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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL ARNOLD, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kathryn J. Nelson, Judge

No. 16-1-00069-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant is unable to show that any of the witness's testimony constituted improper opinion testimony when she did not comment on the defendant's guilt or the veracity of the victim?
2. Whether defendant has failed to show prosecutorial misconduct occurred when none of the prosecutor's comments during closing were improper, let alone flagrant and ill-intentioned?
3. Whether defendant is unable to show the trial court improperly commented on the evidence when it gave an instruction stating the law that corroboration of the victim's testimony is not required for a jury to convict when such an instruction has been held proper by the Washington Supreme Court in *State v. Clayton* and subsequent case law?
4. Whether defendant has failed to show he is entitled to relief under the cumulative error doctrine when he has failed to show any error occurred much less an accumulation of errors?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On January 6<sup>th</sup> 2016, Michael Arnold, hereinafter referred to as "the defendant" was charged with six counts of domestic violence related Child Molestation in the First Degree<sup>1</sup>. CP 1-4. Jury trial was held on December 7<sup>th</sup> 2016, before the Honorable Judge Kathryn Nelson. RP 26.

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<sup>1</sup> Counts I-III listed S.A. as the victim and counts IV-VI listed C.A. as the victim. CP 1-4.

During trial, the State amended charges to five counts of Child Molestation in the First Degree – domestic violence related to reflect victim C.A.’s testimony at trial. CP 99-101, RP 225.

On December 16<sup>th</sup> 2016, a jury found the defendant guilty beyond a reasonable doubt on Counts IV and V of Child Molestation in the first degree – domestic violence related.<sup>2</sup> RP 368, 371. Counts I-III were later amended as part of an agreed resolution to Assault in the Third Degree to which the defendant plead guilty. CP 154, 155-164, 183-184, RP 376-377.

The court sentenced the defendant to 87 months in custody as well as community custody, lifetime sex offender registration, \$500 crime victim penalty assessment, \$100 DNA testing fee, \$200 court costs and restitution. CP 183-184, RP 387.

Defendant timely filed a Notice of Appeal. RP 185-186.

## 2. FACTS

The defendant is the second oldest of 11 children in the Arnold family. RP 41. His sisters, S.A. and C.A. are 10 and 20 years younger than him<sup>3</sup>. RP 40, 43-44. They lived in a split level house in University Place, Washington with two bedrooms on the downstairs level. RP 47-49. The

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<sup>2</sup> The jury found the defendant guilty on counts IV and V and were unable to reach a verdict on counts I, II and III. RP 368, 371.

<sup>3</sup> Because C.A. and S.A. were minors at the time of the charged incidents, the State is referring to them by their initials for purposes of clarity and no disrespect is intended.

girls slept in one bedroom and the boys in the other. RP 47-56. Neither gender was allowed in the other. RP 47-56, 219. On Friday nights, the children would watch movies and sleep in the downstairs living room. RP 56.

S.A. testified that when she was 4 or 5 years old, the defendant molested her three times as she slept in the downstairs living room on movie nights. RP 83-89. She testified that on two separate occasions, she was awoken by the defendant touching her bare vagina with his hands. RP 82-87. She was wearing a nightgown and the defendant had pushed her underwear to the side. RP 84, 86. S.A. saw the defendant from the flashlight he was using. RP 84. When she woke up, the defendant ran back to his bedroom. RP 85. S.A. testified that on the third occasion, she again woke up to the defendant touching her vagina, but could not remember if it was under or over her clothing. RP 87-90. S.A. did not tell anyone about these incidents until later because the defendant had been physically abusive to her and she was afraid of him. RP 92.

C.A. also testified that she was molested twice by the defendant. RP 169-171. When C.A. was between the ages of 2 and 5 years old, the defendant pulled his penis out of his pants and asked her to touch it while they were alone in his bedroom. RP 169-170. The defendant told her, "Just

do it. It's okay. Just do it." RP 170. C.A. touched the defendant's penis with her hand and felt it get hard. RP 170.

The defendant molested C.A. the second time when she was about 4 or 5 years old. RP 171. C.A. was outside learning to ride a bicycle when the defendant offered her candy to go to his room. RP 171. While alone in his room, the defendant again asked C.A. to touch his penis with her hand. RP 172-173. C.A. remembered the defendant's penis got hard as she touched it the second time as well. RP 170, 173.

