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NO. 35578-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

TROY STEENHARD AKA BLOOR,

Appellant.

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

The Honorable James M. Triplet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find appellant guilty of rape of a child in the first degree.

2. The court erred in denying appellant's motion for judgment notwithstanding the verdict.

3. The court erred in admitting improper opinion testimony on the credibility of the complaining witness.

4. The prosecutor committed misconduct by intentionally eliciting improper opinion testimony.

5. Appellant's right to effective assistance of counsel was violated when his attorney failed to object to improper opinion testimony on the credibility of the complaining witness.

6. The court erred in instructing the jury that no corroboration of the complaining witness' testimony was necessary to convict.

7. Cumulative error deprived appellant of a fair trial.

8. The court erred in entering judgment against appellant.

Issues Pertaining to Assignments of Error

1. Regarding the charge of rape of a child in count one, the jury instructions defined sexual intercourse as contact between the genitals of one person and the anus or mouth of another. There was no testimony that such contact occurred. In a forensic interview admitted at trial, the

alleged victim stated appellant “peed on my mouth.” With no evidence whether the requisite contact occurred, was the evidence insufficient to prove the essential element of sexual intercourse beyond a reasonable doubt?

2. No witness may testify to an opinion regarding the credibility of another witness. To do so invades the province of the jury and violates the constitutional right to a jury trial. The alleged victims’ mother testified, “if given the opportunity, they are going to tell the truth. They’re not going to lie.” The mother’s best friend also testified the girls are honest. (a) Did this testimony amount to improper opinions on credibility that invaded the province of the jury? (b) Did the prosecutor commit misconduct in intentionally eliciting this testimony? (c) Did counsel’s failure to object violate appellant’s constitutional right to effective assistance of counsel?

3. Judges may not comment on the weight of the evidence. Jury instructions must accurately state the pertinent law and may not be misleading. Jurors are the sole judges of the credibility of witnesses. Here, the court instructed the jury that corroboration of the alleged victims’ testimony “shall not be necessary?” By singling out testimony by the alleged victims for special consideration, did the court improperly

comment on the evidence and potentially mislead the jury regarding its role in gauging witness credibility?

4. The compounded effect of multiple trial errors can result in a violation of the right to a fair trial. Did the combination of the jury instruction and opinion testimony bolstering the credibility of the alleged victims in this case amount to cumulative error that deprived appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County prosecutor charged appellant Troy Steenhard with one count of rape of a child in the first degree and two counts of child molestation in the first degree. CP 7-8. The jury found him guilty on each count. CP 28-30. Before sentencing, Steenhard moved for judgment notwithstanding the verdict or for arrest of judgment and a new trial on count 1, the rape of a child charge. CP 37. The court denied the motion and sentenced Steenhard to an indeterminate term of confinement with a minimum of 285 months and a maximum term of life on that count. CP 73. The indeterminate sentences on counts 2 and 3 were run concurrently. CP 73. Notice of appeal was timely filed. CP 84.

2. Substantive Facts

a. Steenhard was a family friend and babysitter for P.W. and L.W.

When Michelle Troup's mother died, Steenhard stepped in to help care for Troup's children, P.W. and L.W., twin girls who were five years old at the time. RP 417-18. Troup's mother had cared for the girls during the afternoons when their kindergarten was finished but Troup and her boyfriend David Holm were still at work. RP 412. The family was devastated at the loss of Troup's mother, and they also needed to make new childcare arrangements. RP 413. Steenhard was a close friend of Holm. RP 415. Steenhard testified Holm asked him to watch the children. RP 724.

Neighborhood children, including Holm's 10-year-old daughter Taylor, were known to hang out at Steenhard's home. RP 415-16. Steenhard was friendly and open with all the children, and Troup had no concerns about taking him up on his offer to watch P.W. and L.W. during the afternoons. RP 417-18. They agreed he would be paid \$100 per week and would also watch Taylor when she arrived home from school around 3:15.¹ RP 418.

Initially, Steenhard watched the children at Troup's home, meeting them when they got off the bus each day. RP 418. About a week in,

¹ Troup claimed Steenhard offered to watch the children for free, but she and Holm insisted on paying him. RP 417-18. Steenhard denied this, saying that he readily agreed to help out but needed the money. RP 724.

Steenhard had car trouble and asked if the children could get off the bus at his home so he could watch them there. RP 419. Troup agreed and, from that point on, the babysitting occurred at Steenhard's home. RP 420.

Steenhard's home was a well-traveled location, visited frequently by friends, neighbors, and children. Steenhard lived with his nephew Vinny, age 18. RP 416. His then-girlfriend Shannon Williams was also usually around. RP 712-13. A neighbor and friend, Anita Brandon, spent her days with Steenhard and was, according to her testimony and Steenhard's, virtually always there when he was babysitting the girls. RP 708-09, 753-54, 760-61. Another neighbor and friend, Shawn Griffin, also testified he dropped by frequently during the day. RP 676. Steenhard testified his daughter Whitney also lived with him at the time and was generally home all day because she was pregnant and did not have a job. RP 726. Steenhard explained that, in addition to Vinny, who lived with him, Williams, Brandon, and Griffin all were regular visitors who were not expected to knock but simply would come over and come right in the house. RP 721-22. Troup claimed that, when she picked up the girls, Steenhard was often the only adult present, but other children were frequently around. RP 425-26.

The girls did not generally have difficulty being left with babysitters or at school. RP 420-21. But a couple of weeks after Steenhard began watching the girls, Troup noticed they became unusually clingy, crying and

asking that she not to go to work and that they not to go to Steenhard's home after school. RP 422. At the time, Troup believed this was a result of their grandmother's recent death. RP 485.

According to Troup, Steenhard's stint as babysitter began the third or fourth week of April 2016 and ended Mother's Day weekend in the first or second week of May that same year. RP 420, 423. But Steenhard testified the arrangement actually continued until the school year ended in June. RP 710-11.

The girls had not complained about Steenhard as a babysitter. RP 430, 431. Troup claimed the termination was amicable from her perspective, she simply told Steenhard they had made other arrangements. RP 427-28.

