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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

TROY BLOOR, a/k/a TROY STEENHARD, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

**SECOND AMENDED BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Is there sufficient evidence that the defendant had “sexual intercourse” with a child (P.M.W.) to support the conviction for first degree child rape?

2. Should this Court consider the defendant’s belatedly raised argument framed as a “sufficiency of the evidence” claim, rather than as a direct challenge to the definition instruction describing “sexual intercourse”?

3. Was the defendant’s right to a jury trial violated where the child victims’ mother and a family friend testified as to rules given to the children, during their upbringing, to tell the truth and the guidelines discussed with the children concerning their forthcoming forensic interview?

4. Did the deputy prosecutor commit misconduct by asking the children’s mother and a family friend how they taught the children to tell the truth, and was the defense attorney ineffective for not objecting to this line of questioning by the deputy prosecutor?

5. Did the trial court err when it instructed the jury that “it shall not be necessary that the testimony of alleged victims be corroborated.”

6. Did the trial court’s non-corroboration instruction shift the burden of proof to the defendant?

## II. STATEMENT OF THE CASE

### Procedural history.

The defendant was charged by information in the Spokane County Superior Court with one count of first degree child rape (victim P.M.W.) and two counts of first degree child molestation (victims P.M.W. and L.L.W.). CP 7-8. The defendant was convicted by a jury as charged and timely appealed. CP 28-30.

The trial court conducted a child hearsay hearing under RCW 9A.44.120(1), regarding statements made by both child victims, P.M.W. and L.L.W., who were five-year-old twin sisters (hereinafter “the twins”), to a forensic interviewer, the children’s mother, and a family friend. RP 263-366. The trial court held the *Ryan*<sup>1</sup> factors supported admission of the hearsay statements made by both P.M.W. and L.L.W. at the time of trial. RP 368-373. No error has been assigned to the court’s ruling.

### Substantive facts.

Michelle Troup is the mother of P.M.W. and L.L.W., who are fraternal twins, and who were born on April 3, 2011. RP 407-08. The twins entered kindergarten in the fall of 2016. RP 409. Ms. Troup was a working mom and her mother babysat the twins until April 2016, when her mother

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<sup>1</sup> *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

passed away. RP 411-12. Subsequently, the defendant volunteered to babysit the twins.<sup>2</sup> RP 417. After consultation with her boyfriend, Ms. Troup and the defendant agreed he would babysit the twins for approximately one and one-half months until the new school year. RP 414-15, 417. During this time frame, the neighborhood children generally convened at the defendant's house, and he requested the children call him "Uncle Troy." RP 415-17.

Initially, the arrangement was to have the defendant babysit the twins at Ms. Troup's home. RP 417-18. Approximately one week passed and the defendant asked whether he could babysit the children at his house, claiming car trouble.<sup>3</sup> RP 419. Approximately two weeks into the defendant watching the twins at his home, they became very clingy and begged their mother not to go to work. RP 421-22. The twins' behavior was very abnormal and continued during the time the defendant babysat the children, until approximately May 13, 2016, when his babysitting duties were terminated by Ms. Troup. RP 422-24. In June of 2016, the twins' behavior normalized. RP 428-29. However, during that time, there was an instance where Ms. Troup's best friend observed the twins inappropriately playing with Barbie dolls, as if the dolls were engaged in sex. RP 428-30, 486-87.

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<sup>2</sup> The defendant was a family friend of Ms. Troup's boyfriend. RP 427.

<sup>3</sup> This occurred toward the end of April 2016. RP 420.

In December 2016, P.M.W. told her mother that the defendant was a “bad man” because “he touches us in our privates.” RP 434-35. When asked by her mother to describe the behavior, P.M.W. “proceeded to put her hand under her dress and pull her dress up and sit there and wiggle her hand around and make an in and out motion with her hand under her dress.” RP 435. P.M.W. had placed her right hand by her vagina. RP 436.

Thereafter, Ms. Troup took P.M.W. to a regularly scheduled doctor’s appointment and after several questions, P.M.W. again stated that “Troy” had touched her. RP 443. P.M.W. and L.L.W. similarly disclosed at some point after the abuse that their late disclosure was because the defendant remarked that he would hurt their family and go to jail. RP 475-76.

On December 31, 2016, L.L.W. and Ms. Troup were within view of the defendant’s home, visiting with Ms. Troup’s ex-husband. RP 461. L.L.W. became teary-eyed and very upset, and told her mother not to go to the defendant’s home because “Troy is a bad man.” RP 461-63. Within several minutes, L.L.W. also disclosed to her mother that “Troy had touched her privates.” RP 462. It was unusual for L.L.W. to have a crying episode. RP 463. At home, L.L.W. stated that the defendant would touch her privates on his couch. RP 463-64. L.L.W. refused to go into any detail about the inappropriate behavior. RP 465. Ms. Troup remarked that the twins were

not prone to making up stories or lying, as there were consequences if they did so. RP 464.

Lea Bias was a longtime friend of Ms. Troup. RP 530. P.M.W. told Ms. Bias that the defendant had touched her inappropriately in a “bad place.” RP 535. Ms. Bias asked P.M.W. to describe the area on a doll. RP 536. P.M.W. indicated between the lower chest and upper thighs, stating the touching occurred in her “potty” area. RP 536.

P.M.W. and L.L.W. both attended a physical examination and forensic interview on January 3, 2017, at Partners With Families and Children,<sup>4</sup> a child advocacy center in Spokane. RP 497-98, RP 466, 510, 606. The children were separately examined and interviewed. RP 605. Prior to the meeting, no one had discussed the parameters or reason for the interview with the twins, as not to cloud the twins’ statements to the interviewer. RP 466-70.