On another occasion, the defendant followed C.A. into the bathroom when she got up to relieve herself during the night. RP 174. The defendant made her take off her 2 piece pajamas and get naked. RP 174-177. After that incident, C.A. was so afraid to go to the bathroom during the night that she refused to do so and instead chose to wet the bed until she was about 11 or 12 years old. RP 176-177.

C.A. didn't initially tell anyone about these incidents because the defendant threatened to kill her if she did. RP 168. The defendant was physically and verbally abusive to C.A. her entire life. RP 200-201.

When C.A. was about 11 or 12 years old, the defendant asked her if she remembered what happened the first time. RP 177-179. Although C.A. lied and said no, the defendant apologized and asked her to forgive him. RP 177-179.

When C.A. was about 8 or 9 years old, she told S.A. that the defendant had done something to her. RP 93. Although C.A. didn't say specifically what happened, S.A. knew C.A. was referring to the defendant molesting C.A. RP 93-94. S.A. told C.A. that something bad happened to her as well. RP 93.

In 2014, when C.A. was about 16 years old, she disclosed to her cousin Jodie Holman, who she and S.A. were living with at the time, that the defendant had been sexually abusing her. RP 181. Holman convinced C.A. to tell her parents and speak to the police. RP 181. About a week and a half later, S.A. also disclosed to Holman that the defendant was sexually abusing her. RP 94-97. S.A. testified that she reported the abuse to prevent the defendant from abusing someone else. RP 96. Pierce County Sheriff's Deputy Ryan Johnson contacted C.A. and S.A. at the Holman residence regarding the sexual abuse. RP 227-234. Detective Gary Sanders of the Pierce County Sheriff's Department interviewed C.A. in November of 2014, and S.A. in December 2015.

C. ARGUMENT.

1. DEFENDANT IS UNABLE TO SHOW ANY OF  
THE WITNESS'S TESTIMONY CONSTITUTED  
IMPROPER OPINION TESTIMONY

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the

defendant; such testimony is unfairly prejudicial to the defendant “because it invades the exclusive province of the jury.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). “Opinion testimony” means evidence that is given at trial while the witness is under oath and is based on one’s belief or idea rather than on direct knowledge of facts at issue. *State v. Demery*, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001).

Washington courts have “expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” *Demery*, 144 Wn.2d at 760 (quoting *Heatley*, 70 Wn. App. at 579). In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 758-59. “[T]estimony 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.

When raised for the first time on appeal, a claim of improper opinion testimony will only be considered if it is a manifest error affecting

a constitutional right. RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “Manifest error” requires a showing of actual and identifiable prejudice to the defendant’s constitutional rights at trial. *Kirkman*, 159 Wn.2d at 926-27. In regards to improper opinion testimony, a defendant can show manifest constitutional error only if the record contains “an explicit or almost explicit witness statement on an ultimate issue of fact.” *State v. Elmore*, 154 Wn. App. 885, 897-98, 228 P.3d 760 (2010)(quoting *Kirkman*, 159 Wn.2d at 938). Courts construe the exception narrowly because the decision not to object to such testimony may be tactical. *Kirkman*, 159 Wn.2d at 934-35. Also important in a court’s determination whether opinion testimony prejudiced a defendant is whether the trial court properly instructed jurors that they alone were to decide credibility issues. *Elmore*, 154 Wn. App. at 898 (citing *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008)).

In the present case, because the defendant did not object to the testimony at trial, he must demonstrate a manifest constitutional error. He argues that improper opinion testimony was elicited during the testimony of Pierce County Prosecuting Attorney Office’s child interviewer Keri Arnold. Appellant’s Opening Brief at 15. But when the actual statements are looked at in the context of what was being discussed, it is apparent that they do not constitute improper opinion testimony. Thus, defendant is

unable to show any of the statements he cites to constitute a manifest constitutional error.

With regard to Ms. Arnold's testimony, defendant cites to statements she made when she discussed the process of interviewing children. Specifically, he points to when Ms. Arnold explained what delayed disclosure is in the context of interviewing children:

STATE: Are you familiar with delayed disclosure? Is that a specific topic?

WITNESS: 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?

WITNESS: Or 13 years as a child interviewer.

STATE: Oh, I'm sorry. Thank you for correcting me.

