

**FILED**  
**Oct 03, 2016**  
Court of Appeals  
Division III  
State of Washington

NO. 33886-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**TRACEY EDWARD LYON,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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## **ASSIGNMENTS OF ERROR**

1. The testimony of Lisamarie Larrabee, a child forensic interviewer, amounted to a comment upon the credibility of the complaining witness, M.K., and also improperly bolstered M.K.'s testimony.

2. The prosecuting attorney, in closing argument, committed misconduct by ridiculing Tracey Edward Lyon's statements and asking the jury to speculate concerning the reasons for any contact between Mr. Lyon and M.K.

3. Conditions 4 and 10 of the Judgment and Sentence are not crime-related prohibitions. (CP 170)

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the prosecuting attorney's direct examination of Lisamarie Larrabee result in testimony bolstering the credibility of the child witness, M.K.?

2. Did the prosecuting attorney commit misconduct in closing argument when he ridiculed Mr. Lyon's statement to law enforcement and subsequently asked the jury to speculate concerning the reasons for any contact between Mr. Lyon and M.K.?

3. Do conditions 4 and 10 of the Judgment and Sentence meet the statutory requirement of crime-related prohibitions under RCW 9.94A.505(8)?

### **STATEMENT OF THE CASE**

Mr. Lyon was living in a home belonging to Karen Krause's brother in February of 2013. Mr. Lyon and Ms. Krause were in a romantic relationship. Ms. Krause is M.K.'s paternal grandmother. (RP 385, ll. 22-24; RP 386, ll. 4-8; RP 393, ll. 5-7)

M.K. was born on October 27, 2004. Some time in either February or March of 2013 she told her grandmother that Mr. Lyon "touched me in a spot he should not have." (RP 332, ll. 9-12; RP 336, ll. 3-5; RP 387, ll. 9-23; RP 392, ll. 5-23)

Ms. Krause confronted Mr. Lyon. He denied touching M.K. Ms. Krause then advised M.K. that she did not believe her. M.K. did not inform anyone else until February 2014 when she handed a note to her father. (RP 345, l. 7 to RP 346, l. 2; RP 346, ll. 14-18; RP 347, ll. 8-17; RP 413, ll. 9-17; RP 439, ll. 1-2; RP 442, ll. 13-15)

M.K. described what occurred. She stated that she was sitting on Mr. Lyon's bed listening to music. Mr. Lyon had a laptop computer on

his lap and was lying on the bed. When she reached for a glass of orange juice that was sitting on a shelf near the bed Mr. Lyon allegedly reached over, slid his hand inside her pants and underwear, and touched her vagina with one finger. (RP 338, ll. 2-5; RP 338, ll. 8-11; RP 341, ll. 1-25; RP 342, ll. 1-24)

On February 13, 2014 an audio/video interview of M.K. was conducted by Lisamarie Larrabee, a child forensic interviewer. M.K. reiterated during that interview that Mr. Lyon had “touched me in a place where I shouldn’t be touched.” (RP 460, ll. 15-16; RP 474, ll. 4-8; RP 495, ll. 5-15)

Officer Taylor of the Kittitas Police Department interviewed Mr. Lyon on February 26, 2014. Mr. Lyon’s version of the events paralleled M.K.’s, with the exception that he denied that any touching occurred. He claimed that he fell asleep while M.K. was in the room. (RP 552, ll. 4-6; RP 555, ll. 1-5; RP 558, l. 1 to RP 562, l. 22; RP 561, l. 5; ll. 16-17; RP 563, l. 13 to RP 564, l. 8; RP 565, ll. 6-7)

An Information was filed on August 12, 2014 charging Mr. Lyon with first degree child molestation. (CP 1)

Multiple scheduling orders and waivers were entered prior to a jury trial commencing on September 1, 2015. (CP 3; CP 5; CP 8; CP 14; CP 15; CP 20; CP 21; CP 36; CP 39; CP 44; CP 46; CP 65; CP 67; CP 79)

Stipulated orders were entered relating to the admissibility of the child interview and Mr. Lyon's statements to law enforcement. (CP 9; CP 17)

A child hearsay hearing was conducted. The trial court determined that M.K. was competent to testify. The court also determined that the forensic interview was admissible. (RP 115, l. 13 to RP 124, l. 2)

The trial court entered Findings of Fact and Conclusions of Law following the child hearsay hearing on August 31, 2015. (CP 81)