As part of the process, a forensic nurse conducted a genital exam on both P.M.W. and L.L.W., finding nothing unusual. RP 506-08, 511. The forensic nurse remarked that over 90 percent of the time when female children have been abused, there is no physical evidence as penetration may not leave any marks. RP 513-14. During the interviews, both children

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<sup>4</sup> The organization was not affiliated with law enforcement, CPS, or the hospitals. RP 499.

disclosed inappropriate touching to Tatiana Williams, the forensic interviewer. RP 509, 514-15. P.M.W. also stated she had been penetrated by the defendant, which is discussed below. RP 509. A DVD of the forensic interview of both children was played for the jury. EX P-1 (DVD of both children's interview).<sup>5</sup> The full, sealed transcripts for both P.M.W. and L.L.W. were filed with the trial court.<sup>6</sup>

P.M.W. advised the forensic interviewer that the defendant made her touch his penis, at times, for most of the day. Ex. P-1 (DVD), P.M.W. interview at 7:15-8:00.<sup>7</sup> He also required P.M.W. to touch his penis while he urinated. Ex. P-1, P.M.W. interview at 7:15-8:00, 8:43-9:18, 9:40-10:01, 11:26-11:56, 17:35-18:09, 19:21-19:31. At one point during one of these encounters, P.M.W.'s vaginal area bled, as P.M.W. asserted the defendant scratched her. Ex. P-1, P.M.W. interview at 27:44-28:57. P.M.W. also stated that the defendant urinated into her mouth on more than one occasion, which

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<sup>5</sup> Exhibit P-1 is a DVD recording that was admitted and played in open court, and it was not sealed or "held in confidence," per GR 15, by the trial court.

<sup>6</sup> See, Commissioner's rulings of July 25, 2018, and August 2, 2018. Per the Commissioner's August 2, 2018 ruling, any quotes from forensic interviews contained within sub numbers 52 and 53, are sealed and are not included within the brief, nor are they referenced. A supplemental designation of clerk's papers was filed designating these sealed transcripts for transfer on August 9, 2018. General summaries from Ex. P-1, of P.M.W.'s. and L.L.W.'s statements, are included in the brief.

<sup>7</sup> The reference to the relevant excerpts are signified according to the applicable minute and second demarked on Ex. P-1.

made her vomit. Ex. P-1, P.M.W. interview at 30:16-32:14, 32:52-33:01. P.M.W. also said the defendant placed an object into her vagina. Ex. P-1, P.M.W. interview at 35:30-35:51, 36:06-36:18.

Victim L.L.W. was also forensically interviewed. L.L.W. She asserted that the defendant touched her and P.M.W. on their vaginas at his house. Ex. P-1, L.L.W. interview at 36:06-36:18, 30:44-31:04, 31:24-31:37, 33:57-34:03, 37:29-37:38.<sup>8</sup>

At trial, P.M.W. testified at trial. She stated the defendant babysat her and L.L.W. at his residence. RP 523, 525. P.M.W. stated that the defendant touched her “privates” with his hand. RP 524.

Detective Robert Satake interviewed the defendant during his investigation. The defendant confirmed that he babysat the twins at his residence during the period of the charged crimes, but denied the allegations. RP 566, 571.

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<sup>8</sup> Although the audio portion of the DVD continues, the video portion of the DVD interview stops at 16 minutes, 50 seconds.

### III. ARGUMENT

#### A. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION FOR FIRST DEGREE CHILD RAPE, INCLUDING SUFFICIENT EVIDENCE THAT THE DEFENDANT HAD “SEXUAL INTERCOURSE” WITH P.M.W. BY PENETRATING HER WITH A DEVICE OR HIS PENIS.

The defendant first argues the evidence was insufficient to convict him of first degree child rape under count one of the information, claiming the State did not establish that he had “sexual intercourse” with P.M.W.

##### Standard of review.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence, *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), and circumstantial evidence carries the same weight as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury.

*State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

*State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

*State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

First degree rape of a child.

A person is guilty of rape of a child in the first degree “when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” RCW 9A.44.073(1).

The defendant was charged by information, alleging in pertinent part:

COUNT I: RAPE OF A CHILD IN THE -FIRST DEGREE, committed as follows: That the defendant, TROY LEE STEENHARD, in the State of Washington, on or about between April 2016 and May 2016, being at least twenty-four months older than, and not married to or in a state registered domestic partnership with the victim, P.M.W., did engage in sexual intercourse with the victim, who was 4-5 years old,

CP 7.

At the time of trial, the court instructed the jury regarding the elements of first degree rape under the court's instruction number seven. It states, in pertinent part:

To convict the defendant of the crime of RAPE OF A CHILD IN THE FIRST DEGREE as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between about April 1, 2016 and May 31, 2016, the defendant had sexual intercourse with P.M.W;
- (2) That P.M.W. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That P.M.W. was at least twenty-four months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

CP 18.

The statute defining “sexual intercourse” expressly includes the “ordinary meaning” of that term. As defined by statute, “sexual intercourse,” in pertinent part, “*has its ordinary meaning* and occurs upon any penetration, however slight.”<sup>9</sup> RCW 9A.44.010(1)(a), (b)<sup>10</sup> (emphasis added); *see* WPIC 45.01. Indeed, “[s]exual intercourse [was] given a broad definition” by the legislature. *State v. McKnight*, 54 Wn. App. 521, 530, 774 P.2d 532 (1989) (Forrest, J., dissenting). Here, the trial court instructed the jury on the definition of “sexual intercourse,” which stated: “Sexual intercourse means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” CP 19 (court’s instruction number eight).