WITNESS: Yes, I have experienced that a great deal.

STATE: Can you please explain to the jury what delayed disclosure is?

WITNESS: The majority of 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?

WITNESS: Yes.

STATE: And what is that impact?

WITNESS: 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.

RP 243-245 (emphasis added).

In none of these statements was Ms. Arnold offering an opinion on the defendant's guilt or the veracity of the witnesses. On the contrary, she testified that she had never even met the defendant, C.A or S.A. RP 248. Ms. Arnold's testimony was entirely appropriate given the nature of the case and the facts at issue. *Heatley*, 70 Wn. App. at 578 (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.) C.A. did not disclose for nearly 8 years that she was molested by her older brother, the defendant, because he threatened to kill her if she would. RP 139, 142, 168, 173-74, 180. Ms. Arnold's expert testimony as a child interviewer was helpful to the jury in that she explained what delayed disclosure is as well as how and why it arises in the context of child sex abuse interviews. Ms. Arnold testified that delayed disclosure is a topic so common in child interviews that it not only comes up in a lot of the conferences and trainings she's attended, but also is discussed their interviewing protocols. RP 243. She further explained that delayed disclosure is often caused by fear motivated reasons in the context of close family relationships and the reasons why. RP 244. Her statements were described in the context of her training as a Washington State child interviewer as well as her own personal experience as a child interviewer of 13 years. RP 241-43. Her statements were not based on her own beliefs or ideas, but rather on direct knowledge from her training and experience. Her statements did not constitute improper opinion testimony.

Defendant argues that this testimony is comparable to what occurred in the case of *State v. Black* where in a rape trial, the victim's

counselor testified that the victim suffered from “rape trauma syndrome”. *State v. Black*, 109 Wn.2d 336, 339, 745 P.2d 12 (1987). Specifically, the expert testified that “ ‘[t]here is a specific profile for rape victims and [the victim] fits it.’ ” *Id.* at 339. The Supreme Court found that there was a significant danger of prejudice in using the term “rape trauma syndrome” as the term itself connotes rape and such expert testimony constituted “in essence, a statement that the defendant is guilty of the crime of rape.” *Id.* at 349.

Unlike in *Black*, Ms. Arnold never commented on the credibility of C.A. or S.A. or diagnosed them as having a condition specifically relating to victims of sexual abuse. On the contrary, Ms. Arnold testified that she’d never met either C.A. or S.A. RP 248. Her testimony regarding delayed disclosure never came close to commenting on the veracity of the witnesses. Ms. Arnold’s testimony merely explained what delayed disclosure was in the context of child interviewing. RP 241-45. Thus, her testimony did not comment on the guilt of the defendant or invade the jury's province to weigh the evidence and make credibility determinations.

In addition, the trial court instructed the jury that they alone were to decide issues of credibility. The written jury instructions stated in jury instruction number one that “you are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be

given to the testimony of each witness.” CP 44-59. The court also read this aloud to the jury just prior to the parties closing arguments. RP 644. Defendant is unable to show any improper opinion testimony amounting to a manifest constitutional error occurred in the present case.

2. DEFENDANT FAILED TO SHOW THAT ANY PROSECUTORIAL MISCONDUCT OCCURRED WHEN THE PROSECUTOR’S COMMENTS WERE NOT IMPROPER.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). “If the defendant objected at trial, the defendant must show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of

that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). In closing arguments, attorneys have latitude to argue the facts in evidence and any reasonable inferences therefrom. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). However, they may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993).

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556

U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 808, P.2d 85 (1993). A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87. “Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The trial court is in the best position to determine whether misconduct or improper argument prejudiced the defendant. *See Stenson*, 132 Wn.2d at 718.

Defendant in the present case cites to slides shown by the prosecutor during his closing argument as well as the statements made with regard to those slides. Appellant’s Opening Brief at 20-21. None of these slides or arguments were objected to by defense counsel. Thus, defendant must meet the higher burden showing that the comments by the prosecutor were flagrant and ill-intentioned and could not have been cured by a curative instruction. He fails to not only meet this heightened burden, but fails to show how any of the prosecutor’s comments were improper in any way.

