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A. IDENTITY OF PETITIONER.

The State of Washington , by and through Gerald R. Fuller, Chief Criminal Deputy, Grays Harbor County Prosecuting Attorney, asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this opinion.

B COURT OF APPEALS DECISION.

The State of Washington seeks review of the published opinion of the Court of Appeals dated May 15, 2007, reversing the defendant's convictions for First Degree Rape of a Child and First Degree Child Molestation and also, reversing the sentence of the court upon the defendant's conviction of multiple counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. The State asks that the convictions for child rape and child molestation be reinstated and that the Supreme Court reinstate the sentence of the court on the convictions for Possession of Depictions of Minors Engaged in Sexually Explicit Conduct.

A copy of the decision of the Court of Appeals is attached hereto and incorporated herein by this reference.

C. ISSUES PRESENTED FOR REVIEW.

1. Did the Court of Appeals improperly hold that the testimony of the mother was an opinion concerning the truth of the child's statement?
2. Was the testimony of the mother, if error, harmless beyond a reasonable doubt?
3. What is the proper unit of prosecution for the crime of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070?

D. STATEMENT OF THE CASE.

Respondent's counterstatement of the case in the Brief of the Respondent sets forth the complete procedural and factual background in this matter. The objected to testimony of the mother, Lisa Butcher, is set forth at page 19-20 of the Brief of Respondent. The Brief of Respondent also sets for the pertinent dates and times when it is alleged that the defendant downloaded and thus "possessed" the various items that he was convicted of possessing. The facts are summarized below.

In December 2004, the victim and her sister traveled from Kennewick to the Grays Harbor area with her mother for Christmas at the residence of her mother's parents. During this time, the children spent three days and two nights with the defendant and his wife, their paternal grandparents. The defendant picked up the children and drove them to his home, returning them to the maternal grandparents' residence on

December 22, 2004. (RP 32-34, 38). The defendant and his wife picked up the children and their mother on Christmas day and drove them back to their home in Kennewick. (RP 34).

On the morning of December 25, 2005, Libby disclosed to her maternal grandmother, while being bathed, that her “pee-pee” stung and that it hurt. When the child went out the door to return home to Kennewick on Christmas day, the child, almost in tears, asked her grandmother “Do I have to go back to his house?” The grandmother assured her that she was going home. (RP 36).

The defendant and his wife stayed at the child’s residence in Kennewick until December 27, 2004. Within moments after they left, Libby disclosed to her mother that the defendant had “hurt my pee-pee.” When asked by her mother what had happened, the child stated that the defendant got under the blankets and poked at her pee-pee. She told her mother that it hurt and that it felt like pinching. The child explained to her mother that this had happened in the defendant’s residence. (RP 14-15).

The child was seen by a pediatrician that same day. She disclosed to the doctor that she had been poked in her “potty” and identified the assailant as “Randy,” her dad’s dad. She gave a description of the time and place of the touching that was consistent with the disclosure made to the mother. (RP 76-80).

The physician's examination revealed an erythema inside the child's labia and trauma to the hymen. The doctor testified that these findings were consistent with the description given by the child concerning how the injury had occurred. (RP 81-83).

The child testified at trial and was subject to cross-examination. She explained that the rules of the court were "never lie." She then recounted in detail what had happened to her. (RP 45-57).

As part of the criminal investigation in this matter, the child was interviewed by Mari Murstig, a child interviewer with the Benton County Prosecuting Attorney's Office, and Laura Davis, a nurse practitioner with the Sexual Assault Clinic in Lacey, Washington. Her account of the events were consistent throughout. She told Ms. Murstig that "he poked me real hard" and it "felt like a pole."

Detective Ed McGowan of the Grays Harbor County Sheriff's Office later interviewed the defendant. The defendant admitted being with the child in the room where the child alleged that the touching occurred. He told McGowan that he straightened up the child's blankets and then went to bed. During a subsequent polygraph examination, he told Detective Kevin Darst of the Aberdeen Police Department that he did not feel it was abnormal behavior to view child pornography. He told Darst that he had sexual fantasies while looking at young children on the

internet. The defendant stated, however, that he “would never cross the line by acting out a fantasy with the child.” (RP 196-97).

