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Division II
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NO. 50083-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE ARNOLD,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. RESTATEMENT OF THE ERRORS AND ISSUES.....1

1. Does expert testimony improperly comment on the guilt of the accused and credibility of the complaining witnesses who said that their brother had sexual contact with them fifteen or sixteen years earlier, where the expert has no knowledge of the facts of the case or training in “delayed disclosure,” but is nevertheless permitted to testify that there is “delayed disclosure” in 95% of the cases of sex abuse and that the length of delay is longer the closer the relationship between the accuser and alleged perpetrator? Did this testimony constitute a manifest error of constitutional magnitude where it invaded the province of the jury and denied the right to a jury trial?

2. Does the prosecutor’s misconduct -- in arguing in closing and in the PowerPoint presentation used in closing that the only two possibilities were (a) that the alleged victims were telling the truth or (b) they had made up their allegations themselves; and that no alternative, such as misremembering, could be considered unless there was evidence at trial to support the alternative -- deny Mr. Arnold 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?

3. Does the trial court’s Instruction No. 17, which told the jury that “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. . . .” convey the judge’s opinion that the testimony of the alleged victim alone was sufficient to find the accused guilty and constitute a comment on the evidence in violation of Article 4, section 16 of the Washington Constitution?

4. Does the cumulative error in this case deny Mr. Arnold a fair trial?

B. RESTATEMENT OF THE CASE.....2

TABLE OF CONTENTS – cont'd

	Page
1. Procedural history.....	2
2. Trial evidence.....	3
3. Expert testimony.....	4
4. Objection to jury instruction.....	5
5. Closing and the prosecutor’s PowerPoint.....	5
a. Prosecutor’s PowerPoint.....	5
b. Prosecutor’s verbal closing.....	7
c. Defense closing.....	7
d. Prosecutor’s rebuttal closing.....	8
C. ARGUMENT IN REPLY.....	8
1. MICHAEL ARNOLD WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW BY THE IMPROPER ADMISSION OF EXPERT TESTIMONY: (1) THAT IN 95% OF CASES OF SEXUAL ABUSE DISCLOSURE IS DELAYED, (2) THAT THE CLOSER THE RELATIONSHIP BETWEEN PERPETRATOR AND VICTIM THE LONGER THE DELAY, AND (3) THAT THE REASONS FOR DELAY IN REPORTING IN CASES INVOLVING FAMILY RELATIONSHIPS ARE FEAR FOR THE PERPETRATOR OR THE FAMILY OR THE VICTIM’S FEAR FOR HIMSELF.....	8

TABLE OF CONTENTS – cont'd

Page

2.	THE PROSECUTOR’S MISCONDUCT IN CLOSING ARGUMENTS AND THE POWERPOINT PRESENTATION FOR CLOSING ARGUMENTS –IN ARGUING THAT THE ONLY TWO POSSIBILITIES WERE THAT THE ALLEGED VICTIMS WERE TELLING THE TRUTH OR MADE UP THE ACCUSATIONS ON THEIR OWN -- DENIED MR. 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.....	13
3.	THE TRIAL COURT ERRED AND UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE IN GIVING INSTRUCTION NO. 17 WHICH TOLD THE JURORS THAT TO CONVICT MR. ARNOLD OF CHILD MOLESTATION IT WAS NOT NECESSARY THAT THE TESTIMONY OF THE ALLEGED VICTIMS BE CORROBORATED.....	17
4.	CUMULATIVE ERROR DENIED ARNOLD A FAIR TRIAL.....	19
E.	CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES:	
<u>In re Glassmann</u> , 175 Wn.2d 696, 286 P.3d 673 (2004).....	16
<u>State v. Barrow</u> , 60 Wn. App. 869, 809 P.2d 209, <u>review denied</u> , 118 Wn.2d 1007 (1991).....	15
<u>State v. Black</u> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987).....	11-12
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74, <u>review denied</u> , 118 Wn.2d 1007 (1991).....	15
<u>State v. Carlton</u> , 80 Wn. App. 116, 906 P.2d 999 (1999).....	12
<u>State v. Clayton</u> , 32 Wn.2d 571, 202 P.922 (1949).....	18
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	12
<u>State v. Eisner</u> , 95 Wn.2d 458, 626 P.2d 10 (1981).....	18
<u>State v. Jacobsen</u> , 78 Wn. App. 491, 477 P.2d 1 (1970).....	18
<u>State v. Fleming</u> , 83 Wn. App. 209, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018 (1997).....	15-16
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936 (2010).....	16

