a child and child molestation. During closing argument in the trial, the prosecutor stated: “Then you have the defendant. The manner in which he testified, the State believes, this prosecutor believes, that he got up there and lied.” *Id.* On post-conviction review, the defendant argued that this argument constituted an improper comment on the credibility of a witness, that the improper comment denied him a fair trial, and that trial counsel was deficient in failing to object. The Court of Appeals agreed, noting as follows:

In general, a prosecutor errs by expressing a “personal opinion about the credibility of a witness and the guilt or innocence of the accused.” Just as it “is improper for a prosecutor personally to vouch for the credibility of a witness,” it is improper for a prosecutor to personally vouch against the credibility of a witness.

State v. Horton, 116 Wn.App. at 121 (citing *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956) (this is “an attempt to impress upon the jury the [prosecutor’s] personal belief in the defendant’s guilt. As such, it was not only unethical but extremely prejudicial”)).

An example of the latter principle is found in *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996). In this case, the defendant was convicted of rape following a trial that included the following in closing argument by the state:

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

State v. Fleming, 83 Wn.App. at 213.

The defendant argued, among other things, that this argument shifted the burden of proof. The Court of Appeals agreed, finding that

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

State v. Fleming, 83 Wn.App. at 213.

The prosecutor committed the same type of misconduct in the case at bar when he made the following comments to his complaining witness in front of the jury.

Q. Connie, I know this is tough for you, but I'm going to ask you to speak up. You have a very soft voice. Can you tell me how old you are right now.

RP 36.

Within a few minutes the prosecutor repeated this sentiment in front

of the jury in the following exchange with the complaining witness.

Q. I'm sorry to have to ask you, Connie, but I have to ask some more specifics about what happened. When you say you felt him touch you, where did you feel him touch you?

A. My vagina.

RP 39.

One is left here to ask the question: How does the prosecutor know that testifying is “tough” for the complaining witness and why is the prosecutor “sorry to have to ask” such personal questions. The answer to this question does not lie in the prosecutor’s belief that the complaining witness was lying about what happened. Rather, the answer to this question lies in the prosecutor’s claim that he knows that the defendant is guilty, that he knows that the complaining witness is the victim of sexual abuse, and that he knows that she is now victimized again by having to relive the abuse before the defendant, the court and the jury.

The juries that serve in the courts of this state and the jury in the case at bar are not dullards and morons. In fact, as a group they constantly prove themselves capable of following and inferring important facts from even the smallest nuances of criminal trials. To think that the jurors in this case did not infer the prosecutor’s opinion of both the credibility of the witness and the guilt of the defendant from these improper comments beggars the intelligence of the individual jurors as well as their intelligence as a group.

In addition, Connie McGarry was not an unimportant witness called at the end of a long day of trial in order to testify to an unimportant fact. Rather, she was the first witness in the trial and more important, she was the critical witness in the trial. Without her testimony there would be no case. However, if her testimony was correct, then the defendant was guilty.

Under these circumstances, no reasonable trial attorney would fail to at least object to such obvious comments upon credibility and guilt; such blatant attempts to improperly bias the jury. Indeed, competent trial counsel would probably have moved for a mistrial at this point. Thus, counsel's failure to object fell below the standard of a reasonable prudent attorney thereby meeting the first prong of an ineffective assistance claim under *Strickland*. In addition, a careful review of the evidence present demonstrates that trial counsel's failure to object or move for a mistrial caused prejudice.

In the case at bar the jury was faced solely with a question of the credibility of Connie McGarry. She claimed that the defendant digitally penetrated her and that he had oral-genital contact with her. No witness claimed to be present and see the alleged events and no forensic evidence supported the claim. Thus, in order to convict, the jury had to believe beyond a reasonable doubt that Connie McGarry was telling the truth. The problem with her credibility was that Dr. Metzger directly refuted her claims of digital penetration and oral-genital contact. It was not just that Connie McGarry

failed to claim either digital penetration or oral-genital contact. Rather, she specifically denied that such contact occurred. Under these circumstances, the question of credibility was a close question for the jury. A question undoubtedly influenced by the prosecutor's improper statements.