At trial, the defendant explained that the child’s “little bottom” was hanging off the edge of the mattress and she was ready to fall off. The child was naked, in a fetal position. He explained that as he went to pick up the child, she arched her back and rolled out of his hands back onto the mattress. (RP 330-31). This happened twice. The defendant explained that he had an injury to the little finger on his right hand. With the aid of a large doll he explained to the jury how he picked up the child and how the injury must have occurred, explaining that he must have poked her with his damaged pinkie finger. (RP 320-21).

When asked about depictions found on his computer, the defendant stated that he never intentionally searched for or downloaded child pornography. He admitted downloading adult pornographic sights “fairly often,” but claimed that he must have inadvertently downloaded the child pornography. (RP 303, 308-09, 354-55).

The defendant was charged with Rape of a Child in the First Degree, Child Molestation in the First Degree and ten separate counts of Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, RCW 9.68A.070. Additionally, each of the violations of RCW 9.68A.070 contained an allegation of sexual motivation. RCW 9.94A.855.

The defendant's computer was seized pursuant to consent of the defendant on March 2, 2005. The offense dates for Counts 3 through 10 and Count 12, as alleged in the Information, were established by showing the date and time that the image was downloaded from the internet to the hard drive of the defendant's computer. (RP 21-22, 12-21-05). The offense date for Count 11 was determined to be the date of the seizure of the computer because these depictions were in unallocated space and no download date could be established. (CP 93-94, RP 228-229).

Count	Exhibit No.	Date Downloaded File Name	
3	6	02-04-04 Baby J. Sideways	RP 11/2/05, p. 7-8, 18, 19
4	7	02-02-04 Lucie and Full	RP 11/02/05, p. 16-19
5	8	02-02-04 Kidssuck 1	RP 11/02/05, p. 19
6 & 7	9, 10	02-02-04 Dana 10.3	RP 11/02/05, p. 19-20
8	11	01-27-05	RP 11/02/05, p. 20-21
9	12	02-18-05 Julia 028x	RP 11/02/05, p. 21-22
10	12	02-18-05	RP 11/02/05, p. 22
11	14	found to be possessed on date of arrest and seizure of computer, 03-02-05, download date not available	RP 11/02/05 p. 23-24

Count	Exhibit No.	Date Downloaded File Name	
12	15	11-29-02 1Fix696 10	RP 11/02/05 p. 25-26

E. ARGUMENT BY REVIEW SHOULD BE ACCEPTED.

1. The opinion of the Court of Appeals regarding the testimony of the mother is in conflict with prior decisions of the Supreme Court and the Court of Appeals concerning opinion testimony.
2. Alleged error concerning the testimony of the mother, if any, is harmless beyond a reasonable doubt.
3. The opinion of the Court of Appeals concerning the unit of prosecution for violation of RCW 9.68A.070 is in conflict with the decision of the Court of Appeals, Division I, in State v. Gailus, 136 Wn.App. 191, 47 P.3d 1300 (2006).

Testimony of the Mother.

The mother did not express an opinion concerning the ultimate issue of whether her child had been molested. The mother testified to certain mannerisms of the child that she often observes under circumstances when she knows the child is not telling the truth. The mother testified concerning the mannerisms of the child at the time of the disclosure. It certainly is not objectionable for the mother to describe the manner and demeanor of the child when the child is making the disclosure. This is information that is properly before the jury for them to make an

assessment of the truth of the child's out-of-court statement. It is not an opinion concerning whether the child is telling the truth.

Furthermore, this is not expert witness testimony. This is not a situation in which a physician vouches for the truth of declarations made in a clinical interview. See State v. Carlson, 80 Wn.App. 116, 120-123, 906 P.2d 999 (1995); State v. Kirkman, 126 Wn.App. 97, 103, 197 P.3d 133 (2005).

In any event, error, if any, was harmless beyond a reasonable doubt. There was direct physical evidence from a physician concerning the injury to the child. The defendant admitted the contact, but offered the explanation that the injury occurred accidentally. From the defendant's point of view, it would have been incredibly foolish to deny that the touching had taken place in one breath and then claim that it was an accident in another breath. Testimony of the mother was introduced without objection. This clearly was a matter of trial strategy. It was in the best interest of the defendant to concede that the child was telling the truth about the touching to the extent that she could have understood what was happening at the time. The child knew that she had been touched and injured. The child had no way of knowing if this was for a sexual purpose. The defendant's explanation was that the injury occurred accidentally.