TABLE OF AUTHORITIES – cont’d

	Page
<u>State v. Jones</u> , 117 Wn.2d 89, 68 P.3d 1153 (2003).....	12
<u>State v. Maule</u> , 35 Wn. App. 287, 667 P.2d 96 (1983).....	11
<u>State v. O’Neal</u> , 126 Wn. App. 395, 109 P.3d 429 (2005), <u>aff’d</u> , 159 Wn.2d 505 (2007).....	12
<u>State v. Riley</u> , 69 Wn. App. 349, 848 P.2d 1288 (1993).....	15
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	12
<u>State v. Stewart</u> , 34 Wn. App. 221, 660 P.2d 278 (1983).....	11
<u>State v. Sutherby</u> , 144 Wn.2d 755, 30 P.3d 1278 (2001).....	12
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 752 (2005).....	12
<u>State v. Traweck</u> , 43 Wn. App. 99, 107, 715 P.2d 1148, <u>review denied</u> , 106 Wn.2d 1007 (1986), <u>disapproved on other grounds by State v. Blair</u> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	15
 FEDERAL CASES:	
<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....	16

TABLE OF AUTHORITIES – cont’d

Page

United States v. Alcantara-Castillo,
788 F.3d 1156 (9th Cir. 2015).....12

United States v. Harding,
585 F.3d 1155 (9th Cir. 2009).....12

United States v. Sanchez,
176 F.3d 1214 (9th Cir. 1999).....12

United States v. Weatherspoon,
410 F.3d 1142 (9th Cir. 2005).....12

STATUTES, RULES AND OTHER AUTHORITY:

Const. Article 4, section 16.....2

ER 702.....13

Fifth Amendment, U.S. Constitution.....16

Fourteenth Amendment, U.S. Constitution.....16

A. RESTATEMENT OF THE ERRORS AND ISSUES

1. Does expert testimony improperly comment on the guilt of the accused and credibility of the complaining witnesses who said that their brother had sexual contact with them fifteen or sixteen years earlier, where the expert has no knowledge of the facts of the case or training in “delayed disclosure,” but is nevertheless permitted to testify that there is “delayed disclosure” in 95% of the cases of sex abuse and that the length of delay is longer the closer the relationship between the accuser and alleged perpetrator? Did this testimony constitute a manifest error of constitutional magnitude where it invaded the province of the jury and denied the accused the right to a jury trial?

2. Does the prosecutor’s misconduct -- in arguing in closing and in the PowerPoint presentation used in closing that the only two possibilities were (a) that the alleged victims were telling the truth or (b) they had made up their allegations themselves; and that no alternative, such as misremembering, could be considered unless there was evidence at trial to support the alternative -- deny Mr. Arnold 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?

3. Does the trial court’s Instruction No. 17, which told the jury that “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. . . .” convey the judge’s opinion that the testimony of the alleged victim alone was sufficient to find the accused guilty and constitute a comment on the evidence in violation of Article 4, section 16 of the Washington Constitution?

4. Does the cumulative error in this case deny Mr. Arnold a fair trial?

B. RESTATEMENT OF THE CASE

The following restatement of facts, omitted by respondent in its brief, is relevant to the issues on appeal.

1. Procedural history

Of the six counts of child molestation the Pierce County Prosecutor’s Office charged against Michael Arnold, the jury convicted on only two of those charges, both involving his sister Caitlin. CP 102-107. One charge involving Caitlin was dismissed for the lack of evidence to support it (CP 99-191; RP 225), and the jury was unable to agree on any of the three counts involving his sister Sarah.¹ CP 102-107. Arnold received a sentence of 84 months in prison for allegedly having had his younger

¹ The parties subsequently resolved Counts I-III by a guilty plea to one count of assault in the third degree, in which Mr. Arnold did not admit guilt. CP 154, 155-164, 183-184; RP 376-377.

sister touch his penis on two occasions when he was a teenager. CP 183-184.