As was previously mentioned, the test for prejudice is whether there is a reasonable probability that, but for counsel's professional errors, the result in the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Given the directly contradictory testimony of Dr. Metzger and the state's failure to explain the inconsistency, there is a "reasonable probability" that the outcome of the trial would have been different absent trial counsel's failure to object to the prosecutor's improper statements. As a result, trial counsel's failure to object did cause prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment.

In this case, the failure to object to the prosecutor's improper comments on credibility was exacerbated by the elicitation of opinion evidence of guilt. This occurred during the testimony of Bobbie McGarry and Officer Dennison concerning the removal of Connie McGarry from her home. Bobbie McGarry testified:

Q. What happened as a result of telling the police?

A. He said that Connie couldn't be home with me because he didn't know for sure that Ben would not return, and so Connie had to go and stay with her biological father for about three weeks.

RP 91.

The state elicited this evidence a second time through Officer Dennison. RP 207-208.

Q. All right. And did you then speak separately with her mother, Bobbie McGarry?

A. Yes, I did.

Q. During -- at the end of those interviews, what did you do?

A. At that time I'd decided it was -- it was best that I take Connie to her father's house, and I then released her into his custody.

RP 207-208.

This evidence was relevant for one reason and one reason only: to give the jury Officer Dennison's opinion that Connie McGarry was the victim of sexual assault and that the defendant was guilty of this crime. Otherwise, why would he have insisted on taking Connie McGarry to her father's house? The fact that she did go stay with her father bore no relation to the question whether or not the defendant had sexual contact with Connie McGarry over a week earlier. No reasonable trial attorney would fail to object to evidence which, on the one hand, had no relevance and, on the other hand, expressed a police officer's opinion that the defendant was guilty. In addition, when combined with the improper comments on credibility there is a reasonable

likelihood that this evidence affected the outcome of this trial.

(2) The Prosecutor Improperly Elicited Evidence that Impinged upon the Defendant's Fifth Amendment Right to Silence.

The Fifth Amendment to the United States Constitution states that no person “shall ... be compelled in any criminal case to be a witness against himself.” Washington Constitution, Article 1, § 9 contains an equivalent right. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It also precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

In *State v. Easter, infra*, the court states this proposition as follows:

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *Miranda*, 384 U.S. at 461, 86 S.Ct. at 1620-21. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” *Miranda*, 384 U.S. at 468 n. 37, 86 S.Ct. at 1624 n. 37. The purpose of this rule is plain. An accused's Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by

questioning defendant himself.” *State v. Fricks*, 91 Wash.2d 391, 396, 588 P.2d 1328 (1979).

State v. Easter, infra at 236.

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the defendant was prosecuted for multiple counts of vehicular homicide. At trial, the state, in its case in chief, elicited testimony from its investigating officer that shortly after the accident, he found the defendant in the bathroom of a gas station at the intersection, and that the defendant “totally ignored” him when he asked what happened. The police officer also testified that when he continued to ask questions, the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction, the defendant appealed, arguing that this testimony violated his right to remain silent. The Washington Supreme Court agreed and reversed, stating as follows:

Accordingly, Easter’s right to silence was violated by testimony he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term “smart drunk” as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter’s right to silence.

State v. Easter, 130 Wn.2d at 241.

In the case at bar, the state also elicited evidence concerning the defendant’s right to silence. It did so at the very end of its questions to

Officer Dennison. This occurred with the following exchange.

Q. Did -- what's the procedure on allegations of child sexual abuse after you take the initial report?

A. I would generally make -- try to make contact with the -- the person that the allegations are against and get a general -- a first statement from them, and then refer the -- the case to Child Abuse Intervention Center.

Q. And is that the standard protocol on sexual abuse cases --

A. Yeah.

Q. -- of children?

A. Pretty much. I mean, they're all -- they're different individually, but, yeah, overall that's -- that's the -- what we do.