The real reason, however, was Troup's belief that Steenhard was in contact with Taylor's mother. RP 424-25. Holm had been trying to find Taylor's mother to serve her with legal papers. RP 424-25. Steenhard denied any contact with Taylor's mother. RP 714-15. He also testified Troup confronted him and accused him of trying to bring Taylor back to her mother. RP 714. Steenhard testified he was frustrated because he received only partial payment from Troup. RP 720-21. He decided not to press the issue because he knew Troup was already upset with him over the issue with Taylor's mother. RP 721.

- b. Six months after the babysitting ended, the girls accused Steenhard of touching them inappropriately.

Approximately six months after the end of the babysitting arrangement, in December 2016, P.W. told Troup she did not want to go skating with Steenhard. RP 434-35. When Troup told her that was not going to happen, P.W. said he was a bad man. RP 435. When asked what she meant, P.W. said he touched them in their privates. RP 435-36. She also put her hand under her dress and wiggled her fingers with an in-and-out motion near her vagina. RP 435-36. Later, P.W. repeated her statements to Holm and to Troup's best friend Leah Bias. RP 438, 535-36. At a doctor's visit for a cold, P.W. also named Steenhard as the one who had touched her. RP 443, 458. On Bias's advice, Troup called the sheriff's office. RP 440-42.

A couple of weeks later, in the car near Steenhard's home, L.W. suddenly told Troup, "you're not taking us to [Steenhard]'s." RP 461-62. When Troup told her no, they were not going there, L.W. repeated her sister's accusation that Steenhard was a bad man who touched their privates. RP 462. L.W. subsequently refused to give any more detail or talk about the matter further. RP 464-65.

Both girls were taken for forensic interviews with the child interview specialist, and the interviews were played for the jury. RP 470. In the interview, the girls mixed in ideas that were clearly fantastical and fictitious,

such as sexual abuse while ice skating. Ex. P1; RP 629. P.W. also told the interviewer that she bled all day and her blood went from red to pink to purple to rainbow. Ex. P1; RP 630. She said Steenhard had a real bunny and put it in her privates. Ex. P1; RP 631. She said he took a picture of this with his phone, but her mother saw it and deleted it. Ex. P1.

P.W. also told the interviewer that Steenhard touched her privates with his hand, did not stop when she told him to, and told her not to tell or he would ground her. Ex. P1. She explained that privates are used “to go pee and to poop.” Ex. P1. She said it happened more than one time. Ex. P1. She also said she touched his privates, in ways she described as tickling and squeezing, after he showed her what to do. Ex. P1. She also described an incident where he pulled her pants down while ice skating and everyone in the town saw him do it. Ex. P1. She drew pictures of a time when her sister saw Steenhard touching her private. Exs. P1, P10, P11.

L.W.’s interview does not mention Steenhard until the very end. She denied ever having any other babysitter except the current sitter, Alissa. Ex. P1. When asked about things that happened to her, she spoke of a rat in her dad’s house, her grandmother dying, getting punched in the face at school, and having water poured on her face. Ex. P1. She said no one ever touched her, but that someone named Billy said someone was touching him. Ex. P1. Towards the end of the interview, she mentioned that Steenhard “touched us

in the private” and her mother “slapped him in the mouth.” Ex. P1. She said he used his “bare-y hand” and demonstrated a hand motion. Ex. P.1. That part of the video failed, and there is only an audio record of that portion of the interview. Ex. P1. She said this only happened one time. Ex. P1.

After the interviews, P.W. occasionally came forward with more details, such as that she was forced to be in a room and felt like her hands and feet were taped. RP 474. She said she did not tell anyone sooner because Steenhard had said he would hurt her family and he would go to jail. RP 476. She told police about Steenhard’s “sharpy nails,” which matched photographs of Steenhard’s hands. RP 575; Exs. P1, P5-P9.

Both girls were also taken for a physical examination and sex abuse counseling. RP 513, 471. The physical examinations were normal, as is generally the case when a female child is sexually abused, especially six months later. RP 513, 559. For a child who had not been abused, the same results would be expected. RP 516-17.

At trial, P.W. identified Steenhard as her former babysitter and testified she did not like it when he touched her privates with his hand. RP 522-24. She testified it happened in his bedroom. RP 525. L.W. was incompetent to testify. RP 374.

At trial, Troup also related two other incidents that she had come to view in a different light since the girls’ disclosures. In June, the girls’ new

babysitter alerted Troup the children were simulating sexual conduct using their dolls. RP 429. When Troup asked the girls if they had seen something like that, maybe in a movie, they told her they had seen their father kissing his girlfriend. RP 488. They saw their father on Fridays, and he was single, with girlfriends. RP 418, 430. Troup talked to the girls' father and did not have any further concerns at the time. RP 430. She also recalled at trial that, when the family ran into Steenhard once over the summer of 2016, the girls ran and hid. RP 489. She had not thought to mention this to the detectives. RP 489.

c. Steenhard denied ever being alone with the girls.

Steenhard was very surprised and choked up when he heard the accusations. RP 719. He denied ever touching the girls inappropriately and explained that what they said was impossible given the number of other people present in his home when he was looking after them. RP 571, 722-23. He also denied that he ever had to bathe them or dress them or help them in the bathroom. RP 710, 738. According to Steenhard, the children were always happy to see him, and he never had to discipline them. RP 706, 711. He agreed that, in his experience, the girls were not liars. RP 728. He simply could not fathom why they would say such a thing. RP 723.

When police questioned Steenhard, he told them he was never alone with the children. RP 567-68, 571. He denied that either girl had ever been in his bedroom. RP 568.

Several witnesses corroborated Steenhard's testimony that he was virtually never alone with the girls. Steenhard's friend Anita Brandon testified she was always with him when he babysat the girls. RP 760. Friend and neighbor Shawn Griffin explained he often sent his children to Steenhard to fix their bicycles. RP 676, 680. He also frequently spent time with Steenhard while Steenhard was babysitting the twins and never saw anything that raised a concern. RP 680-81. He explained that usually, when he was there in the afternoons, the girls were asleep, having their afternoon nap on the couches in Steenhard's living room. RP 679. Steenhard's mother corroborated Brandon's frequent presence at her son's house, as well as that of Shannon Williams and Steenhard's nephew Vinny. RP 660-61.

d. Closing arguments revolved around the believability of the girls' accounts and the erroneously limited jury instruction defining sexual intercourse.