2. Trial evidence

Although at the time of trial, Michael Arnold was thirty years old, his sister Sarah twenty and sister Caitlin eighteen, the trial involved incidents which allegedly occurred sixteen or seventeen years earlier, when Michael was a juvenile.² RP 26, 38, 41, 44, 100, 139,382, 384

The incidents allegedly took place in the family home where the Arnold children had little privacy growing up. RP 55, 63. All eleven of the children shared two bedrooms, and were home schooled as well. RP 45-50, 145-148. They were not left alone when they were younger; there were always older children around. RP 157.

Sarah said that she did not disclose over the years because Michael was physically abusive in disciplining her. Her examples were: he picked her up and threw her against the wall, swung her off the top bunk bed to the bottom bunk so that she hit against a dresser, and had her knock before coming into the bathroom. RP 116-119. Michael got angry with her for turning up the heat when she was practicing her flute. RP 118.

Sarah got Caitlin to agree that Michael had “done something” to

² Respondent claims that Sarah and Caitlin Arnold are 10 and 20 years younger than Michael, but they were 9 and 11 years younger. Brief of Respondent (BOR) 2.

her, before she made her disclosures, after questioning Caitlin about why she was so upset at the time. RP 93. Sarah then told Caitlin that something had happened to her too. RP 93.

3. Expert testimony

Keri Arnold, a child interviewer for the Pierce County Prosecutor's office, who was unrelated to the Arnold family and who knew nothing about the case, testified as a state's expert witness on memory and delayed disclosure. RP 249-251. She conceded that she had no special training in "delayed disclosure," but said it was a topic that came up at training and conferences. RP 243. Based on this, she testified:

-- 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.

-- it is most frequently a delay of months or years, depending -- in some degree -- on the relationship between the victim and the perpetrator. RP 244.

-- the closer the relationship is -- a close family member or family friend -- the more likely the victim is to delay disclosure. RP 244.

-- fear causes the delay -- fear of what will happen to the perpetrator, the family or both of them. RP 245.

Keri Arnold also testified that “episodic memory” refers to being able to recall specifics of the incident, where scripted memory sounds generic because it is describing recurrent events.³ RP 246. She also testified that disclosure is a process and not an event, such that a person may disclose additional events and provide more detail over time.⁴

4. Objection to jury instruction

Defense counsel objected to the Court’s Instruction 17:

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 credibility.

CP 108-138; RP 257-260 (emphasis added). Defense counsel objected that the instruction was not necessary, given the instruction on direct and circumstantial evidence, and that it placed undue emphasis on the fact that corroboration is not necessary and improperly highlighted that an alleged victim’s testimony alone is enough for conviction. RP 258-260.

5. Closing and the prosecutor’s PowerPoint

a. Prosecutor’s PowerPoint

The prosecutor’s PowerPoint slides included a series of slides proclaiming there were only two possibilities in the case:

³ This distinction was not relevant at trial; there were no witnesses describing the sisters’ disclosures other than the fact that they made them. RP 232, 234, 274.

⁴ Caitlin told less as time went by. CP 1-2.

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.

Then, “Why do people lie?,” with the possibilities “to get THEMSELVES out of trouble or to make themselves look good,” but that “Allegations of abuse do neither” because “attention is negative. Criminal justice process is uncomfortable at best.” CP 75-98.

Followed by, “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.

b. Prosecutor’s verbal argument

The prosecutor’s verbal argument followed the theme that there were only two possibilities, Sarah and Caitlin 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 Caitlin 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 Caitlin’s reasons for not telling for 16 years were valid. RP 302-303.

c. Defense closing

Defense counsel argued, among other things, that while corroboration is not mandatory, the absence of corroboration does not automatically mean that the statements are true. RP 311-312. Counsel noted that perhaps they misremembered another event involving someone else or incorrectly remembered an incident. RP 319-321.

d. The prosecutor's rebuttal closing

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 IN REPLY

- 1. MICHAEL ARNOLD WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A JURY TRIAL AND DUE PROCESS OF LAW BY THE IMPROPER ADMISSION OF EXPERT TESTIMONY: (1) THAT IN 95% OF CASES OF SEXUAL ABUSE DISCLOSURE IS DELAYED, (2) THAT THE CLOSER THE RELATIONSHIP BETWEEN PERPETRATOR AND VICTIM THE LONGER THE DELAY, AND (3) THAT THE REASONS FOR DELAY IN REPORTING IN CASES INVOLVING FAMILY RELATIONSHIPS ARE FEAR FOR THE PERPETRATOR OR THE FAMILY OR THE VICTIM'S FEAR FOR HIMSELF.**