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<sup>9</sup> For instance, the trial court has discretion to instruct the jury that penetration can be accomplished with a finger. *See State v. Tili*, 139 Wn.2d 107, 117, 985 P.2d 365 (1999).

<sup>10</sup> In full, RCW 9A.44.010(1) and (2) state:

(1) “Sexual intercourse” (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) “Sexual contact” means 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.

The jury was not limited to the definition of sexual intercourse given in instruction number eight and could have applied its ordinary meaning.<sup>11</sup> Within that framework, “sexual intercourse” is not a technical term with various meanings; juries understand that it requires penetration of the female victim’s genitalia or intercourse.

A rational trier of fact could have found there was sufficient evidence to establish that the defendant had “sexual intercourse” with P.M.W., within its ordinary understanding, notwithstanding the lower court’s instruction defining “sexual intercourse.” Forensic nurse, Theresa Forshag, had examined and forensically interviewed P.M.W. The victim told her that the defendant had touched her where she “pees” and “poops,” and that *his hands went in both parts*. RP 509. P.M.W. also told the nurse that there was bleeding and it hurt at times when she urinated. RP 509.

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<sup>11</sup> This case is distinguished from the circumstance where an element has been added to the base crime in the “to-convict” instruction. A defendant may assign error to the sufficiency of the evidence of an element added to the crime in the elements instruction. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

The first degree rape of a child statute does not provide for alternative means of committing the offense. *See State v. Bobenhouse*, 166 Wn.2d 881, 892-93, 214 P.3d 907 (2009), regarding first degree rape of a child, “[w]hile sexual intercourse can be committed in multiple ways, *see* RCW 9A.44.010 (defining sexual intercourse), the statute does not provide alternative means (separate and distinct offenses) to committing rape of a child.” *See also State v. Bobenhouse*, 143 Wn. App. 315, 326, 177 P.3d 209 (2008), *affirmed*, 166 Wn.2d 881, 214 P.3d 907 (2009) (same); *State v. Linehan*, 147 Wn.2d 638, 646, 56 P.3d 542, 546 (2002) (definition statutes do not create additional alternative means of committing an offense).

P.M.W. also testified that the *defendant placed a smooth appearing, knife like “bunny” inside of her vagina and took a photograph.* The jury could have reasonably inferred the “bunny” was a vibrator or a similar sexual device. The jury could have also reasonably inferred from the circumstance when the defendant urinated “onto [P.M.W.’s] mouth,” which presumably accumulated inside her mouth, causing her to throw up, that the defendant inserted his penis into P.M.W.’s mouth to effectuate urinating into P.M.W.’s mouth.

The jury was free to credit P.M.W.’s statements to forensic personnel and her own testimony as constituting “sexual intercourse” within its ordinary meaning or with a “sexual organ.” Therefore, the defendant’s penetration of five-year-old P.M.W.’s vagina with his finger and with a “bunny” like objection or the insertion of his penis into P.M.W.’s mouth during urination was sufficient to establish the element of sexual intercourse within its common meaning, notwithstanding the trial court’s instructional definition of “sexual intercourse.”

In the alternative, the defendant has not shown or alleged there is an insufficiency of the evidence regarding the elements of first degree child rape. Rather, he truly argues an instructional error, under the guise of a sufficiency of the evidence claim, involving the trial court’s definitional

instruction of “sexual intercourse.” The defense did not take exception or object to the court’s instructions at the time of trial. RP 749.

Due process requirements are met when a trial court instructs the jury on all elements of an offense and that each element must be established beyond a reasonable doubt. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Further, “[t]he court in the trial of a criminal case is required to define technical words and expressions, but not words and expressions which are of ordinary understanding and self-explanatory.” *Id.* at 689. There is no claim that the State did not prove the necessary elements of first degree rape, but rather the State did not produce sufficient evidence to support the court’s definition of “sexual intercourse.”

The defendant conflates a sufficiency of the evidence argument with an asserted instructional error regarding the court’s instruction number eight, which defines “sexual intercourse.” The defendant cannot raise this claim for the first time on appeal. A party generally waives the right to appeal an error unless there is an objection in the trial court. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). One exception is for “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *Kalebaugh*, 183 Wn.2d at 583. To determine whether a reviewing court will consider an unpreserved error under RAP 2.5(a)(3), the inquiry is whether (1) the error is truly of a constitutional magnitude and (2) the error is manifest.

183 Wn.2d at 583. “Manifest” in RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

“[T]he omission of an element of a charged crime is a manifest error affecting a constitutional right that can be considered for the first time on appeal.” *State v. Richie*, 191 Wn. App. 916, 927, 365 P.3d 770 (2015). However, if the instructions properly inform the jury of the essential elements of the crime, an error in defining terms that describe the elements of a crime is not an error of constitutional magnitude. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011). Furthermore, a to-convict instruction that contains the essential elements of the crime is not deficient simply because it does not contain definitions of terms. *State v. Fisher*, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009).

For instance, in *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992), our Supreme Court held that a jury instruction *improperly* defining “manufacture” does not amount to a manifest error affecting a constitutional right. *Id.* at 250. But “[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” *Id.* at 250. The Court did not reach the merits of the defendant’s argument that the definition was improper because it held that the defendant’s failure to raise the issue at trial precluded appellate review. *Id.* at 250. The Court found

“[e]ven an error in defining technical terms does not rise to the level of constitutional error” *Id.* at 250.

In *Gordon*, 172 Wn.2d at 674-77, the jury was presented with the alleged statutory aggravators and found that they applied; however, the jury was not instructed further as to the meaning of the aggravating circumstances. The Supreme Court determined that further instruction would be merely definitional and, thus, the purportedly erroneous instruction could not be challenged on that basis for the first time on appeal: “Further elaboration in the instructions would have been in the vein of definitional terms, and the omission of such definitions is not an error of constitutional magnitude satisfying the RAP 2.5(a) standard.” *Id.* at 679-80.