The audio/visual interview of M.K. was played for the jury. The interview was consistent with what M.K. had told her grandmother. It was also consistent with Mr. Lyon's statements, with the exception of the touching. (RP 483, l. 13 to RP 536, l. 13)

M.K. clarified the touching in the interview. She indicated that it felt weird. Only a finger touched her. It didn't move around. Mr. Lyon removed the finger as soon as her grandmother walked in the room. (RP 520, ll. 15-17; RP 521, ll. 11-24; RP 522, ll. 5-8; RP 532, ll. 17-22)

After the interview was played for the jury the prosecuting attorney continued with his direct examination of Ms. Larrabee. The following exchanges occurred:

Q. Okay. And what -- what is an alternative hypothesis?

A. That is where -- it -- it's basically an alternative explanation for what is thought to have happened to the child going into the interview. If the child has made a disclosure you -- you're -- you know, you attempt to keep your mind open that it could be some other explanation than -- that abuse.

Q. So you go into the interview with an attempt to keep your mind open?

A. Yeah.

(RP 541, l. 24 to RP 542, l. 8)

**Q. And did you check in this case for alternative hypotheses or motives to make a false statement?**

A. Yes. So, you know, **an example of an alternative hypothesis might be that it was a misconstrued innocent touch**, or that it's something the child observed or heard, that it didn't actually happen to them, perhaps it -- if someone -- some other perpetrator that the child is trying to protect actually

was the one that did it and -- **or that a child is lying** to retaliate or seek attention, something like that.

So in this particular case, **since the child had very early on clearly stated that her -- her gent -- her genitals had been touched** directly by a particular person, you know, given the -- the nature of the relationship between those two people and her age **I eliminated the possibility that it was an innocent --**

Q. Okay.

A. -- **misconstrued touch**. So, I think, at that point what I -- what **I was kind of trying to focus on more was a possible motive** for -- **for lying** and I -- and I did ask questions in an effort to try and explore that.

(RP 542, l. 15 to RP 543, l. 10) (Emphasis supplied.)

Defense counsel finally objected that the questioning was invading the province of the jury. The trial court overruled the objection. (RP 544, l. 9 to RP 545, l. 22)

The prosecuting attorney returned to his inquiry and the following exchange occurred:

Q. In general, then, Ms. Larrabee, through the course of your interview, utilizing your training and experience and background, did you, in questioning, keeping an open mind, attempt to explore whether the child was engaging in -- whether there was an alternative explanation or whether she was providing a false statement? Did you do that as an interviewer?

A. Yes, I did.

Q. Okay. And last, **as a trained and experienced child forensic interviewer**, in looking at your interviews, **how would you compare this interview to four hundred and eighty -- four hundred and forty others you conducted?**

A. **I'd say that it was technically sound. The child was forthcoming. She seemed like she wanted to provide accurate in-**

**formation.** I think it was a little long, longer than most.

(RP 545, l. 24 to RP 546, l. 14) (Emphasis supplied.)

After the State rested its case-in-chief the defense also rested. (RP 584, l. 14; RP 586, ll. 3-8)

During closing argument, the prosecuting attorney, in discussing Instruction 9, the definition of sexual conduct, stated:

Instruction 9 - sexual contact, any touching of the sexual or intimate parts of a person done for the purpose of gratifying that person's sexual desire. Any touching. I only point that out because perhaps somebody's thinking, you know, I mean, is that it? Are we just talking Oops! Yes, that's it. That's all we're talking about.

(RP 620, ll. 10-16)

Returning to that same theory, the prosecuting attorney later argued:

So the fact when you think about why would anybody do this? **I mean, why? Give me a break. You've got to be kidding me.**

**There's got to be some psychoanalytical reason, something, OCD, something there.** I submit to you as you make the decision based on the facts in evidence, **who knows? Who really cares?**

**Who knows why anybody does anything?** Sometimes we do. **And who really cares in the aftermath?** We take an extreme case of an individual who just, for whatever reason, or for whatever moment, takes out a gun and fires it into somebody they don't know. **It is what it is. That's it.** Well, it's a matter of fact. **What's the big deal?**

(RP 642, ll. 7-19) (Emphasis supplied.)

A jury determined that Mr. Lyon was guilty of first degree child molestation. (CP 152)

Judgment and Sentence was entered on November 13, 2015. Mr. Lyon filed his Notice of Appeal that same date. (CP 169; CP 170)

## **SUMMARY OF ARGUMENT**

Mr. Lyon is entitled to a new trial due to the fact that he was denied his constitutional right to a fair and impartial trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22.