The defendant's trial strategy is reflected in final argument presented to the jury.

The point here is, I think Libby is simply misinterpreting or mistaking as to what

actually occurred in that bedroom. She can certainly interpret what Mr. Sutherby described to you and demonstrated, and that can be interpreted exactly how she said it. It doesn't mean it happened that way. And a five year old saying that doesn't make it necessarily so. Does she believe she is telling the truth? I think so, and I believe her parents think so too, and the grandma. The thing is, though, when you look at that, was she misinterpreting what happened? I think she was.

I think that Mr. Sutherby is sure exactly what happened. He explained to you how she stiffened up. Certainly consistent with an accidental touching by his injured finger. You saw how that was positioned there. I don't think that's just a coincidence that's how his finger is. It took him a while to realize that's happened in the context of all of this. He was asked to give that written statement only an hour and a half after he has been arrested at his house. He didn't have his thoughts together. His mind was probably racing, wondering if he is going to be able to go home. I'm not sure what they were talking about. His words were floored, couldn't comprehend the nature of the charges.

The "opinion" of the mother added nothing to the proof in this case. The independent evidence of his guilt on the charges of Rape of a Child in the First Degree and Child Molestation in the First Degree was overwhelming.

Unit of Prosecution.

RCW 9.68A.070 prohibits the knowing possession of visual or printed matter depicting "a minor" engaged in sexually explicit conduct.

A child is victimized by each separate image. The statute provides that each separate image is a crime. "Visual or printed matter" means any photograph. RCW 9.68A.011(2). To "photograph" includes making a digital image. A photograph is any item produced by photographing. RCW 9.68A.010. Clearly, the statute, by its literal meaning, provides that each photograph possessed is a separate crime.

The legislature has the authority to define the unit of prosecution. It has clearly done so by the statute enacted herein. This is quite apart from whether, on the facts of a particular case, the conduct of the defendant might constitute "same criminal conduct."

The issue presented herein has been addressed and correctly decided by the Court of Appeals in State v. Gailus, 136 Wn.App. 191, 47 P.3d 1300 (2006). In Gailus, officers seized a compact disc containing 149 separate digital files, most of which contained depictions of minors engaged in sexually explicit conduct. The 149 files had been copied onto the disc in eight separate sessions. The defendant was charged with 10 counts of possessing depictions of a minor engaged in sexually explicit conduct.

The factual situation in the case at hand is nearly identical to that in Gailus. In Gailus, the separate files were on a compact disc. Here, there were numerous separate files on the hard drive of the defendant's

computer. The Court of Appeals in Gailus rejected any contention that the unit of prosecution should be limited by the medium used for digital storage. Gailus, 136 Wn.App. at 198:

...We conclude that the legislature did not intend possession of multiple photographs on a single digital storage medium, such as compact disc or computer hard drive, to be a single unit of prosecution. As noted by a federal appellate court, the conclusion that the possession of a single compact disc constitutes a single unit of prosecution could lead to an absurd scenario in which an individual who possesses multiple books containing one visual depiction apiece would violate the statute multiple times, whereas an individual with hundreds of images on a hard drive or compact disc would only violate the statute once. U.S. v. Vig, 167 F.3d 443, 448 (8th Cir. 1999).

The Court of Appeals in this matter tries to create an ambiguity by saying that “any” visual matter should include all such visual matter stored on the hard drive regardless of when the matter may have been downloaded and placed on the hard drive. In the context of the purposes of RCW 9.68A, the decision of the Court of Appeals is simply wrong. The legislative purpose of RCW 9.68A is the “prevention of sexual exploitation and abuse of children. The care of children is a sacred trust and should not be abused by those who seek commercial gain or personal gratification based upon exploitation of the children.” RCW 9.68A.001. The victim is the child. Possession of the image of the child is sexual exploitation of that child. State v. Ehli, 115 Wn.App. 556, 560-61, 62 P.3d 929 (2003).

The statute prohibits knowing possession of visual or printed matter depicting “a minor” engaged in sexually explicit conduct. To now say that “any photograph” encompasses all of the photographs contained on the hard drive flies in the face of the purpose of the statute.