The central issue for the jury to decide at trial was why, for so many years, Caitlin and Sarah, who lived in a house brimming full of people who loved them – sisters, brothers, parents, grandmother –and who had coaches and instructors at the YMCA as well as aunts with whom they were close, never told anyone that Michael behaved inappropriately towards them. On appeal, Michael Arnold assigns error to the state's calling an expert witness, who knew nothing about the facts of the case and had no real training in what the state called "delayed disclosure," to

convince the jurors that the disclosures of Sarah and Caitlin were credible, not just in spite of the delay, but because of the delay.

In its brief, respondent first tries to minimize the centrality of the topic of “delayed disclosure” to the expert’s testimony. Respondent argues that interviewer Keri Arnold touched on this issue of delayed reporting merely as “statements she made when she discussed the process of interviewing children.” Brief of Respondent (BOR) at 8. In fact the record shows that the trial prosecutor called Ms. Arnold, a child interviewer from his office, for the express purpose of telling the jurors that the fact that Sarah and Caitlin accused Mr. Arnold of misconduct that they said happened years earlier was consistent with his guilt and their being credible.

Specifically, the interviewer was called to place the disclosures against Michael Arnold in a category with 95% of other sexual abuse disclosures and to tell the jurors that the very long delay was explained by the close, sibling relationship. There was no other reason for Keri Arnold’s testimony; the general process of interviewing children was not at issue in the trial and she had no other relevant testimony. In fact, after being qualified as an expert, RP 240-242, the prosecutor immediately asked her if she was familiar with “delayed disclosure.” RP 243. The remainder of her testimony -- except for testifying briefly about the

irrelevant difference between episodic and script memory,⁵ and that additional disclosures may follow initial disclosures-- was about delayed disclosure, a subject about which she had no training or expertise. RP 243.

Not only did Ms. Arnold admit that she had no specific training about delayed disclosure, she defined it in such general terms that it was not useful. She defined it as from “at least” a few days to weeks, months or years, most often months or years. RP 244.

But if there is any doubt about the purpose of her testimony, the prosecutor, in closing argument, made that purpose clear by using Keri Arnold’s testimony to support arguments that such delayed disclosure is common and that Caitlin’s reasons for not telling for 16 years were valid. RP 302-303. Her testimony clearly and improperly vouched for the credibility of Sarah and Caitlin. Her testimony denied Mr. Arnold his state and federal constitutional rights to a jury trial and due process of law.

Indeed, on appeal, respondent continues to argue that “Ms. Arnold’s expert testimony as a child interviewer was helpful to the jury in that she explained what delayed disclosure is,” and further that “delayed

⁵ There was no testimony about the nature or content of the disclosures by the officers who interviewed them. RP 232, 234, 274.

disclosure is often caused by fear motivated reasons in the context of close family relationships and the reasons why.” BOR 10.

As in the case of State v. Black, where the expert testified about “rape trauma syndrome” and the profile of a rape victim which matched characteristics of the victim, the expert here testified about “delayed disclosure” and about the profile of longer delays by victims abused by family members, such as Michael. The error here is the same as the error in State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983), in admitting testimony about the characteristics of sexually abused children; here, the characteristics were a delay in reporting abuse and an even longer delay when the perpetrator was a family member. In State v. Stewart, 34 Wn. App. 221, 222-224, 660 P.2d 278 (1983), the error was in admitting testimony about the propensity of babysitting boyfriends to inflict child abuse; here it was the propensity of victims to delay reporting abuse by family members who have caused them fear. As in those cases, the testimony improperly vouched for the credibility of Caitlin and Sarah and implied that, because of the long delay in reporting, Michael was guilty.

Contrary to the argument of respondent (BOR 5-6), such testimony is improper whether it directly or indirectly implies the witness is telling

the truth. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001); State v. Carlton, 80 Wn. App. 116, 129, 906 P.2d 999 (1999).