Here, the defendant does not argue that the trial court omitted any essential element of first degree child rape, but rather that the definitional instruction of “sexual intercourse” limited the jury’s consideration to the court’s instruction. The trial court properly instructed the jury as to the elements constituting first degree rape. CP 18. The failure to further define the term “sexual intercourse” to include its common, ordinary meaning does not constitute a manifest constitutional error, nor does a purported argument that the definitional instruction was erroneous constitute error that can be raised for the first time on appeal. This Court should decline to consider the alleged instructional error that defendant has presented to this Court under

the guise of an “insufficiency” claim, where that instructional error is presented for the first time on appeal.

There was sufficient evidence that the defendant had “sexual intercourse” with P.M.W., by its ordinary meaning. Furthermore, this Court should decline to review the issue as it is truly a claim of instructional error raised for the first time on appeal. In either event, this claim fails.

**B. THE VICTIM’S MOTHER AND A FAMILY FRIEND DID NOT GIVE IMPROPER OPINION TESTIMONY, THERE WAS NO PROSECUTORIAL MISCONDUCT IN THAT REGARD, AND DEFENSE COUNSEL WAS NOT INEFFECTIVE BY NOT OBJECTING TO THIS LINE OF INQUIRY BY THE DEPUTY PROSECUTOR.**

For the first time on appeal, the defendant alleges that his right to a fair trial was violated when the children’s mother and a family friend allegedly gave improper opinion testimony to the jury regarding the twins’ credibility.

At the time of trial, the deputy prosecutor asked the twins’ mother, Ms. Troup, about her discussion with the twins prior to the forensic interview with Ms. Williams, what Ms. Troup did or did not discuss with the children prior to the interviews, and her discussion with the children

regarding the interview parameters. The following exchange occurred,

*without objection:*

[DEPUTY PROSECUTOR]: And why did you choose not to talk to the girls about what had happened between when you learned about it and the forensic interview?

[MS. TROUP]: Because I knew -- the detective had explained to me what a forensic interview was, and I didn't want to cloud -- cloud [P.M.W.'S] mind, because at the time, it was just [P.M.W.] that we had at the appointment for. I didn't want any adult verbiage. I didn't want her to be influenced by my feelings. I wanted them to be able to tell what was actually on their mind and what truly happened without any influence from anybody.

...

[DEPUTY PROSECUTOR]: Did you have some kind of -- any concerns about the possibility of making a false accusation against Mr. Steenhard?

[MS. TROUP]: 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.

Regarding the family friend, Ms. Bias, the following exchange occurred, *without objection:*

[DEPUTY PROSECUTOR]: In terms of their honesty, have you had a chance to observe that in the girls?

[MS. BIAS]: Yeah.

[DEPUTY PROSECUTOR]: Let's start with [P.M.W.]. Is [P.M.W.] an honest girl?

[MS. BIAS]: Yes, she is.

[DEPUTY PROSECUTOR]: Are you aware whether they have any rules in the house or does she ever talk to you about rules regarding telling the truth?

[MS. BIAS]: Basic rules, just like any kid. You need to tell me the truth. Our children play together so that's - you know, we have the same values in that.

[DEPUTY PROSECUTOR]: What about [L.L.W.]?

[MS. BIAS]. The same.

RP 538-39.

1. The defendant raises the claim of improper opinion testimony for the first time on appeal.

It is generally improper for a witness to testify regarding the veracity of another witness because such testimony invades the province of the jury as the fact-finder in a trial and violates a defendant's right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001);<sup>12</sup> *State v. Thach*, 126 Wn. App. 297, 312, 106 P.3d 782 (2005).

Defense counsel did not object to the above testimony. In that regard, an appellate court will not consider an issue raised for the first time on appeal. RAP 2.5(a); *Kirkman*, 159 Wn.2d at 926. An appellate court will consider a claim of improper opinion testimony raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926. For a constitutional error to be "manifest" it must be readily identifiable, *O'Hara*, 167 Wn.2d at 99-100,

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<sup>12</sup> *Demery* involved tape recordings of police officers directly accusing the defendant of lying. 144 Wn.2d 757.

and narrowly construed, *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). An error is “manifest” when it is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). “An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.” *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Accordingly, “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 the context of improper opinion testimony, “[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *Id.*, at 936. An appellate court construes this exception narrowly in part because the decision not to object to such testimony may be tactical. *Id.* at 934-35. A showing that improper witness testimony constitutes manifest error requires an explicit or almost explicit statement by a witness that he or she believed the accusing victim. *Id.* at 936.

For example, in *Kirkman*, the defendants were convicted of child rape. A detective interviewed the child victim and testified to the “preliminary competency protocol” used to determine the victim’s ability to tell the truth. *Id.* at 930. The detective used this protocol because he was

interested in the victim's ability to distinguish between truth and lies. *Id.* at 922, 930. He stated that the victim distinguished truth from lies, that he asked the victim to promise to tell the truth, and that the victim explicitly promised to do so. *Id.* at 929. For the first time on appeal, the defendants argued the detective improperly testified to the victim's credibility. Our high court determined that the detective's testimony "simply" accounted for the interview protocol used to obtain the victim's statement and "merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses." *Id.* at 931. The court also concluded that the detective did not testify that he believed the victim or that she told the truth, and testifying as to the protocol used was not a comment on the truthfulness of the victim.