In closing, the prosecutor argued the rape of a child charge was committed based on P.W.'s description of being penetrated by a bunny. RP 791. He argued the child molestation charge regarding P.W. could be satisfied by either her description of touching Steenhard's penis or him touching her crotch area. RP 791. He argued the child molestation charge

regarding L.W. was met by her statement regarding him touching her privates with his bare hand. RP 800.

In response, defense counsel argued Steenhard was credible, while the girls' statements contained elements that were clearly fantastical or fictional. RP 819-20, 829-30. He also pointed out that the jury instruction defining sexual intercourse, a required element of the rape of a child charge, was limited to contact between the genitals of one person and the mouth or anus of another. RP 827-29. P.W. did not testify to any such contact. RP 828-29.

During deliberations, the jury submitted an inquiry requesting clarification on the definition of sexual intercourse stating, "The jury requests additional clarification on 'sexual intercourse' as defined by WA law. The definition presented does not seem to apply to any testimony presented during trial." CP 33. After consultation with counsel, the court determined it could not, at that point in the trial, supplement the definitional instruction. RP 864-919. The jury was instructed it needed to rely on the instructions already provided. RP 919; CP 33.

In addition to the limited definition of sexual intercourse, CP 19, one other instruction is particularly relevant to the issues raised on appeal. Instruction 14 read, "In order to convict a person of the crime of RAPE OF A CHILD IN THE FIRST DEGREE or CHILD MOLESTATION IN THE

FIRST DEGREE, it shall not be necessary that the testimony of the alleged victims be corroborated.” CP 25. This instruction was given over defense objection that the instruction partially relieved the State of its burden of proof. RP 690, 742, 747.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE ELEMENT OF SEXUAL INTERCOURSE REQUIRED TO CONVICT OF RAPE OF A CHILD.

Under the law as stated in the instructions, the jury could not convict Steenhard of rape of a child without finding oral or anal contact between Steenhard and P.W. CP 19. The conviction for rape of a child must be reversed because the State failed to present any evidence of this type of contact. In closing argument, the State argued rape of child had occurred based on P.W.’s statement that a bunny penetrated her vagina. RP 791. There was no argument or evidence regarding oral or anal contact at trial.

a. The law of the case doctrine required the State to prove oral or anal contact beyond a reasonable doubt.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). The doctrine of the law of the case provides that jury instructions not objected to become the law of the case. State v. Willis,

153 Wn.2d 366, 374, 103 P.3d 1213 (2005) (citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)).

The law of the case is an established doctrine with roots reaching back to the early days of statehood. Hickman, 135 Wn.2d at 101-02 (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)). In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction. Willis, 153 Wn.2d at 374-75 (citing Hickman, 135 Wn.2d at 102; see also State v. Johnson, 188 Wn.2d 742, 747, 399 P.3d 507 (2017) (adhering to the framework established in Hickman despite federal case law to the contrary)).

Here, the state was required to prove all the elements of rape of a child in the first degree. Those elements include “sexual intercourse.” CP 18. The jury instructions defined sexual intercourse as “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” CP 19. Under these instructions, the jury could not convict without proof beyond a reasonable doubt of oral or anal to genital contact.

- b. The evidence is insufficient to show the type of contact required by the instructions.

Nowhere in any of the girls’ statements did they describe or mention oral or anal to genital contact. Indirect contact with bodily fluids is

insufficient in light of the burden of proof beyond a reasonable doubt, as is speculation that such contact may have occurred.

On appeal, a conviction must be reversed for insufficient evidence when, viewed in the light most favorable to the State, no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). The evidence is insufficient when no rational trier of fact could fail to find a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 278, 161 L. Ed. 2d 560 (1979).

The purpose of appellate sufficiency review is to ensure the fact-finder rationally applied the legal standards. State v. Kohonen, 192 Wn. App. 567, 574, 370 P.3d 16 (2016) (citing State v. Rattana Keo Phuong, 174 Wn. App. 494, 502, 299 P.3d 37 (2013)). The standard of review is designed to ensure the fact-finder actually reached the “subjective state of near certitude” that the Fourteenth Amendment requires. Kohonen, 192 Wn. App. at 574 (citing Jackson, 443 U.S. at 315). The trier of fact may rely on circumstantial evidence. State v. Jackson, 145 Wn. App. 814, 817, 187 P.3d 321 (2008). However, the existence of a fact cannot rest in guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

In this case, no rational juror could find proof beyond a reasonable doubt of oral or anal sexual contact. In her initial disclosures to Troup, P.W.

did not describe any oral or anal contact. RP 435-36. She only said he touched their privates and made a wiggling hand gesture near her vagina. RP 435-36. In her subsequent statements to Bias, P.W. also did not describe any oral or anal contact. RP 535-36. In fact, Bias testified she showed P.W. the back side of a doll and asked if there was anywhere in the back that she was touched. RP 540. P.W. said no. RP 540. In her forensic interview, P.W. did not describe any oral or anal contact. Ex. P1. In her testimony at trial, she did not describe any oral or anal contact. RP 518-27. On the contrary, she specified she was not touched with anything but his hand, and she did not touch him. RP 524. L.W.'s statements were even more imprecise and made no mention of oral or anal contact. RP 463-64, Ex. P1. No physical evidence was presented of any oral or anal contact.

The jury also recognized the lack of evidence of oral or anal contact. In an inquiry during deliberations, the jury told the judge the instruction defining sexual intercourse, "does not seem to apply to any testimony presented at trial." CP 33.