Defendant argues that the prosecutor shifted the burden of proof because the slides and arguments amounted to telling the jury that “if they do not find Sarah and Caitlin were lying, they must find they were telling the truth and find Michael Arnold guilty.” Appellant’s Opening Brief at 24. Defendant argues that the State committed prosecutorial misconduct akin to that in *Fleming*. *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996). Appellant’s Opening Brief at 23-24. But in *Fleming*, the prosecutor argued that in order for the jury to return a verdict of not guilty:

[B]ased 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 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.

*Id.* at 213 (emphasis added). The court held that “it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” *Id.* at 213.

This case is clearly distinguishable. Here, the prosecutor’s slide showed “Possibilities 1. S.A. and C.A. are telling the truth 2. S.A. and C.A. made it up on their own.” CP 85. With regard to that slide, he made the following argument during closing arguments:

There'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.

RP 294.

None of the prosecutor's slides or arguments came even remotely close to saying that in order to acquit, they had to find that C.A. was lying. On the contrary, the trial court stated on the record that it "reviewed the PowerPoint prepared by the State and [found] nothing that would be improper conduct." RP 286. The prosecutor argued that the evidence demonstrated that C.A. and S.A. were credible and that the jury should believe their testimony. RP 288-310. The prosecutor even emphasized in his slides, and repeatedly in his argument, that the State had the burden to prove the charge beyond a reasonable doubt and asked the jury to weigh C.A. and S.A.'s credibility. CP 75-98, RP 288-294. The majority of this case concerned issues of credibility. The prosecutor's entire argument was focused on why C.A. and S.A. were credible witnesses. Such an argument was entirely appropriate in light of the nature of the case and facts presented at trial. None of the comments made by the prosecutor were improper, let alone flagrant or ill-intentioned. Defendant is unable to show prosecutorial misconduct occurred in the present case.

3. THE TRIAL COURT DID NOT IMPROPERLY COMMENT ON THE EVIDENCE WHEN IT GAVE AN INSTRUCTION THAT HAS BEEN HELD PROPER BY THE WASHINGTON STATE SUPREME COURT IN *STATE V. CLAYTON* AND SUBSEQUENT CASE LAW.

Article 4, section 16 of the Washington Constitution states “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose behind this provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the submitted evidence. *State v. Miller*, 1179 Wn. App. 91, 107, 316 P.3d 1143 (2014)(citing *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999), *cert. denied*, 531 U.S. 837, 121 S. Ct. 98, 148 L. Ed. 57 (2000)). “To constitute a comment on the evidence, it must appear that the trial court’s attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court’s statements.” *Id.* (citing *Elmore*, 139 Wn.2d at 376).

A jury instruction can be an improper comment on the evidence. *Miller*, 179 Wn. App. at 107. However, “[a] jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.” *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). An

appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1081 (2006). In such a case where a jury instruction is found to be a comment on the evidence, it is presumed to be prejudicial and the burden rests on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

Prior to closing arguments in the present case, the State submitted the following instruction as part of its proposed jury instructions:

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 19-51.

It based this instruction on RCW 9A.44.020(1) which holds that “[i]n 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.” Defendant objected to the instruction and after much discussion, the court allowed the instruction as proposed by the State. RP 256-260; CP 108-138. (Instruction No. 17). On appeal, defendant argues this was an unconstitutional comment on the evidence because it appeared to express

an attitude toward the merits of the case and the strength of the evidence. Appellant's Opening Brief at 25-26.

Defendant's argument fails however, as the Washington Supreme Court has already found that such an instruction was not an improper comment on the evidence in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). In that case, the Court instructed the jury:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

*Clayton*, 32 Wn.2d at 572. The Court found that the trial court had not expressed an opinion as to the truth or falsity of the alleged victim or as to the weight to give to her testimony, but submitted all questions involving credibility and the weight of the evidence to the jury for its consideration. *Id.* at 573-74.

In 2005, this Court itself was confronted with this so called "non-corroboration" instruction in *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005), *review denied*, 161 Wn.2d 1012, 166 P.3d 1218 (2007). This Court looked to the precedent in *Clayton*, discussed above, and the

1978 Division One case of *State v. Malone*, 20 Wn. App. 712, 582 P.2d 883 (1978), *review denied*, 91 Wn.2d 1018 (1979). In *Malone*, the trial court in a rape case had instructed the jury that “[i]n order to convict the defendant of the crime of rape in any degree, it shall not be necessary that the testimony of the alleged victim be corroborated.” *Malone*, 20 Wn. App. at 714. Division One held that “the instruction was a correct statement of the law and was pertinent to the issues presented at the trial. It also found that the phrasing of the instruction did not convey an opinion on the alleged victim’s credibility” and was therefore not a comment on the evidence. *Zimmerman*, 130 Wn. App. at 181 (citing *Malone*, 20 Wn. App. at 714-15).