Further, there is no question but that improper vouching for the credibility of a witness or commenting on the guilt of the defendant is constitutional error under the state and federal constitutions. 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); United States v. Sanchez, 176 F.3d 1214, 1219 (9th Cir. 1999); United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Sutherby, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn.2d 89, 91, 68 P.3d 1153 (2003), State v. O’Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff’d, 159 Wn.2d 505 (2007); State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 752 (2005).

Thus, an improper comment can constitute a manifest constitutional error which can be raised for the first time on appeal even where, as here, it is not objected to at trial. Thach, at 312. Where, as here the witness is called and extensively qualified as an expert and has no other relationship to the case; where her testimony is that delayed disclosure is almost always present in sexual abuse cases and that a long delay – such as in the case at hand – is likely when the perpetrator is a

sibling; and where the defense is strictly whether the accusers are credible, the prejudice engendered by the opinion testimony cannot be cured short of a new trial.

In virtually any case resting on the jury's assessment of a witness's credibility, the prosecutor could likely find an interviewer or investigator to give an opinion about some aspect of the case in a way that appeared to bolster the credibility of that witness or the apparent guilt of the accused. Unless the expert testimony is based on legitimate expertise and is helpful to the jury's understanding of a technical matter, it denies the accused of the fundamental right to have the jury determine the facts. ER 702. It did in Mr. Arnold's case and he should be given a new trial without Keri Arnold's expert opinion testimony.

2. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENTS AND THE POWERPOINT PRESENTATION FOR CLOSING ARGUMENTS –IN ARGUING THAT THE ONLY TWO POSSIBILITIES WERE THAT THE ALLEGED VICTIMS WERE TELLING THE TRUTH OR MADE UP THE ACCUSATIONS ON THEIR OWN -- DENIED MR. 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

Respondent cites authority for a number of points on the issue of a prosecutor's misconduct: that prosecutors may argue the facts in evidence

and reasonable inferences from those facts; may not make statements unsupported by the evidence or appeal to the jurors' passions or prejudices; may have reasonable latitude in arguing inferences about witness credibility -- as long as they do not express personal opinions; and may make fair responses to defense arguments. BOR 13-14. This authority, however, is not relevant to the issue on appeal: the false premise set forth in the prosecutor's PowerPoint presentation and verbal arguments that there were only two possibilities -- Sarah and Caitlin were either telling the truth or they made up their accusations "on their own." CP 75-98. This premise is set out in a first slide and then developed in ensuing slides asserting that there was no evidence of a sinister plot or any credible evidence they made up their accusations and they would have nothing to gain by lying, and therefore the only conclusion supported by the evidence was that they were telling the truth. CP 75-98. This point was made in other slides and during verbal argument. CP 75-98; RP 293-294, 302-306. In closing rebuttal the prosecutor again argued that the jury should not consider any other possibilities but lying or telling the truth, as suggested by defense counsel, because there was no evidence to support those other alternatives.

The prosecutor insisted that there was only possible syllogism:

Two possibilities: telling the truth or made up accusations

No evidence made up accusations
Therefore, telling the truth

The authority relevant to this false and improper argument is a matter of well-established precedent: a prosecutor commits misconduct when he or she tells jurors that to acquit, they would have to find that the state's witnesses were lying. 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. Fleming, 83 Wn. App. 209, 313-314, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Such arguments unconstitutionally misstate the law and relieve the state of its burden of proof, as the prosecutor specifically did in this case. The prosecutor argued that none of the possible scenarios described by defense counsel, such as a possible motive to falsely accuse Mr. Arnold, confusion or misremembering could be considered because there was no evidence of them. RP 327-328. This is in conflict with the equally well-established principle that "[a] defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (citing State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148,

review denied, 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (citing In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)), Fifth and Fourteenth Amendments.

Although respondent tries to distinguish the argument of the prosecutor in this case from the holding in Fleming -- that it was improper to argue that in order to acquit, the jury had to find the alleged victim was lying or mistaken -- this is precisely the argument the prosecutor made in this case: “One, they’re telling the truth, or two, they’re making this whole thing up,” that is, lying. RP 294. Fleming, 83 Wn. App. at 214.

PowerPoint slide:

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.