Despite the lack of evidence and the jury's question, the court denied the motion for judgment notwithstanding the verdict, finding sufficient circumstantial evidence of mouth to genital contact based on P.W.'s statement that Steenhard had "peed on my mouth" and "it just went all the way down to my throat into my heart." Ex. P1; RP 954-55; CP 64. But that

conclusion is mere speculation and is insufficient to support a verdict that must be based on proof beyond a reasonable doubt. Colquitt, 133 Wn. App. at 796 (“[T]he existence of a fact cannot rest upon guess, speculation, or conjecture.”). While it is possible that mouth to genital contact occurred in that encounter, it is also possible that it did not. The State presented no evidence making either scenario more likely than the other.

When the State presents no evidence tending to disprove entirely reasonable alternative conclusions from the evidence, there is a failure of proof. See Martinez, 171 Wn.2d 354. In Martinez, the fact at issue was whether Martinez had attempted to use a knife during a burglary. Id. at 368. He ran from the scene and was chased by police on foot. During the chase, he summersaulted over a barbed wire fence. Id. at 358. When police caught up with him, he was wearing an empty sheath on a belt. Id. The knife was found somewhere along the route he had run as he fled the police. Id. The only evidence that Martinez tried to use the knife at any time was the fact that the sheath was unfastened. Id. at 369. The court deemed this evidence insufficient and reversed Martinez’ conviction. Id.

Here, the only evidence of contact between Steenhard’s sexual organs and P.W.’s mouth was her statement that he peed on her mouth. Ex. P1. There was no evidence one way or the other about whether his penis was

ever in physical contact with her mouth. This is insufficient to prove the requisite contact beyond a reasonable doubt.

The State may try to argue contact with bodily fluids amounts to sexual intercourse. It does not. If indirect contact were sufficient, the instruction would not need to specify what two body parts had to come in contact. This is illustrated by comparison to the sexual contact required to prove child molestation. In Jackson, the court held that sexual contact can occur even indirectly. 145 Wn. App. at 819. Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” Id. The court noted that touching through clothing or indirectly is sufficient. Id. (citing In re Adams, 24 Wn. App. 517, 519, 601 P.2d 995 (1979)). Therefore, the Jackson court held the requisite touching was established by evidence that Jackson ejaculated onto the victim. 145 Wn. App. at 820-23; see also State v. Brown, 55 Wn. App. 738, 745, 780 P.2d 880 (1989) (holding victim touched defendant by operating a “penis enlarger”).

For sexual contact, which only requires “touch” of intimate body parts, it is sufficient to touch the intimate body parts with something other than a part of one’s own body. Jackson, 145 Wn. App. at 820-23; Brown, 55 Wn. App. at 745. But the definition of sexual intercourse specifies that the contact must occur between the sex organs of one person and the mouth or

anus of another. CP 19. Contact with some other item or substance is, therefore, insufficient.

As the jury recognized, the definition of sexual intercourse does not correspond to any evidence presented. CP 33. With nothing but speculation to support any finding of the required oral or anal contact, the evidence is not just circumstantial; it is fundamentally insufficient. Colquitt, 133 Wn. App. at 796. The conviction for first-degree rape of a child should be reversed and the case remanded for dismissal of the charge with prejudice.

2. IMPROPER OPINION TESTIMONY ON THE CREDIBILITY OF THE COMPLAINING WITNESS VIOLATED STEENHARD'S RIGHT TO A FAIR TRIAL.

Steenhard's jury trial right was violated when Troup and Bias testified the girls are truth-tellers, not liars. RP 467, 538-39. In the context of this he-said/she-said case, an opinion on the girls' credibility amounted to a nearly explicit opinion on guilt and caused actual prejudice to Steenhard's case. It was, therefore, manifest constitutional error that may be raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007). The opinion was particularly damaging because it came from the girls' own mother, with the additional weight that her opinion was likely to carry with the jury. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). Additionally, the question that intentionally elicited these comments

were prosecutorial misconduct, and the failure to object violated Steenhard's right to effective assistance of counsel.

- a. Opinion testimony on guilt or credibility of a witness is improper and violates the right to a jury trial.

The constitutional right to a jury trial includes the right to a jury as the sole judge of witness credibility. Const. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, no witness may offer opinion testimony regarding the credibility, or lack thereof, of another witness. State v. Montgomery, 163 Wn.2d 577, 590-91, 183 P.3d 267 (2008). Such improper opinions on credibility invade the province of the jury and violate the right to a jury trial. Id.

Opinions on guilt are improper whether explicit or merely implied. Id. at 594. Courts consider five factors in determining whether opinion testimony improperly invades the province of the jury: (1) the type of witness involved, (2) the 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. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). While courts consider all these factors in determining whether to admit opinion testimony, certain opinions are "clearly inappropriate. . . particularly expressions of personal belief, as to the defendant's guilt, the intent of the accused, or the veracity of witnesses." State v. Quaale, 182 Wn.2d 191, 200,

340 P.3d 213 (2014). “Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury.” State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991) (citing State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985)). In short, a mother’s opinion about her child’s credibility is inadmissible.

- b. Troup and Bias offered nearly explicit opinions on guilt that violated Steenhard’s right to a jury trial when they testified the girls are truthful.

Here, the inappropriate exchange occurred when the prosecutor asked Troup whether she had any concerns about the possibility of the girls falsely accusing someone. RP 467. Troup responded, “No, no. I knew that my children – I mean, if given the opportunity, they’re going to tell the truth. They’re not going to lie. They don’t even understand what they’re even saying in regards to any type of that.” RP 467. Subsequently, Troup’s good friend Leah Bias also testified P.W. is honest. RP 538-39.

Improper opinion testimony that invades the province of the jury may constitute manifest constitutional error that can be raised for the first time on appeal under RAP 2.5. Kirkman, 159 Wn.2d at 936-37. Manifest constitutional error generally requires that the error is truly of constitutional magnitude and that it actually affected the defendant’s rights at trial. State v. O’Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). The facts necessary to

adjudicate the claim must be on the record. Id. Improper opinion testimony is manifest constitutional error when there is an explicit or nearly explicit opinion on guilt and there is some indication that the jury was improperly influenced. Kirkman, 159 Wn.2d at 936-37; Montgomery, 183 Wn.2d at 596 n. 9.