Relying on these two cases, and specifically the precedent in Clayton, this Court held that the instruction in Zimmerman’s case correctly stated the law and was not an improper comment on the evidence. *Zimmerman*, 130 Wn. App. at 182. Although this Court noted that the Washington Pattern Criminal Jury Instructions (WPIC) do not contain the instruction, and the Washington Supreme Court Committee on Jury Instructions recommends against using such an instruction, this Court recognized it was bound by *Clayton* and that the giving of such an instruction is not reversible error. *Id.* at 182-83.

While defendant attempts to distinguish the instruction in *Clayton* from that in the present case, case law interpreting *Clayton* has found no distinction. The instructions given in *Malone* and *Zimmerman* were nearly identical to the instruction in the present case and were found to be accurate statements of the law and not a comment on the evidence. *Malone*, 20 Wn. App. at 714; *Zimmerman*, 130 Wn. App. at 173-74. They did not even include the second sentence that was included in the present case which stated and thus reiterated that “the jury is to decide all questions of witness credibility.” CP 108-138. (Instruction No. 17).

Likewise, Division One of the Court of Appeals again addressed this issue when it dealt with an instruction that was identical to the one in the present case, save for the crime (incest instead of child molestation). *State v. Chenoweth*, 188 Wn. App. 521, 535, 354 P.3d 13, review denied, 184 Wn.2d 1023, 361 P.3d 747 (2015). The court again recognized that the Washington Supreme Court Committee on Jury Instruction recommends against giving such an instruction and how several courts “share the Committee’s misgivings”, but found that “there is a historical basis for instructing the jury regarding corroboration for sex crimes.” *Id.* at 536-37. Citing the fact that sex offenses are rarely, if ever, committed in the presence of more than the perpetrator and victim and are therefore often incapable of corroboration, the court described how it is permissible

to instruct the jury that there is no corroboration requirement. *Id.* at 537. The court again expressed its concern in using the instruction, but found it was not a comment on the evidence. *Id.* Indeed, the concurrence by Judge Becker expressed disagreement, but reiterated how this was not a matter of first impression in Washington and the courts were bound by *Clayton* which holds that the giving of such an instruction is not reversible error. *Id.* at 538.

While defendant attempts to distinguish the instruction in the present case from the instruction in *Clayton*, case law, specifically *Chenoweth* which is identical to the present instruction, finds no distinction. Like the court in *Chenoweth* and the concurring opinion reiterate, this Court is bound by the Washington Supreme Court. Regardless of what other states around the country are doing, the Washington Supreme Court has expressly approved of this instruction and found no error.

The giving of the instruction that there is no corroboration requirement in sex offense case where the only witness was a ten year old child was not a comment on the evidence. It did not convey the court's attitude toward the merits of the case, tell the jury to give the evidence more or less credence, or express an opinion about the credibility of the witnesses. The instruction accurately stated the law and reiterated that the

jury was to decide all questions of credibility. In accordance with *Clayton*, and subsequent case law on this issue, the trial court's instruction to the jury did not improperly comment on the evidence

4. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE WHEN HE HAS FAILED TO SHOW ANY ERROR OCCURRED.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been a harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998) ("although none of the errors discussed above alone mandate reversal..."). The analysis is intertwined with the harmless error doctrine, in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

Defendant in the present case has failed to show that any error occurred, much less an accumulation of errors which deprived him of a fair trial. He is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests the Court affirm the defendant's convictions.

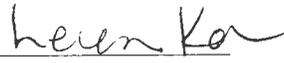
DATED: November 6, 2017.

MARK LINDQUIST  
Pierce County Prosecuting Attorney

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ROBIN SAND  
Deputy Prosecuting Attorney  
WSB # 47838 

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The undersigned certifies that on this day she delivered by ~~U.S.~~  mail or ABC-LMI delivery to the attorney of record for the appellant ~~and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11.7.17   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**November 07, 2017 - 11:10 AM**

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