Similarly, in *State v. Warren*, 134 Wn. App. 44, 52, 138 P.3d 1081 (2006), *affirmed*, 165 Wn.2d 17, 195 P.3d 940 (2008), *cert. denied* 556 U.S. 1192 (2009), for the first time on appeal, the defendant argued that the testimony of the forensic interviewer and a detective improperly vouched for the child victim's credibility and violated his right to a jury trial. Two forensic witnesses testified that they interviewed a child victim and discussed the importance of telling the truth, also asked the child the meaning of telling the truth compared to a lie, and the child promised to tell the truth. *Id.* at 54. Ultimately, the court held that the testimony of the

forensic witnesses was not manifest constitutional error that impermissibly invaded the province of the fact finder, and, because Warren did not object below, he could not challenge the testimony for the first time on appeal.

Likewise, in *State v. King*, 131 Wn. App. 789, 130 P.3d 376 (2006), *review denied*, 160 Wn.2d 1019 (2007), witnesses who interviewed a child victim in a child molestation case testified that the victim could distinguish the truth from a lie and the victim agreed to tell the truth during the interview. *Id.* at 800. Division One ultimately found such testimony did not infringe on the jury's role of determining the victim's testimony. *Id.* at 800-01. Importantly, the court found that even if there was error, it would not be manifest and could not be raised for the first time on appeal. *Id.* at 801

In *State v. Madison*, 53 Wn. App. 754, 760, 770 P.2d 662 (1989), *review denied*, 113 Wn.2d 1002 (1989), an expert witness testified without objection, that a young child's conduct was "typical of a sex abuse victim." The court rejected the argument that the testimony amounted to a statement of belief in the victim's story and, consequently, an opinion on the defendant's guilt. *Id.* After acknowledging that certain statements would have been properly excluded if challenged at trial, the court indicated its general reluctance to recognize the admission of testimony without objection as manifest constitutional error.

Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, gives rise to “manifest constitutional error” reviewable for the first time on appeal. The failure to object deprives the trial court of an opportunity to prevent or cure the error. The decision not to object may be a sound one on tactical grounds by competent counsel, yet if raised successfully for the first time on appeal, may require a retrial with all the attendant unfortunate consequences. Even worse, ... it may permit defense counsel to deliberately let error be created in the record, reasoning that while the harm at trial may not be too serious, the error may be very useful on appeal.

*Id.* at 762-63.<sup>13</sup>

In the present case, the twins’ mother testified regarding her discussion with the children about the forensic interview protocol and whether the children would tell the truth during the interview. She did not express an opinion on the children’s truthfulness about the accusations against the defendant, that she believed the children’s accusations, or whether the defendant was guilty of the crimes charged.

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<sup>13</sup> *But see State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007), where the defendant was charged with first degree child rape and first degree child molestation, in addition to other charges. The victim was five at the time of the rape and molestation. The victim’s mother testified that she could tell when her daughter was lying because she made a half smile when she lied, but did not make a half smile when she accused Sutherby of rape. The *Sutherby* court explained that her testimony was prejudicial because it conveyed not only that her daughter told the truth when she disclosed the abuse, but that jurors could evaluate her daughter’s credibility by a whether or not she made a half smile while testifying. The opinion does not state whether Sutherby objected to this testimony or asked the court to strike it.

Likewise, Ms. Bias testified that P.M.W. was an honest child and that there were rules in place in Ms. Troup's home about the children telling the truth. Similarly, to Ms. Troup, Ms. Bias described P.M.W.'s ability to tell the truth and the rules in place in the children's home necessitating the children tell the truth. Ms. Bias did not directly comment on the defendant's guilt or comment about the children's truthfulness regarding the charges against the defendant, or state that she believed the children's accusation, or that the defendant was guilty.

Unlike the testimony deemed impermissible in *Sutherby*, Ms. Troup and Ms. Bias did not deprive the jury of its ability to independently assess the victims' credibility, such as suggesting how to determine whether the children were being untruthful. Moreover, neither witness conveyed an opinion that the twins were truthful in accusing the defendant or while testifying, or give the jury a method for determining whether P.M.W. or L.L.W. were telling the truth in each instance. The witnesses simply testified that the twins knew the difference between telling the truth and a lie, and they had been taught accordingly. Hence, both witness's testimony did not constitute improper opinion testimony. Even if it did constitute improper opinion testimony, it was not on an ultimate issue in the case and does not rise to the level of a manifest constitutional error under RAP 2.5(a), which should be reviewed for the first time on appeal.

In addition, the defendant cannot establish any actual prejudice. Important to the determination of whether opinion testimony prejudiced the defendant is whether the jury was properly instructed. *Montgomery*, 163 Wn.2d at 595; *Kirkman*, 159 Wn.2d at 937, 155 P.3d 125. “Proper instructions obviate the possibility of prejudice.” *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012), *review denied*, 177 Wn.2d 1010 (2013). In the present case, the trial court’s jury instructions obviated the possibility of prejudice. The trial court properly instructed jurors that they, alone, were to decide credibility issues. For example, in *Kirkman*, 159 Wn.2d at 937, the Supreme Court rejected the defendant’s claims of prejudice because defense counsel had tactical reasons for not objecting and that the jury was instructed that they alone decided credibility issues. Here too, the court instructed the jurors that they were “the sole judges of the credibility of the witnesses” and that they alone were to determine the credibility and weight of testimony. CP 11; *see also State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984) (jurors are presumed to follow the court’s instructions absent evidence proving the contrary). Because actual prejudice cannot be established, RAP 2.5(a)(3) should not allow for appellate review.

2. Harmless error.

Even if this Court determines that the unobjected-to testimony by Ms. Troup and Ms. Bias constitutes improper opinion testimony and is manifest constitutional error, a harmless error analysis applies. *Kirkman*, 159 Wn.2d at 927. To be harmless, the State must show beyond reasonable doubt that any reasonable jury would have still reached the same result absent the error. *State v. Quaale*, 182 Wn.2d 191, 201, 340 P.3d 213 (2014). The untainted evidence must be so overwhelming that it necessarily leads to a finding of guilt. *State v. Binh Thach*, 126 Wn. App. 297, 313, 106 P.3d 782 (2005).