F. CONCLUSION

For the reasons set forth, the decision of the Court of Appeals must be reversed.

Respectfully Submitted,

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Division Two

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CONSOLIDATED CASE #: 34331-2-II and 35662-7-II
State of Washington, Respondent v. Randy James Sutherby, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:cjb
Enclosure

cc: Judge David Foscue
Indeterminate Sentence Review Board

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STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

No. 34331-2-II
(consolidated with 35662-7-II)

v.

RANDY J. SUTHERBY,
Appellant.

PUBLISHED OPINION

In Re Personal Restraint Petition of
RANDY J. SUTHERBY,
Petitioner.

QUINN-BRINTNALL, J. — A jury convicted Randy Sutherby of first degree child rape, first degree child molestation, and seven counts of possession of depictions of minors engaged in sexually explicit conduct. Sutherby argues on appeal that (1) the trial court used the wrong unit of prosecution under the child pornography statute, former RCW 9.68A.070 (1990); (2) the child's mother gave impermissible opinion testimony that E.K. was telling the truth when she said that Sutherby raped her; and (3) his attorney should have moved to sever the child rape charges from the child pornography charges. We agree with Sutherby that the proper unit of

prosecution under former RCW 9.68A.070 is one for contemporaneous possession of child pornography in the same location. And we agree that the trial court erred when it allowed the child's mother's opinion testimony. Accordingly, we reverse and remand for a new trial on the first degree child rape and child molestation charges. But because our review of the record clearly establishes that the error in admitting the mother's improper opinion testimony did not affect the jury's deliberations on the pornography charges, we affirm and merge those convictions and remand for resentencing on one count of possession of depictions of minors engaged in sexually explicit conduct.

FACTS

BACKGROUND

The State alleged the following facts. On Christmas Eve, Sutherby crawled into bed with his five-year-old granddaughter, E.K., and inserted his finger repeatedly into her vagina. E.K. told her grandmother the next day that her genitals hurt, and she expressed fear at the prospect of spending more time with Sutherby.

Two days later, E.K. also reported the incident to her mother and identified Sutherby as the assailant. E.K.'s mother immediately took E.K. to Dr. Sharon Ahart, who interviewed her and received a similar description of events. Dr. Ahart noted trauma to E.K.'s hymen and irritation to her genitals that may have been caused by rubbing.

Detective Edward McGowan investigated the charge. He eventually arrested Sutherby and read him his *Miranda*¹ rights. With Sutherby's consent, law enforcement seized two of his

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

personal computers from his home. Investigators found dozens of digital files on the computers containing photographs and films depicting pre-pubescent children engaged in sexual acts.

PROCEDURE

The State charged Sutherby by amended information with: (1) one count of first degree child rape; (2) one count of first degree child molestation; and (3) ten counts of possession of depictions of minors engaged in sexually explicit conduct. The trial court consolidated five of the pornography counts into two counts on the ground that the proper unit of prosecution under former RCW 9.68A.070 is per minor and some of the counts related to different images of the same minors. The jury convicted Sutherby on all counts and found sexual motivation on each of the seven counts of possessing depictions of minors engaged in sexually explicit conduct.

In this appeal, we address two issues: (1) what is the proper unit of prosecution under the child pornography statute, former RCW 9.68A.070, and (2) does the trial court's error in allowing E.K.'s mother to give impermissible opinion testimony require reversal of Sutherby's first degree child rape and molestation convictions.

ANALYSIS

UNIT OF PROSECUTION

Sutherby argues that the trial court erred when it ruled that the proper unit of prosecution under former RCW 9.68A.070 was per minor child depicted.² The State charged Sutherby with

² Former RCW 9.68A.070 reads: "A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a class C felony."

10 counts under former RCW 9.68A.070—one count for each of 10 different digital files.³ The trial court held that the proper unit of prosecution was one count for each child who was photographed or filmed and so it consolidated some, but not all, counts because the consolidated counts related to different visual matter depicting the same child. We reverse.

The double jeopardy clause of the Fifth Amendment protects a defendant from being punished multiple times for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). When a defendant is charged with violating one statute multiple times, the proper inquiry for double jeopardy analysis is what “unit of prosecution” the legislature intended. *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998).