Here, there were two nearly explicit opinions on guilt. By opining that the girls are honest and do not lie, Troup and Bias were implicitly telling the jury that the girls' accusations were true, which would necessarily mean Steenhard was guilty. This is not a case of indirect opinion, such as the testimony in Kirkman regarding whether the witness' statements were consistent with other facts.

In Kirkman, the two consolidated child rape cases involved four instances of allegedly improper opinion testimony. First, Dr. Stirling testified the child gave "a very clear history" with "lots of detail," "a clear and consistent history of sexual touching . . . with appropriate affect" and that "[t]he physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent." Id. at 929. In the case of the other defendant, Dr. Stirling testified, "to have no findings after receiving a history like that is actually the norm rather than the exception." Id. at 932. The detectives in each case also testified that, as part of the interview

protocol, they determined the child appeared able to distinguish the truth from a lie and had promised to tell the truth. Id. at 930, 933.

The Kirkman court held there was no manifest constitutional error because the testimony only indirectly reflected an opinion on the complaining witness's credibility. Id. at 936. By contrast, Troup and Bias went far beyond commenting on whether the girls' statements were consistent or whether they were able to distinguish fact from fiction. They each testified the girls were honest people who tell the truth. RP 467, 538-39.

- c. The opinions caused actual prejudice because the jury was not likely to be able to disregard a mother's opinion.

The jury was unlikely to be able to ignore opinion testimony by the girls' own mother. Opinions offered by the defendant's own family members are particularly problematic. State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009). Mothers have a powerful prestige. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Jerrels, 83 Wn. App. at 508. Jerrels demonstrates the prejudice caused by this type of testimony. Jerrels was charged with rape, child molestation, and assault. Id. at 504. The prosecutor asked the alleged victim's mother three times whether she believed the child, and three times the mother stated she did. Id. at 506-08. The defense never objected to this line of questioning. Id. at 507. Nonetheless, the court reversed the conviction

because the questioning was flagrant prosecutorial misconduct that deprived the defendant of a fair trial. Id. at 508. Troup’s opinion testimony likewise deprived Steenhard of a fair trial.

A similar result obtained in Johnson. Division Two of this Court reversed Johnson’s child molestation conviction because of improper opinion testimony by his wife. Johnson, 152 Wn. App. at 927, 931. The alleged victim, her mother, and her stepfather all related an incident in which Johnson’s wife confronted the victim, T.W., about the accusations and demanded proof. Id. at 932-33. According to the witnesses, when T.W. recounted details of Johnson’s intimate anatomy and sexual habits, his wife burst into tears, acknowledged the accusations must be true, and hours later attempted suicide. Id.

The court concluded this type of testimony “sheds little or no light on any witness’s credibility or on evidence properly before the jury.” Id. at 933. On the contrary, it served only to tell the jury that Johnson’s wife believed the accusations. Id. The court held the error in admitting this testimony violated Johnson’s right to a fair trial. Id.

As in Jerrels and Johnson, the only purpose of this testimony was to inform the jury that the girls’ mother and her best friend believed their accusations. As in Jerrels, the jury was likely to be unfairly influenced by a mother’s opinion, despite proper jury instructions. 83 Wn. App. at 508.

The State may argue jurors are presumed to follow the court's instruction that they are the sole judges of the credibility of witnesses. However, reversal may still be required when there is evidence that the jury did not, in fact, follow the instruction under the circumstances. Montgomery, 163 Wn.2d at 596 n. 9. The Montgomery court noted, "[I]f there were evidence that these improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice and manifest constitutional error regardless of the failure to object or the likelihood that an objection would have been sustained." Id. The opinions here were far more likely to influence the jury than the officer's opinion in Montgomery because they came from the girls' own mother. Jerrels, 83 Wn. App. at 508. The improper opinion testimony requires reversal.

d. Troup's and Bias' opinions were equally inadmissible as character evidence under ER 608.

This testimony was also inadmissible under ER 608, which permits evidence of a witness' character for truthfulness by reputation only. A witness may not testify to mere opinion regarding the veracity of another witness. State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993); State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005). The testimony must be based on the witness' reputation within the community. Land, 121 Wn.2d at 500. To establish a foundation for reputation evidence, the proponent of the

evidence must first establish the existence of a community that is both neutral and general. Id. No such foundation was laid in this case.

Even assuming Troup and Bias meant to offer testimony about the girls' reputation within the family, a family is not a neutral and general community. Thach, 126 Wn. App. at 315 (“No case law exists supporting the proposition that a family constitutes a community for purposes of character evidence. Under the holding in Lord, a family is not ‘neutral enough [and] generalized enough to be classed as a community.’”) (citing State v. Lord, 117 Wn.2d 829, 874, 822 P.2d 177 (1991)). Therefore, ER 608 cannot provide an alternate justification for admitting improper opinion testimony.

- e. The prosecutor committed misconduct by asking Troup and Bias whether the girls are honest.

Even if this court concludes the improper opinion testimony does not amount to manifest constitutional error or was not preserved for appeal, the prosecutor's misconduct in intentionally eliciting this inadmissible evidence requires reversal. Both Troup's and Bias' opinions regarding the girls' honesty were offered in direct response to questions by the prosecutor. RP 467, 538-39.

Prosecutorial misconduct deprives the defendant of a fair trial such that the conviction must be reversed when the prosecutor's conduct was improper and there is a substantial likelihood that it affected the verdict.

State v. Thierry, 190 Wn. App. 680, 689-90, 360 P.3d 940 (2015), rev. denied, 185 Wn.2d 1015 (2016). Even without an objection in the trial court, misconduct necessitates reversal on appeal when the prosecutor's remarks were so flagrant and ill-intentioned as to cause prejudice that would be incurable by instructing the jury. State v. Pinson, 183 Wn. App. 411, 416, 333 P.3d 528 (2014). Recent cases focus on the effect of the prejudice and the likely value of a curative jury instruction, rather than on the prosecutor's intentions. Id. at 416 (citing State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012)).