The prosecuting attorney's direct examination of the child forensic interviewer resulted in comments on the credibility of the child victim which invaded the province of the jury to such a degree that it exceeded the parameters of an expert opinion.

The prosecuting attorney's "OOPS" comment, combined with the request that the jury speculate on whether or not sexual contact occurred, further exacerbated the unfairness of the proceedings in contravention of due process requirements.

Conditions 4 and 10 of the Judgment and Sentence are neither affirmative conditions nor crime-related prohibitions and must be removed.

## **ARGUMENT**

### **I. EXPERT OPINION**

ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Mr. Larrabee is a forensic child interviewer. She was qualified as an expert witness at trial.

Mr. Lyon contends that Ms. Larrabee's testimony bolstered the credibility of M.K. The bolstering was a direct comment upon M.K.'s credibility in contravention of existing caselaw. Moreover, it constituted a comment upon Mr. Lyon's guilt.

An expert opinion is not objectionable merely because it "embraces an ultimate issue to be decided by the trier of fact." ER 704. But a witness may not offer an opinion as to the defendant's guilt, either by direct statement or by inference. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (plurality opinion)); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion violates the defendant's "inviolable" constitutional right to a jury trial, which vests in the jury "the ultimate power to weigh the evidence and determine the facts." *Montgomery*, 163 Wn.2d at 590 (quoting WASH. CONST. art. I, § 21; *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of the case, in-

cluding (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Montgomery*, 163 Wn.2d at 591 (quoting *Demery*, 144 Wn.2d at 759).

*State v. Hudson*, 150 Wn. App. 646, 652-53, 208 P.3d 1236 (2009).

Ms. Larrabee was testifying as an expert witness. She was commenting upon the audio/visual interview involving M.K. The specific nature of the testimony was to bolster M.K.'s credibility and direct the jury to her opinion that M.K. was telling the truth and that Mr. Lyon is guilty.

Any child sexual offense is a highly charged situation for a jury. The case before the jury was a "she said-he said."

The consistency between M.K.'s version of the events and Mr. Lyon's version of the events cannot be ignored. The only difference is the denial of any touching. There was no other evidence before the jury with the exception of M.K.'s statements.

Because improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right, we apply the constitutional harmless error standard set forth in *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), to determine if the error was harmless. *State v. Thach*, 126 Wn. App. 297, 312-13, 106 P.3d 782 (2005). **We presume that constitutional errors are prejudicial, and the State must convince us beyond a reasonable doubt that any reasonable jury would have reached the**

**same result absent an error.** *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *Thach*, 126 Wn. App. at 313 (quoting *Guloy*, 104 Wn.2d at 425). **This test is met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt.** *Watt*, 160 Wn.2d at 636; *Thach*, 126 Wn. App. At 313.

*State v. Hudson*, *supra* 656; *see also*: *State v. Rafay*, 168 Wn. App. 735, 805-06, 285 P.3d 83 (2012). (Emphasis supplied.)

The evidence at trial was not overwhelming. It was a swearing match. Mr. Lyon contends that the error was not harmless. The State cannot establish, beyond a reasonable doubt, that in removing the comments by Ms. Larrabee, that the jury would have reached the same result.

Defense counsel did insert an objection based upon Ms. Larrabee's testimony. The objection was a correct objection. The question and answer invaded the province of the jury.

As recognized in *State v. Kirkman*, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007):

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. **"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim.** Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our

precedent holding the manifest error exception is narrow. [Citation omitted.]

Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt. *State v. Garrison*, 71 Wn.2d, 312, 315, 427 P.2d 1012 (1967); *State v. Trombley*, 132 Wash. 514, 518, 232 P. 326 (1925).

*See also: State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). (Emphasis supplied.)

Ms. Larrabee's testimony was more than an almost explicit statement that she believed M.K. The questioning by the prosecuting attorney was aimed at eliciting an opinion on either M.K.'s credibility or Mr. Lyon's guilt.

Mr. Lyon asserts that this exchange between the prosecuting attorney and Ms. Larrabee violated his right to due process and a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22.

## **II. PROSECUTORIAL MISCONDUCT**

Mr. Lyon's second issue pertains to portions of the prosecuting attorney's closing argument which adversely impacted his due process rights, including the right to a fair and impartial trial.

Those portions of the closing argument ridiculed Mr. Lyon's statements to law enforcement and requested the jury to speculate as to why the alleged touching occurred.