For this analysis, the first task is to closely review the statute to determine what act or course of conduct it prohibits. *State v. Root*, 141 Wn.2d 701, 706, 9 P.3d 214 (2000). Sutherby was charged with multiple violations of former RCW 9.68A.070. That statute provides: “A person who knowingly possesses visual or printed matter depicting a minor engaged in sexually explicit conduct is guilty of a . . . felony.” And the legislature defined “visual or printed matter” as “any photograph or other material that contains a reproduction of a photograph.” RCW 9.68A.011(2) (emphasis added).

The debate here focuses on the legislature’s use of the word “any.” Sutherby argues that “any” means “one or more,” and that, applying this definition, possessing child pornography at

³ The parties did not make the photographic exhibits part of the appellate record and we find no clear expression that the counts relate to different visual matter. But the file names are listed at Clerk’s Papers 111-12, and an independent review of Exhibit Five, the entire seized contents of Sutherby’s computer, reveals that each count related to a different digital file. And each digital file contained different visual matter. Counts six and seven relate to different portions of the same film, and counts nine and ten relate to different photographs of the same girl. The trial court consolidated those counts and so the question of whether they constituted the same criminal conduct was not before that court.

any one time and general location is typically⁴ a single unit of prosecution, regardless of the quantity of material possessed. The State argues that “any” means “one” and that under this definition each distinct material, such as a photograph, film, or digital file, is one unit.

“The word ‘any’ has troubled many courts.” *United States v. Reedy*, 304 F.3d 358, 365 n.7 (5th Cir. 2002). It denotes a full spectrum of quantities, including: (1) one; (2) one, some, or all regardless of quantity; (3) one or more; (4) great, unmeasured, or unlimited in amount; and (5) all. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976). The placement of the word in RCW 9.68A.011(2) provides no guidance as to the legislature’s intended use in this context. The statute is equally sensible using the acceptable dictionary definitions of (1) one, (2) one, some or all, or (3) one or more. Under these readings, the legislature may have intended that the statute ban the possession of (1) one photograph or other material that contains a reproduction of a photograph; (2) one, some, or all, regardless of quantity, photographs or other material containing a reproduction of a photograph; or (3) one or more photographs or other material containing a reproduction of a photograph. A reading of the statute’s plain meaning fails to reveal the legislature’s intended answer to the question of how many is “any” and, thus, does not set a unit of prosecution.

If the legislature fails to denote the unit of prosecution in the statute, courts must resolve the ambiguity and must do so in favor of the defendant charged with having violated the statute. *Adel*, 136 Wn.2d at 634-35 (citing *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed.

⁴ We do not address special circumstances not present here, such as possession in two distinct locations or at two distinct times. See *Adel*, 136 Wn.2d at 640-41 (Talmadge, J. concurring) (noting that, despite the majority’s holding that misdemeanor possession of marijuana was one unit of prosecution even though two quantities were found in the defendant’s contemporaneous possession, a case-by-case analysis is required to determine whether, for instance, one quantity was in Seattle and another in Spokane or one quantity was consumed before another was possessed).

905 (1955)). In *Bell*, the United States Supreme Court held that when “argumentative skill . . . could persuasively and not unreasonably reach either of the conflicting constructions,” it is improper to resolve the question by turning a single transaction into multiple offenses. *Bell*, 349 U.S. at 83-84. Applying this rule of lenity here to avoid turning a single transaction into multiple offenses, we hold that Sutherby’s violation of the statute by simultaneously possessing multiple materials in the same location is one unit of prosecution for which he is subject to only one conviction.

We are mindful that this decision differs from Division One’s recent opinion in *State v. Gailus*, 136 Wn. App. 191, 147 P.3d 1300 (2006). In that case, the court held that the proper unit of prosecution is each photograph, film, or each digital file containing a photograph or film. But the *Gailus* court was not asked to interpret the word “any.” Its analysis focused instead on whether a compact disc containing multiple images constituted one unlawful act or many. In light of those arguments, we agree that the legislature intended to prohibit possession of the images regardless of the method or medium used to store them. Because *Gailus*’s narrow unit of prosecution ruling does not address the arguments Sutherby raises, it does not apply here.⁵ Under our reading of the statute, Sutherby may only be convicted of one count of possession of depiction of a minor engaged in sexually explicit conduct. Thus, Sutherby’s convictions on Counts 3, 4, 5, 8, 9, 11, and 12 merge and we remand to the trial court for resentencing on a single count.