It is well established that a prosecutor commits misconduct by asking a witness to opine on the credibility of another witness. Jerrrels, 83 Wn. App. at 507. "A prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. Such questioning invades the jury's province and is unfair and misleading." Id. (citing State v. Suarez-Bravo, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993)). Here, the prosecutor specifically asked for opinions on witness credibility. First, he asked Troup, "Did you have some kind of – any concerns about the possibility of making a false accusation against Mr. Steenhard?" RP 467. Then, he asked Bias, "Is [P.W.] an honest girl?" RP 538.

This was flagrant misconduct because it has been clear for decades that opinion testimony on credibility is improper. Jerreles, 83 Wn. App. at 507. Even if the prosecutor intended to elicit character evidence under ER 608, as discussed above, he made no attempt to lay the proper foundation or make clear this was a reputation rather than a personal opinion. RP 467, 538-39. It is also clear from well- established law that the family cannot qualify as a generalized neutral community wherein the child might have a relevant reputation regarding truthfulness. Thach, 126 Wn. App. at 315. There was no indication in the record that Troup's and Bias' testimony on this score amounted to anything more than personal opinion. This was a flagrant attempt to bolster the credibility of the girls' testimony.

Despite the existence of a three-part standard - flagrant, ill-intentioned, and incurable by instruction to the jury - courts have recently focused on only one part of that standard, the incurable prejudice. Pinson, 183 Wn. App. at 416. Even under that more limited inquiry, the prosecutor's conduct here requires reversal. The only evidence of a crime in this case was the girls' statements and testimony. The improper opinion substantially bolstered their credibility. The mother's opinion, in particular, was not the type of information jurors would be able to set aside and disregard, even with a judicial instruction. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."

Jerrels, 83 Wn. App. at 508. The prosecutor's misconduct in intentionally eliciting improper opinion testimony requires reversal.

- f. Counsel was ineffective in failing to object to improper opinion testimony on the credibility of the alleged victims.

Ineffective assistance of counsel also provides an alternative basis for reversal in this case because trial counsel failed to object to the improper opinions or the prosecutorial misconduct. "A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude." State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Our state and federal constitutions guarantee to all accused persons the right to effective assistance of defense counsel. U.S. Const. amend. VI; Const. art. 1, § 22; State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). This constitutional right is violated when (1) defense counsel's representation was deficient, and (2) counsel's deficient representation prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness. State v. Crawford, 159 Wn.2d 86, 97, 147 P.3d 1288 (2006). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent

performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” Crawford, 159 Wn.2d at 98. Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Here, there was no valid reason not to object to improper opinion testimony and misconduct by the prosecutor that bolstered the credibility of the only witnesses. Assuming the prejudice caused by Troup’s and Bias’ opinions was of a sort that could have been cured by instructing the jury, then counsel was ineffective in objecting and requesting that instruction. These opinions on credibility were inadmissible and the failure to object was unreasonably deficient.

Prejudice is shown when, but for counsel’s errors, there is a reasonable probability the outcome of the trial would have been different. Strickland, 466 U.S. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the reliability of the outcome.” Id. Troup’s and Bias’ opinion testimony was exceedingly damaging in the context of this case because their opinions unfairly bolstered the

credibility of the only witnesses to the charged incidents. Counsel's failure to request a curative instruction undermines confidence in the outcome. Defense counsel's failure to protect Steenhard denied him a fair trial.

Steenhard's convictions should be reversed because the improper opinion testimony violated his constitutional right to a jury trial. Alternatively, reversal is required because the prosecutor committed misconduct in intentionally eliciting this inadmissible testimony and Steenhard's attorney was constitutionally ineffective in failing to object.

3. THE COURT ERRED IN INSTRUCTING THE JURY THAT CORROBORATION OF THE ALLEGED VICTIMS' TESTIMONY "SHALL NOT BE NECESSARY."

The court erred in instructing the jury, over defense objection, that corroboration of the alleged victims' testimony "shall not be necessary." RP 747; CP 25. This disfavored instruction was an improper comment on the evidence and was likely to mislead the jury regarding its role as the sole judge of witness credibility.

a. The no-corroboration instruction is an improper comment on the evidence because it implies the alleged victim's testimony is particularly credible.

The instruction at issue reads in full, "In order to convict a person of the crime of rape of a child in the first degree or child molestation in the first degree, it shall not be necessary that the testimony of the alleged victims be corroborated." CP 25. There is no dispute that the instruction accurately

reflects the law. RCW 9A.44.020 provides, “In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.” But the instruction is an unconstitutional comment on the evidence because it singles out testimony by the alleged victim for special consideration and is misleading to the jury in a way that undermines the burden of proof beyond a reasonable doubt.

Article 4, section 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A judge improperly comments on the evidence when the court’s attitude toward the merits of the case or the court’s evaluation regarding a disputed issue may reasonably be inferred from the nature or manner of the statement. Johnson, 152 Wn. App. at 935; State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). This provision prohibits a judge from instructing the jury “that matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (citing State v. Primrose, 32 Wn. App. 1, 3, 6, 645 P.2d 714 (1982)). Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006).

The constitutional prohibition on judicial comments on the evidence is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d

1305 (1971). ““All remarks and observations as to the facts before the jury are positively prohibited.”” State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478, 483 (2009) (quoting State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963)). But a comment on the evidence is especially problematic when it conveys an opinion regarding the truth or falsity of evidence produced at trial or relieves the prosecution of its burden of proof. See Bogner, 62 Wn.2d at 250; Primrose, 32 Wn. App. at 2-4 (instruction that defendant had produced no evidence of lawful excuse for failure to appear was tantamount to directed verdict)).

The no-corroboration instruction is an impermissible comment on the evidence because it improperly singles out the alleged victim’s testimony for special consideration. By instructing the jury that the alleged victim’s testimony need not be corroborated, the court is essentially affirming her credibility. There are two basic problems with this instruction.