At age six, P.M.W. testified at trial. The deputy prosecutor asked P.M.W. what the rules were in her mom's house about being truthful.

[DEPUTY PROSECUTOR]: Does your mom have rules about telling the truth?

[P.M.W.]: She says to always don't lie and always tell the truth.

[DEPUTY PROSECUTOR]: What happens if you don't tell the truth in your home?

[P.M.W.]: You get in big trouble.

[DEPUTY PROSECUTOR]: What kind of trouble?

[P.M.W.]: Lots and lots of trouble.

[DEPUTY PROSECUTOR]: Lots and lots. Did you ever get in trouble with your mom for not telling the truth?

[P.M.W.]: No.

[DEPUTY PROSECUTOR]: No?

[P.M.W.]: (Shakes head.)

[DEPUTY PROSECUTOR]: When you told your mom what happened with Troy, were you saying the truth?

[P.M.W.]: Yes.

RP 525-26.

[DEPUTY PROSECUTOR]: Whenever you talked about Troy, did you tell the truth?

[P.M.W.]: Yes.

[DEPUTY PROSECUTOR]: Did your mom tell you anything about telling the truth today in court in front of these people?

[P.M.W.]: No.

[DEPUTY PROSECUTOR]: Did the judge tell you anything?

[P.M.W.]: Yes.

[DEPUTY PROSECUTOR]: Did he tell you to tell the truth?

[P.M.W.]: Yeah.

[DEPUTY PROSECUTOR]: If I told you right now that I was wearing a purple hat on my head, would that be a true thing or not a true thing?

[P.M.W.]: Not a true thing.

[DEPUTY PROSECUTOR]: If I told you right now that you were wearing a blue dress, would that be a true thing or not a true thing?

[P.M.W.]: A true thing.

RP 526-27.

Additionally, the video recording of the forensic interview of P.M.W. and L.L.W. was played for the jury. Certainly, the jury observed P.M.W. while testifying and both P.M.W. and L.L.W. during the forensic interview, weighed the evidence, and could determine the twins' credibility independent of the testimony of Ms. Troup and Ms. Bias, employing their own common experience and understanding of children the twins' age, and

taking into consideration the court's instruction that they were the sole judges of the credibility of the witnesses. The overwhelming, untainted evidence necessarily leads to a finding of guilt on the charged crimes absent Ms. Troup's and Ms. Bias's testimony. Accordingly, the error was harmless beyond a reasonable doubt.

3. Claim of prosecutorial misconduct.

The defendant next alleges the prosecutor committed misconduct when he questioned Ms. Troup and Ms. Bias as outlined above.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the conduct was both improper and prejudicial. *Fisher*, 165 Wn.2d at 747. Prosecutorial misconduct is prejudicial where there is a substantial likelihood the improper conduct affected the jury's verdict. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Because the defense did not object during trial, the defendant's prosecutorial misconduct claim is considered waived unless the misconduct is "so flagrant and ill-intentioned that it cause[d] an enduring and resulting prejudice that could not have been neutralized by a curative instruction." *Matter of Phelps*, 190 Wn.2d 155, 165, 410 P.3d 1142 (2018). In *Phelps*, 190 Wn.2d at 170, our high court observed that it has only found prosecutorial misconduct was flagrant and ill-intentioned only "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence,

such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner.”

Here, the defendant has not established any prosecutorial misconduct. It is apparent from the record that the prosecutor asked the above outlined questions in an effort to assist the jury's understanding of the guidance received by the twins regarding telling the truth and the expectations and parameters of the forensic examination for the children. As stated above, the deputy prosecutor did not ask the witnesses if the defendant was lying, or asked them to comment on the accuracy of the charges against the defendant, or whether the defendant was guilty of the charged crimes. In addition, there was no objection to the testimony or questions posed by the deputy prosecutor. In the instance regarding Ms. Troup, her answer was nonresponsive. The defendant did not object on an evidentiary basis. Generally, a party's failure to object to evidence at trial waives a challenge to a claimed evidentiary error on appeal. ER 103(a)(1); *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The defendant waived any claim of error.

The defendant has not shown the above questioning and answers given were objectionable or constitute flagrant and intentional prosecutorial misconduct. Finally, the defendant has waived this argument because he

fails to make any showing that an objection and a curative instruction would not have eliminated any prejudicial effect. The defendant's prosecutorial misconduct challenge fails.

4. Claim of ineffective assistance of counsel for not objecting to the testimony.

The defendant also argues that his trial counsel was ineffective for failing to object to the above referenced testimony of Ms. Troup and Ms. Bias.

*Standard of review.*

Review of an ineffective assistance of counsel claim begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). "To prevail on this claim, the defendant must show his attorneys were 'not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment' and their errors were 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Judicial scrutiny of counsel's performance is highly deferential and requires that every effort be made to eliminate the "distorting effects of hindsight" and to evaluate the conduct from "counsel's perspective at the time"; in order to be successful on a claim of ineffective assistance of counsel, the defendant must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689.

The first element of ineffectiveness is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceeding would have been different. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

*Strickland*, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. *Id.* at 696. To rebut the presumption of effective assistance of counsel, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). In addition, the competency of counsel is determined based upon the entire record in the trial court. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). A failure to demonstrate either deficient

performance or prejudice defeats an ineffective assistance of counsel claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

As discussed above, neither witness's testimony conveyed an improper opinion at the time of trial and the failure to object did not fall below an objective standard of reasonableness.