Q. All right. Once you made that referral to the child abuse center, that was the end of your involvement in the case?

A. Yeah. I had made another attempt to contact Ben in this case, and -- and that was the end of my involvement in -- in the case.

Q. All right.

RP 208-209.

In addressing the defendant's claims herein, a good place to start is the question of relevance. In other words, in the context of the case at bar, why and how was the foregoing evidence relevant? In what way did it make a question before the court at least slightly more or less likely? The answer to this question is that the relevance of this evidence is found in the argument that the defendant's refusal to turn himself in to the police and admit what he

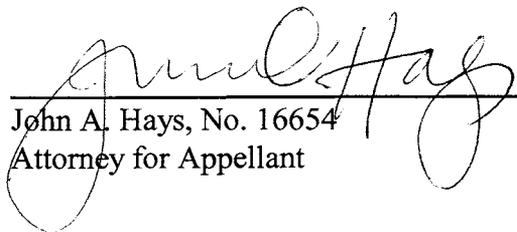
did is indicative of guilt. By eliciting this testimony, the state directly commented on the defendant's exercise of his right to remain silent, and thereby implicitly argued that the jury should infer guilt from the exercise of the right to silence. As with the comments on credibility and guilt, no reasonable trial attorney would fail to object to such evidence. In addition, as previously argued, the case before the jury was very close on Connie McGarry's credibility. Thus, even the slightest error was sufficient to influence the outcome of the trial. Combined with the previous failures to object to the improper evidence of credibility, trial counsel's failure to object to this evidence also denied the defendant his right to effective assistance of counsel.

CONCLUSION

The defendant is entitled to a new trial based upon the trial court's comment on the evidence that violated Washington Constitution, Article 4, § 16. The defendant is also entitled to a new trial based upon trial counsel's failure to object to the state's improper vouching for the credibility of its key witness and based upon the state's introduction of improper opinion evidence of guilty.

DATED this 22nd day of June, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION,
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

INSTRUCTION NO. 7

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight and any penetration of the vagina however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex except when such penetration is accomplished for medically recognized treatment or diagnostic purposes and any act of sexual contact between persons involving the sex organs of one person and the mouth of another whether such persons are of the same or opposite sex.

INSTRUCTION NO. 10

A finger can be an “object” for purposes of the definition of sexual intercourse.

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COURT OF APPEALS

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STATE OF WASHINGTON

BY [Signature]
NOTARY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

6 STATE OF WASHINGTON,)
7 Respondent,)
8 vs.)
9 BENJAMIN PATRICK CLOSE,)
10 Appellant,)

**CLARK CO. NO.03-1-02471-6
APPEAL NO: 34212-0-II
AFFIDAVIT OF MAILING**

11 STATE OF WASHINGTON)
12 COUNTY OF CLARK) vs.
13)

13 CATHY RUSSELL, being duly sworn on oath, states that on the 22ND day of JUNE, 2006,
14 affiant deposited into the mails of the United States of America, a properly stamped envelope
15 directed to:

15 ARTHUR CURTIS
16 CLARK COUNTY PROSECUTING ATTORNEY
17 1200 FRANKLIN ST.
VANCOUVER, WA 98668

BENJAMIN P. CLOSE #887765
STAFFORD CREEK CORR. CTR
191 CONSTANTINE WAY
ABERDEEN, WA 98520

17 and that said envelope contained the following:

- 18 1. BRIEF OF APPELLANT
- 19 2. AFFIDAVIT OF MAILING

20 DATED this 22ND day of JUNE, 2006.

[Signature]
CATHY RUSSELL

22 SUBSCRIBED AND SWORN to before me this 22nd day of JUNE, 2006.

[Signature]

NOTARY PUBLIC in and for the
State of Washington,
Residing at: Kelso, WA 98626
Commission expires: 10-24-09



AFFIDAVIT OF MAILING

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