First, rather than telling the jury it has the option to believe the alleged victim without corroboration, it makes a categorical assertion that corroboration is unnecessary, implying that the jury is required to believe the alleged victim without corroboration. In short, the instruction fails to account for the jury’s prerogative not to believe the alleged victims. It is possible that the jury might find the alleged victims’ testimony so dubious (perhaps because of the fantastical elements P.W. introduced during her forensic

interview, for example) that it would not convict without some corroboration of their testimony. The jury instruction does not merely tell jurors they may convict without corroboration. It tells them corroboration is categorically unnecessary, regardless of whether jurors might believe it to be necessary under the circumstances. The instruction is incorrect, or in the very least, misleading regarding the jury's role as the sole arbiter of the credibility of witnesses.

Second, it subtly shifts the burden of proof by suggesting a different standard applies to other witnesses such as the defendant. By singling out the alleged victim's testimony as not requiring corroboration, the instruction suggests other witness' testimony may require corroboration. When one class of witness is singled out as not requiring corroboration, that strongly suggests that the general rule, to be applied to all other witnesses, must be that corroboration is required. The instruction is likely to mislead the jury to shift the burden to the defense to present corroboration of defense testimony. This is particularly problematic in a case such as this one, where the defendant presents testimony and witnesses, rather than resting on the presumption of innocence.

The instruction is generally disfavored in Washington. The Washington Supreme Court Committee on Jury Instructions recommends against giving a no-corroboration instruction. State v. Zimmerman, 130 Wn.

App. 170, 182-83, 121 P.3d 1216 (2005), rev. granted, cause remanded on other grounds, 157 Wn.2d 1012, 138 P.3d 113 (2006) (citing 11 WPIC, § 45.02, cmt. at 561 (2nd ed.1994)). No pattern instruction is proposed. 11 WPIC § 45.02.

Division Two of this Court reluctantly affirmed the conviction in Zimmerman, despite its disapproval of the no-corroboration instruction, stating, “Although we share the Committee’s misgivings, we are bound by Clayton to hold that the giving of such an instruction is not reversible error.” Zimmerman, 130 Wn. App. at 182-83 (discussing State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949)). Similarly, in Division One of this Court, Judge Becker concurred in a separate opinion to express her concern in State v. Chenoweth, 188 Wn. App. 521, 538, 354 P.3d 13 (2015). She declared, “If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction.” Id.

Other jurisdictions have also expressed concern. The Indiana Supreme Court found the no-corroboration instruction misleading because “Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies, accept without question the witness’s testimony, and ignore evidence that conflicts with the witness’s version of events.” Ludy v. State, 784 N.E.2d 459 (Ind. 2003).

The Florida Supreme Court minced no words in finding the instruction to be an improper judicial comment on the evidence. It held:

It cannot be gainsaid that any statement by the judge that suggests one witness's testimony need not be subjected to the same tests for weight or credibility as the testimony of others has the unfortunate effect of bolstering that witness's testimony by according it special status. The instruction in this case did just that, and in the process effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony.

Gutierrez v. State, 177 So. 3d 226, 231-32 (Fla. 2015). The court concluded, "The 'no corroboration' instruction is simply improper." Id.

In addition to Florida and Indiana, at least three other states have deemed the no-corroboration instruction improper, either because it is an improper comment on the evidence or because it is misleading to the jury, or both. See, e.g., State v. Fields, 730 N.W.2d 777, 785 (Minn. 2007) ("[T]he court of appeals has long held that it is error to instruct a jury that the testimony of a victim alone may support a conviction."); Veteto v. State, 8 S.W.3d 805, 816-17 (Tex. App. 2000), abrogated on other grounds by State v. Crook, 248 S.W.3d 172 (Tex. Crim. App. 2008) ("[E]ven though the legislature provides for convictions based on uncorroborated evidence, a charge based on that evidence is an improper comment on the weight of the evidence."); Garza v. State, 2010 WY 64, ¶¶ 20-22, 231 P.3d 884, 890-91 (Wyo. 2010) (holding no-corroboration instruction improper because "an

instruction highlighting or denigrating a victim's testimony has the potential to mislead the jury").

- b. The instruction fails to include qualifying or clarifying language that would prevent it from being an impermissible comment on the evidence.

The concern that the jury might be misled in this way may be alleviated by including language, such as that used in State v. Clayton, 32 Wn.2d 571, 572, 202 P.2d 922 (1949), to the effect that "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."

A simplified version of this language was also included in Chenoweth, where the instruction included a second sentence stating, "The jury is to decide all questions of witness credibility." 188 Wn. App. at 535-38. The Chenoweth court concluded the instruction correctly reflected the law and did not improperly comment on the evidence. Id.

Several other jurisdictions that have affirmed use of the no-corroboration instruction have done so based on instructions with similar qualifying or clarifying language affirming that it is up to the jury to determine whether the alleged victim's testimony alone is sufficient. For example, in United States v. John, 849 F.3d 912, 918-19 (10th Cir.), cert.

denied, 138 S. Ct. 123 (2017), the 10th Circuit approved of an instruction declaring, “The testimony of the complaining witness need not be corroborated if the jury believes the complaining witness beyond a reasonable doubt.” (emphasis added). Similarly, the Nevada Supreme Court approved of an instruction reading, “There is no requirement that the testimony of a victim of sexual offenses be corroborated, and his testimony standing alone, if believed beyond a reasonable doubt, is sufficient to sustain a verdict of guilty.” Gaxiola v. State, 121 Nev. 638, 647, 119 P.3d 1225, 1231–32 (2005) (emphasis added). The instruction approved of in New Hampshire is even more explicit: “With respect to each of the[] [charged] offenses corroboration of the testimony of the victim is not required. That means if you find the victim to be credible in light of all of the evidence introduced during the course of the trial, that testimony alone is sufficient to establish the State’s case-burden of proof beyond a reasonable doubt.” State v. Marti, 143 N.H. 608, 615-17, 732 A.2d 414 (1999).²

Without this additional clarifying language, Division Two of this Court has expressly noted the instruction may be an improper comment on the evidence. Johnson, 152 Wn. App. at 936-37. In Johnson, the jury was

² See also State v. Schmidt, 276 Neb. 723, 728, 757 N.W.2d 291, 295 (2008) (approving of instruction reading, “The testimony of a person who is the victim of a sexual assault, as charged in this case, does not require corroboration. It is for you to decide what weight to give the testimony of [M.C. and K.S.].”) (emphasis added).

instructed in the same terms as in this case: “In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.” Id. at 935. The court noted the instruction lacked the additional language used in Clayton. Johnson, 152 Wn. App. at 936. Seeing no clear pronouncement from any court whether the language from Clayton was essential, the court considered it as a matter of first impression. Id. Because Johnson’s conviction was already being reversed on other grounds, the decision on this issue was advisory as to what should occur on remand. Id. at 934. The court instructed trial courts to “consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction.” Id. at 936. “Without this specific inclusion,” the court continued, “the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim’s credibility.” Id. at 936-37.