Argument which misstates the burden of proof may be considered manifest constitutional error which can be raised for the first time on appeal. State v. Fleming, 83 Wn. App. at 315-316; State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010); In re Glassmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2004) (where the prosecutor’s misconduct is flagrant and ill-

intentioned and it is unlikely the prejudice could be cured, failure to object does not waive the issue on appeal).

The error was clearly not harmless. The jurors acquitted on the counts involving Sarah. They may have felt that the fact that a court denied her protection order application against Mr. Arnold, possibly because it found her claim not credible, provided affirmative evidence in the record from which they could find her untruthful, while no such evidence was available with respect to Caitlin.

The trial took place many years after the alleged incidents were said to have occurred, and what the jury heard relevant to the accusations was only the testimony of Sarah and Caitlin and the opinion testimony of Keri Arnold. The misconduct in misstating the burden of proof was overwhelmingly and unfairly prejudicial. The prosecutor was charged with knowing the well-established law and the decision to ignore that law to get a conviction was flagrant and ill-intentioned and should require the reversal of Mr. Arnold's convictions.

3. **THE TRIAL COURT ERRED AND UNCONSTITUTIONALLY COMMENTED ON THE EVIDENCE IN GIVING INSTRUCTION NO. 17 WHICH TOLD THE JURORS THAT TO CONVICT MR. ARNOLD OF CHILD MOLESTATION IT WAS NOT NECESSARY THAT THE TESTIMONY OF THE ALLEGED VICTIMS BE CORROBORATED.**

The state concedes that the Court's Instruction No. 17, "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,” is not included in the Washington Pattern Criminal Jury Instructions. BOR 20. The state further concedes that, in fact, the Washington Supreme Court Committee on Jury Instructions recommends against using the instruction and that some courts have expressed misgivings about it and other courts have upheld it feeling bound by the decision of the Supreme Court in State v. Clayton, 32 Wn.2d 571, 572-574, 202 P.2d 922 (1949). BOR 20-22.

Mr. Arnold asks this Court to recognize that the distinction made by the court in Clayton—that the instruction was not a comment on the evidence because it didn’t advise the jury that uncorroborated testimony was sufficient to find guilt -- does not save it from being a comment on the evidence. Clayton, 32 Wn.2d at 574. “In order to convict . . . it shall not be necessary that the testimony of the alleged victim be corroborated,” is not really different from telling the jury that the uncorroborated victim’s testimony alone is sufficient to find the defendant guilty, and unconstitutionally conveys the judge’s opinion about the weight and sufficiency of the evidence. See State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981); State v. Jacobsen, 78 Wn.2d 491,495, 477 P.2d 1 (1970). In this case in particular, where there is nothing but the testimony of Sarah and

Caitlin and Keri Arnold's opinion testimony about delayed disclosure for the jury to consider in determining guilt, the instruction constitutes an opinion by the judge that Caitlin and Sarah's testimony alone is sufficient to find Mr. Arnold guilty. This is exactly what the prosecutor argued to the jurors in closing -- that it all came down to whether Sarah and Caitlin were telling the truth or lying, and their recollections were enough for conviction, without corroboration. RP 293-294, 301.

Mr. Arnold wishes also to preserve an issue that the non-corroboration instruction is a comment on the evidence in all cases and should not be given.

4. CUMULATIVE ERROR DENIED ARNOLD A FAIR TRIAL.

As set out in the Opening Brief of Appellant, cumulative error denied Mr. Arnold a fair trial. See AOB at 29-31. The credibility of Caitlin and Sarah, who were testifying about something that may or may not have happened many years earlier when they were very young, was the issue for the jury to resolve at trial. Keri Arnold's testimony that their delaying in disclosure was explained by their close relationship with their brother, the prosecutor's insistence that Michael was guilty unless he had affirmative evidence that Caitling and Sarah were lying and the court's

instruction that the sisters' testimony was sufficient to establish guilt, collectively denied Michael a fair trial.

F. CONCLUSION

For all of the above reasons and in his Opening Brief of Appellant, Michael Arnold asks that his convictions for two counts of child molestation be reversed and remanded for retrial.

DATED this 5th day of December, 2017.

Respectfully submitted,

_____/s/_____

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I certify that on the 5th day of December, 2017, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following by e-mail

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_____/s/____ 12/5/2017
Rita Griffith DATE at Seattle, WA

December 05, 2017 - 11:01 AM

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