Moreover, strategic or tactical reasons do not support an ineffective assistance claim. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In that regard, the decision to object, or to refrain from objecting even if testimony is not admissible, maybe a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective. *Madison*, 53 Wn. App. at 763 (“[t]he decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal”).

Here, it is certainly conceivable trial counsel did not object to the testimony to avoid emphasizing it to the jury or not to appear as if the defense was attempting to hide information from the jury. Moreover, the defendant has not established nor discussed prejudice by showing “a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.”

*McFarland*, 127 Wn.2d at 334-35. The defendant has not established deficient performance or prejudice and his claim fails.

**C. THE TRIAL COURT DID NOT ERR WHEN IT INSTRUCTED THE JURY THAT THE VICTIM'S TESTIMONY DID NOT HAVE TO BE CORROBORATED. MOREOVER, THE INSTRUCTION DID NOT SHIFT THE BURDEN TO THE DEFENDANT.**

Standard of review.

An appellate court reviews a challenged jury instruction de novo. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006), *as corrected* (2007). In doing so, the court considers the context of the jury instructions as a whole. *Id.*

The defendant also alleges the trial court erred when it instructed the jury, over defense counsels objection, that: “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 (court’s instruction number 14); RP 742-43; *see* RCW 9A.44.020(1) (“In order to convict a person of any crime defined in this chapter [sex offenses] it shall not be necessary that the testimony of the alleged victim be corroborated”).

Specifically, the defendant claims the instruction was an “improper” and “impermissible” comment on the evidence and the instruction improperly shifted the burden of proof to the defendant. Although neither

argument was addressed to the trial court, each argument will be addressed in turn.

1. The instruction was not an impermissible comment on the evidence.

An analysis of this issue begins with *State v. Clayton*, 32 Wn.2d 571, 572, 202 P.2d 922 (1949), wherein the defendant was charged with “an unlawful and felonious attempt to carnally know and abuse a female child, not his wife, of the age of fifteen years.” In that case, the jury was instructed, in part, that the defendant may be convicted upon uncorroborated testimony of the victim.<sup>14</sup> *Id.* The *Clayton* court addressed the use of a non-corroboration jury instruction in a child sexual abuse case. In that case, the defendant admitted that the instruction was a correct statement of the law, but he argued that the trial court impermissibly commented on the evidence by singling out the State’s evidence. *Id.* at 572-73. The court rejected Clayton’s argument, finding that the jury must have understood that it was to determine Clayton’s guilt or innocence from all the evidence presented. *Id.* at 577. Further, the second sentence in the instruction made clear that

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<sup>14</sup> The instruction read as follows: “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 jury were the sole judges of the weight to be given to the witness testimony. *Id.*

Later, in *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966), the jury was instructed that an individual charged with indecent exposure<sup>15</sup> could be convicted upon the uncorroborated testimony of the complaining witness. The defendant argued that it was error to omit the cautionary language regarding the burden of proof of beyond a reasonable doubt in that particular instruction and the instruction was a judicial comment on the evidence. *Id.* at 669. In rejecting the defendant's claim and acknowledging the instruction was a correct statement of the law in Washington, the court provided the rationale for the instruction:

Such offenses are rarely if ever committed under circumstances permitting knowledge and observation by persons other than the accused and the complaining witness, and not all such offenses are otherwise capable of corroboration. It would, therefore, be unrealistic and unreasonable to require proof that could not be procured, particularly where the testimony of the complaining witness is direct and positive as to all essential elements of the crime charged.

The court considered the lack of the "reasonable doubt" burden in the particular instruction, and that it was not a "model" instruction, but the

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<sup>15</sup> At the time, Galbreath was accused of lewd exhibition of his "private parts" before a child under the age of 15. *Galbreath*, 69 Wn.2d at 668-69.

testimony of the child victim was corroborated and the jury was instructed of reasonable doubt standard elsewhere in the instructions. *Id.* at 670-71.

The *Galbreath* court further held that the instruction, in that case, was not a comment on the evidence as it did not express any view as to the credibility or weight of the evidence, the instructions defined the jury's role as fact-finder, and the jury was instructed to consider the instructions as a whole. *Id.* at 671. Indeed, to fall within the constitutional ban of a comment on the evidence, "a judge's statement must suggest his or her personal opinion or view as to credibility, weight or sufficiency of the evidence." *State v. Pastrana*, 94 Wn. App. 463, 480, 972 P.2d 557 (1999). As stated by the *Galbreath* court:

We likewise conclude that the challenged instruction, in the form given, did not amount to an unconstitutional comment on the evidence. An instruction, to fall within the constitutional ban in question, must convey or indicate to the jury a personal opinion or view of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial. A trial judge, in his instructions, is not totally prohibited from making any reference to the evidence in a case. Indeed, he is oftentimes requested and required to advise the jury as to the purpose for which certain evidence is admitted and may be considered (e.g., prior convictions), or to caution the jury as to the application of some portion of the testimony (e.g., statements of an accomplice), or to outline the dispositive issues or premises which the jury must of may find. Such references, so long as they in nowise indicate or reflect the trial judge's impressions concerning

the weight, credibility, or sufficiency of the evidence, do not constitute proscribed comments.

69 Wn.2d at 671 (internal citation omitted).

In *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), *remanded on other grounds*, 157 Wn.2d 1012 (2006), the defendant was convicted of first degree child molestation. In that case, the corroboration instruction stated, “In order to convict a person of the crime of child molestation as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.” *Id.* at 173-74. Division One commented that the Washington Pattern Criminal Jury Instructions (WPIC) do not include a corroboration instruction and the Washington Supreme Court Committee on Jury Instructions has misgivings<sup>16</sup> about the instruction, finding corroboration to really be a matter of sufficiency of the evidence. *Id.* at 182. However, in affirming the conviction, the court concluded that the instruction accurately stated the law because it essentially “mirrored” RCW 9A.44.020(1). *Id.* at 181.