Mr. Lyon recognizes that defense counsel failed to object to the portions of the closing argument that were prejudicial to him. However, they were so prejudicial that a curative instruction would not have been beneficial to him.

Defense counsel's failure to object to a prosecutor's closing argument will generally not constitute deficient performance because lawyers "do not commonly object during closing argument 'absent egregious mis-statements.'" *In re Pers. Restraint of Davis*, 152 Wn.2d [647, 101 P.3d 1 (2004)] at 717 (quoting *United States v. Necochea*, 986 F.2d 1273, 1281 (9<sup>th</sup> Cir. 1993)). But, this does not mean that all failures to object are decidedly reasonable under *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 80 L. Ed.2d 674, 104 S. Ct. 2052 (1984)] at 668. **If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance.** *Gentry*, 125 Wn.2d [570, 888 P.2d 1105 (1995)] at 643-44 (it is prosecutorial misconduct if conduct is both improper and prejudicial).

(Emphasis supplied.)

There was no need for the prosecuting attorney to make the comments that were made. The issue of sexual contact was the direct issue that the jury needed to decide. In a "he said-she said" case the prosecu-

tor's comments were of such a nature that they directed the jury to speculate as to the reasons for the alleged touching. They were derogatory, prejudicial, and wrong.

### **III. CONDITIONS OF SENTENCE**

The following "crime related prohibitions" were imposed in the Judgment and Sentence:

**4)** Not view or use sexually explicit materials such as X-rated movies, images, books or audio.

**10)** Not access social media sites, not limited to Facebook, Twitter, *etc.*

Mr. Lyon contends that neither condition is appropriate under the facts and circumstances of his case.

There is no evidence in the record that Mr. Lyon was accessing any sexually explicit sites or contacting minors on any social media site.

While RCW 9.94A.505(8) allows the trial court to "impose and enforce crime-related prohibitions and affirmative conditions" as part of a criminal sentence, the authority is circumscribed. By terms of RCW 9.94A.-030(10) a "crime-related prohibition" must "directly relate to the circumstances of the crime for which the offender has been convicted."

Division One of this court has already held that a sentencing court may not prohibit a defendant from using the Internet if his or

her crime lacks a nexus to Internet use. In *State v. O’Cain*, the trial court ordered an offender convicted of second degree rape to refrain from using the Internet without the prior approval of his community custody officer. 144 Wn. App., 772, 774, 184 P.3d 1262 (2008). On appeal, Division One noted that no evidence in the record suggested that the defendant used the Internet to commit his crime or that his Internet use had contributed to the crime in any other way. *O’Cain*, 144 Wn. App. at 775. Because of this absence of evidence, the trial court had not made any findings concerning a nexus between Internet use and O’Cain’s crime. *O’Cain*, 144 Wn. App. at 775. The *O’Cain* court remanded the case to the trial court with orders to strike the condition based on the lack of the requisite nexus between the crime and the prohibited activity. *O’Cain*, 144 Wn. App. at 775.

Just as in *O’Cain*, there are no findings suggesting any nexus between Johnson’s offense and any computer use or Internet use. The trial court exceeded its sentencing powers under RCW 9.94A.505(8) in imposing the condition. Following *O’Cain*, we remand Johnson’s case to the trial court with instructions to strike community custody condition 25. 144 Wn. App. at 775.

*State v. Johnson*, 180 Wn. App. 318, 330-31, 327 P.3d 704 (2014).

Just as in the *O’Cain* and *Johnson* cases, the necessary nexus for conditions 4 and 10 is missing in Mr. Lyon’s case.

## CONCLUSION

Mr. Lyon was denied his constitutional right to due process and a fair trial based upon the bolstering of M.K.'s testimony and the comment upon his guilt during the direct examination of the child forensic interviewer.

Prosecutorial misconduct in closing argument also adversely impacted Mr. Lyon's constitutional right to a fair and impartial trial.

Based upon the constitutional violations Mr. Lyon is entitled to have his convictions reversed and the case remanded for a new trial.

In the event that the Court denies Mr. Lyon a new trial conditions 4 and 10 of the Judgment and Sentence must be removed.

DATED this 3rd day of October, 2016.

Respectfully submitted,

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**NO. 33886-0-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	KITTITAS COUNTY
Plaintiff,	)	NO. 15 1 00296 5
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
TRACEY EDWARD LYON,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 3rd day of October, 2016, I caused a true and correct copy of the *BRIEF OF APPELLANT* and *MOTION TO EXTEND TO DATE OF FILING APPELLANT'S BRIEF* to be served on:

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