⁵ Sutherby also asserts that the trial court violated his right to a jury trial by finding the fact of the child victims’ identity in order to determine the unit of prosecution. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, besides the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Because we hold that the time and place of possession determines the number of units of prosecution (charges), we do not address this issue.

MOTHER'S TESTIMONY

Sutherby also argues that E.K.'s mother's testimony—that her daughter was not lying about Sutherby raping her—deprived him of his right to a jury trial. At trial, E.K.'s mother impermissibly commented on methods she used to determine her daughter's credibility and trained the jury to look for a particular mannerism during E.K.'s testimony to determine whether she was telling the truth.

The testimony at issue follows in full:

Q And have you taught [E.K.] about telling the truth and the consequences?

A Yes.

Q And how have you done that?

A How?

Q Yeah, what kind of conversations?

A Just -- she just knows it's wrong to lie and that she will be punished and you get time outs. She knows it can hurt people and causes problems and it's for her safety too.

Q Can you tell when she has told a fib?

A Yeah.

Q How do you tell that?

A She makes kind of a -- tries not to smile, but makes a half smile when she is telling a fib.

Q Ever seen that face or reaction when she was talking about what happened with [Sutherby]?

A No.

1 Report of Proceedings at 33-34. We agree with Sutherby that this testimony was wholly improper and deprived him of his right to have the jury determine E.K.'s credibility.

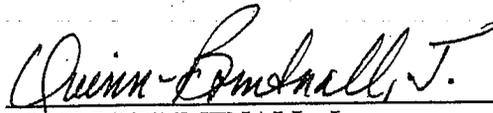
Generally, no witness may offer testimony in the form of an opinion regarding a witness's credibility; such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Opinion testimony is testimony based on one's belief or idea rather than on direct knowledge of

the facts at issue. *Demery*, 144 Wn.2d at 760 (quoting BLACK'S LAW DICTIONARY 1486 (7th ed. 1999)).

E.K.'s mother offered her opinion on her daughter's credibility by telling the jury that E.K. makes a half smile when she lies, but did not make a half smile when she accused Sutherby of rape. Central issues at trial included the assailant's identity and E.K.'s credibility. E.K.'s mother expressed her opinion about the truth of E.K.'s claim of rape by stating that E.K. had certain mannerisms indicating when she was lying. In essence, E.K.'s mother (1) told the jury that E.K. told the truth when she related the incriminating events to her and (2) gave it information that she claimed would enable the jurors to evaluate E.K.'s testimony: that if E.K. made a half smile while testifying she was not simply nervous, but was fibbing. E.K.'s mother's testimony regarding her daughter's credibility was wholly improper.

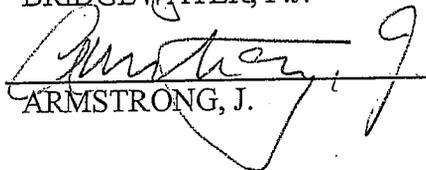
In some instances, a witness who testifies to his belief that the defendant is guilty is merely stating the obvious, such as when a police officer testifies that he arrested the defendant because he had probable cause to believe he committed the offense. *See, e.g., State v. Kirkman*, 2007 Wash. LEXIS 210 (Wash. Apr. 5, 2007). Here, however, E.K.'s mother's testimony was neither cumulative nor innocuous and the error in admitting it deprived Sutherby of his right to have the jury determine E.K.'s credibility based on its knowledge and experience without regard to the mother's practice of judging E.K.'s veracity by the child's smile. The error affected the jury deliberations and was not harmless.

Accordingly, we reverse Sutherby's first degree child rape and first degree child molestation convictions and remand for retrial on counts one and two.⁶


QUINN-BRINTNALL, J.

We concur:


BRIDGEWATER, P.J.


ARMSTRONG, J.

⁶ In his direct appeal and consolidated personal restraint petition, Sutherby also argues that he received ineffective assistance of counsel because his attorney did not move to sever the counts of child rape and sexual molestation from the counts of possession of depictions of minors engaged in sexually explicit conduct. Our decision obviates the need to address these issues.