Our Supreme Court has also indicated additional language clarifying the jury’s role is advisable. State v. Galbreath, 69 Wn.2d 664, 670, 419 P.2d 800 (1966). In 1966, the court considered an instruction stating that no corroboration was necessary but omitting the qualifying language, “if the jury be satisfied, beyond a reasonable doubt, that the defendant is guilty.” Id.

Because the instruction lacked this language, the court explained, “We cannot, therefore, commend it as a model instruction.”³ Id.

Courts have also raised the concern that the no-corroboration instruction states an appellate standard that is not relevant to the jury’s role as fact-finder at trial. Brown v. State, 11 So. 3d 428, 437 (Fla. Dist. Ct. App. 2009), approved sub nom. Gutierrez v. State, 177 So. 3d 226 (Fla. 2015).

The Brown court in Florida reasoned,

[T]he statute was directed at the appellate review of the sufficiency of the evidence in sexual battery cases. This consideration is entirely separate from the question of whether a jury should accept the uncorroborated testimony of the victim in the trial of a sexual battery prosecution. It follows that reading the statute to the jury is unwarranted and unnecessary.

Brown, 11 So. 3d at 439. In her concurring opinion in Chenoweth, Judge Becker appeared to agree: “I agree with the committee on pattern jury instructions that the matter of corroboration is really a matter of sufficiency of the evidence. Many correct statements of the law are not appropriate to give as instructions.” 188 Wn. App. at 538 (Becker, J., concurring).

The no-corroboration instruction given in this case was misleading, incomplete, and inappropriate. Because it included no language, such as was used in Clayton and Chenoweth, to make clear that the credibility decision is

³ The court ultimately affirmed, finding the omission did not prejudice the defendant and the instruction did not convey the judge’s opinion of the credibility or weight of the evidence. 69 Wn.2d at 671.

entirely up to the jury, this Court is not bound to follow that precedent. Without the qualifying language, this disfavored instruction is an unconstitutional comment on the evidence. Johnson, 152 Wn. App. at 936-37. Steenhard's conviction should be reversed.

c. This constitutional error requires reversal of Steenhard's convictions.

Judicial comments on the evidence are presumed prejudicial. Levy, 156 Wn.2d at 725. This presumption exists because the purpose of prohibiting judicial comments is to prevent the trial judge's opinion from influencing the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The Supreme Court has explained, "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." Id. (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Reversal is mandated unless the record affirmatively shows no prejudice could have resulted. State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2006) (reversible error where court's instructions referenced victims' birth dates, an uncontested but critical element of the crime).

The standard jury instruction that judicial comments on the evidence should be disregarded is not determinative. State v. Lampshire, 74 Wn.2d

888, 892, 447 P.2d 727 (1968) (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). In deciding whether a comment on the evidence is harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d at 65 (comment addressed important and disputed issue; reversed); Levy, 156 Wn.2d at 726 (subject of comment “never challenged in any way by defendant”; harmless). In this case, the comment involved the central and disputed issue: whether the girls’ statements should be believed.

The error specifically prejudiced Steenhard’s presentation of his defense. In closing argument, defense counsel acknowledged the law is that corroboration is not necessary for a conviction, but “wouldn’t you like some?” RP 830. Even if the jury agreed with defense counsel that some corroboration was necessary to have real confidence in the girls’ allegations, they could easily have viewed instruction 14 as forbidding them from requiring the State to produce it.

The evidence here was not so overwhelming that no prejudice could have resulted. There was no physical evidence of the offense; the only evidence was the girls’ testimony and their statements to others. RP 507, 511, 516-17. The defense cast doubt on their statements by pointing out they were mixed with obviously fantastical and/or fictitious elements that simply

could not be true. RP 829-30. For example, P.W. said there was abuse at an ice rink, when the evidence was clear that they never went to an ice rink.⁴ RP 485, 629, 831. P.W. also said her friend's mother confronted Steenhard and everyone started fighting. RP 629-30, 831. P.W. talked of bleeding a lot and the blood being the color of a rainbow. RP 630, 832. This was a credibility contest with significant potential that the jury was influenced by instructions placing a thumb on the scale in favor of the alleged victims. Steenhard's convictions should be reversed.

4. CUMULATIVE ERROR DEPRIVED STEENHARD OF A FAIR TRIAL.

Taken cumulatively, the improper opinion testimony and the instruction that no corroboration shall be required deprived Steenhard of a fair trial. Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. XIV; Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). Even unpreserved errors can be considered

⁴ The record indicates Steenhard often took children roller skating, but P.W. and L.W. only accompanied them one time. RP 479-80.

in determining whether cumulative error requires reversal of a conviction. State v. Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992). The combined errors here produced a trial that was unfair.

This case rested entirely on the girls' credibility. First the improper opinion testimony by Troup and Bias unfairly enhanced that credibility, and then the "no corroboration" instruction suggested the jury could not require corroboration even if jurors felt they needed it to be convinced beyond a reasonable doubt. Steenhard's convictions must be reversed.

D. CONCLUSION

For the foregoing reasons, Steenhard asks this Court to reverse his convictions and instruct the trial court to dismiss the rape of a child charge with prejudice.

DATED this 20th day of April, 2018.

Respectfully submitted,

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