The defendant argues that the non-corroboration instruction did not include specific, additional language requiring the jury to weigh the

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<sup>16</sup> The defendant’s claim that the “no corroboration” instruction is disfavored in Washington is inaccurate. Having been approved in similar iterations by both the Supreme Court and several court of appeals decisions, it is *only* the WPIC committee that has suggested that it not be given in Washington.

evidence under the reasonable doubt standard, relying on several other jurisdictions for the proposition. In *Clayton*, the Supreme Court noted that although the non-corroboration instruction did not expressly advise the jury to determine guilt “from all the evidence and surrounding circumstances shown at the trial,” the jury “must have understood, from the second sentence of the instruction, that [the defendant’s] guilt or innocence was to be determined from all the evidence in the case.” *Clayton*, 32 Wn.2d at 577. The court added, “Moreover, the jury was elsewhere expressly instructed” that it must reach a verdict “beyond a reasonable doubt’ only “after examining carefully all the facts and circumstances” in the case. *Id.* at 577.

Here, although the non-corroboration instruction itself did not include the additional, surplus language requiring the jury to assess the “reasonable doubt” standard in that instruction against, the trial court’s other instructions expressly instructed the jury on the reasonable doubt standard for all of the elements of the crimes charged, the presumption of innocence, and the burden of proof.

Specifically, the lower court instructed the jury that they were the sole judges of the credibility of the witnesses and what weight was to be given to all witnesses, that jurors should consider the testimony of any witness against all other evidence, and factors to be used when judging the believability and weight of that witness, and if it appeared that the trial court

commented on the evidence, that jurors must entirely disregard any apparent comment on the evidence. *See* CP 11 (factors to consider and weight given when determining witness credibility); CP 12 (jury to disregard a court’s comment on the evidence); CP 12 (jury to consider instructions as a whole); CP 15 (reasonable doubt instruction, including a reasonable doubt is “such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence”).

The defendant’s reliance on *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009), is of no avail. In *Johnson*, the defendant argued that without additional safeguarding language, the trial court’s non-corroboration instruction “puts the complaining witness’s testimony in a favorable light.” *Id.* at 936. Although Division Two reversed Johnson’s conviction on different grounds, the court observed that *Clayton* contained “no clear pronouncement” about whether additional “safeguarding language” is mandatory to prevent an impermissible comment on the evidence when issuing a non-corroboration instruction. *Id.* Ultimately, although not central to its decision, the *Johnson* court cautioned trial courts to consider including the burden of proof in the non-corroboration instruction, as not including the language in the instruction could be an impermissible comment on the evidence. *Id.* at 937.

In the present case, the record below demonstrates that the trial court's instructions satisfied the standard outlined in *Clayton* because the instructions "elsewhere expressly instructed" the jury that it must reach a verdict beyond a reasonable doubt after examining *all of the evidence*, including all of the factors bearing on the credibility all of respective witnesses. *See Clayton*, 32 Wn.2d at 577. The trial court's non-corroboration instruction was not a comment on the evidence and it was not error to not include the State's burden in that particular instruction as the jury was instructed on the State's burden elsewhere in the instructions, and the jury was required to use the instructions as a whole.

2. The non-corroboration instruction did not shift the burden of proof.

The defendant also argues the non-corroboration instruction "shifts the burden of proof by suggesting a different standard applies to other witnesses such as the defendant." App. Br. at 34. Notwithstanding the defendant offers no analysis regarding this claim other than personal preference, he fails to cite any authority to support this claim.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a crime beyond a reasonable doubt. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). Instructing the jury in a manner that relieves the State of this burden to prove every essential element of the offense is reversible

error. *Kalebaugh*, 183 Wn.2d at 584; *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994). Here, the challenged instruction did not insinuate that the defendant must produce corroboration for his witnesses to be credible. Moreover, the non-corroboration instruction was neutral, an accurate statement of the law, it did not convey the court's belief in any of the testimony or evidence presented at trial, nor did it impart that the defendant was required to produce any evidence or witnesses corroborating his version of events.

Other than personal disapproval, the defendant has not established the impropriety of the non-corroboration instruction or how the instruction shifted the burden to the defendant to produce corroboration for his witnesses or evidence. The instruction simply stated the law in Washington. As discussed above, in total, the court's instructions required the State to prove the elements of the crimes charged beyond a reasonable doubt and the instructions also discussed the factors the jury could use when assessing the credibility of *all* witnesses produced at trial. This claim has no merit.

If this Court determines that the trial court erred when it gave the non-corroboration instruction, it was harmless error. An erroneous jury instruction that misleads the jury is subject to a constitutional harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). An erroneous instruction is harmless so long as an appellate court concludes

beyond a reasonable doubt that the jury verdict would have been the same without the error. *Id.* at 845. As discussed above, the jury was instructed elsewhere in the instructions on the guiding principles concerning the evaluation of the evidence, including what weight, if any, to place on the evidence and factors to determine credibility. There is no evidence that the jury did not follow the court's instructions.

#### IV. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Respectfully submitted this 15 day of August, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

TORY STEENHARD,

Appellant.

NO. 35578-1-III

CERTIFICATE OF SERVICE

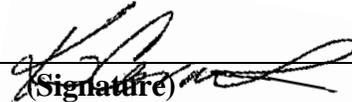
I certify under penalty of perjury under the laws of the State of Washington, that on August 15, 2018, I e-mailed a copy of the Second Amended Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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