

No. 94185-8

THE SUPREME COURT OF WASHINGTON

In re Personal Restraint of:

TODD DALE PHELPS,

Review from Court of Appeals, Division Two, Case No. 48011-5-II

Petitioner's Supplemental Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT1

 A. “GROOMING” IS A COMMONLY UNDERSTOOD
 CONCEPT THAT DOES NOT REQUIRE EXPERT
 TESTIMONY1

 1. “Grooming” Is Within The Average Person’s
 Understanding1

 2. Because Grooming Is Within A Jury’s Common
 Understanding, Expert Testimony Is Unnecessary10

 B. PROSECUTORS DO NOT COMMIT FLAGRANT OR ILL-
 INTENTIONED MISCONDUCT SIMPLY BECAUSE THEIR
 CONDUCT DOES NOT ANTICIPATE AND CONFORM
 WITH FUTURE CHANGES IN THE LAW11

 C. PROSECUTORIAL ERROR IS THE CORRECT STANDARD
 TO EVALUATE PROSECUTOR’S CONDUCT15

IV. CONCLUSION.....20

TABLE OF AUTHORITIES

Washington Cases

In re Det. of Coe, 160 Wn. App. 809, 250 P.3d 1056 (2011).....10

In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004).....16

Marchel v. Bungler, 13 Wn. App. 81, 533 P.2d 406 (1975).....16

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012).....12, 15, 18

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).....12

State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003).....12

State v. Kwan Fai Mak, 105 Wn.2d 692, 718 P.2d 407 (1986)12

State v. Slighte, 157 Wn. App. 618, 238 P.3d 83 (2010)13

State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997).....12

State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015).....13, 14, 15, 18

Other State Cases

People v. Vara, 68 N.E.3d 1018 (Ill. App. 2016)10

State v. Fauci, 917 A.2d 978, 282 Conn. 23 (2007)18

State v. Leutschaft, 759 N.W.2d 414, 2009 Minn. App. LEXIS 18 (2009).....17

State v. Plain, 898 N.W.2d 801, 4, 2017 Iowa Sup. LEXIS 80, (2017)17

State v. Sherman, 378 P.3d 1060, 305 Kan. 88 (2016).....17

State v. Williams, 204 Conn. 523, A.2d 653 (1987)17, 18

Other State Statutes

720 ILCS 5/11-259

Other Rules or Authorities

ER 70210

RAP 9.10.....14

WAC 181-88-060.....9

Webster’s Third New International Dictionary16, 17

Boy Scouts of America, Volunteer Outcomes Study Fact Sheet (2003)
<http://www.scouting.org/filestore/marketing/pdf/factsheet.pdf>.....8

Boy Scouts of America, *Youth Protection, How to Protect Your Child From Child Abuse: A Parent’s Guide*.....8

Boy Scouts of America, Youth Protection Training
www.scouting.org/Training/YouthProtection.aspx8

Coronation Street's child grooming plot caused 'heated debate' among writers, ITV Report, February 16, 20177

Coronation Street's Lucy Fallon: Acting out child grooming plot is 'horrific', The Press, April 18, 20177

Devika Agarwal, *Child grooming: India must take measures to protect children from online sexual abuse*, Firstpost, May 11, 20175

FMT Reporters, *Police draft new law against sexual grooming of children*, Free Malaysia Today, June 25, 2016`

Harriet Sokmensuer, “*Ex-Teacher Allegedly ‘Groomed’ Missing 15-Year-Old Student Who May Have Disappeared with Him: Lawyer*”, People Magazine, March, 16, 20172, 3

Harrison Grimwood, *Woman accused of grooming child for prostitution named Most Wanted*, Tulsa World, April 4, 20173

How my experience of child grooming still haunts me as an adult, Marie Claire, August 25, 20176, 7

Lisa Yanick-Jonaitis, *Mark Ranzenberger, ex-CMU journalism professor, had child porn, how-to guide for grooming young children, police say*, The Oakland Press, May 21, 20164

Lynn Emmerman, *Pedophilia: A Sickness That Tears At Kids’ Trust*, Chicago Tribune, May 28, 19852

Man admitted grooming child on Facebook, Clare Champion (date unknown)6

New laws aim to provide greater protection against grooming and child pornography, Irish Examiner, February 22, 20175

Pei-Sze Cheng, Evan Stulberger, and Dave Manney, *I-Team: Popular Online Gaming Site for Kids Is Breeding Ground for Child Sex Predators, Mother Says*, NBC New York, April 6, 2017 3-4

Stan Finger, *Human trafficking cases soar in Wichita*, The Wichita Eagle, November 29, 2015.....4

State of Washington, Office of Superintendent of Public Instruction, *Commercial Sexual Exploitation of Children & Human Trafficking*, August 6, 20158

State of Washington, Office of Superintendent of Public Instruction, *Commercial Sexual Exploitation, Abuse and Trafficking of Children and Youth, A Prevention and Intervention Resource Guide for Educators, Parents and Community Members*.....8

Thomas Fox-Brewster, *This \$1 Billion App Can’t ‘Kik’ Its Huge Exploitation Problem*, Forbes, August 3, 2017.....3

United Nations Office of the High Commissioner for Human Rights, *Protection of children from sexual exploitation in the context of major sports events*, March 11, 20147

When2becomes4, *Online grooming and parents invading children’s privacy*, July 24, 20176

I. ISSUES

- A. Is grooming a topic that requires testimony from an expert witness?
- B. In a case of first impression can a prosecutor's actions be deemed flagrant and ill-intentioned?
- C. Should this Court stop using prosecutorial misconduct to describe prosecutor's behavior and adopt the more accurate description of prosecutorial error?

II. STATEMENT OF THE CASE

The State relies upon the statement of the case submitted in its Petition for Discretionary Review. The State will supplement the facts as necessary throughout its argument.

III. ARGUMENT

A. "GROOMING" IS A COMMONLY UNDERSTOOD CONCEPT THAT DOES NOT REQUIRE EXPERT TESTIMONY.

The court of Appeals held that the concept of "grooming" is beyond the jury's common understanding and requires expert testimony before the idea can be discussed in closing argument. Because "grooming" in the context of child sexual exploitation is commonly understood in modern society, this Court should reject Division Two's contrary conclusion.

1. "Grooming" Is Within The Average Person's Understanding.

In the context of the sexual abuse of children, "grooming" refers to abuser's manipulation of the child and his or her family in order to facilitate

access to the child and to make the child more compliant for the purposes of sexual contact. As technology has advanced to allow children unsupervised contact with others online, concerns about grooming have pushed the issue into legislation, training materials, and media reports throughout the United States and beyond.

More than 30 years ago, national media outlets were discussing the concept of grooming. In 1985 The Chicago Tribune published an article regarding pedophilia. Lynn Emmerman, *Pedophilia: A Sickness That Tears At Kids' Trust*, May 28, 1985.¹ The article states, “These ‘friendly molesters’ become acquainted with their target victim and the victim’s parents, gaining their trust while secretly grooming the child as a sexual partner.” *Id.* More recently, in media outlets as diverse as People Magazine, Forbes, The Oakland Press, The Tulsa World, NBC New York, and The Wichita Eagle have published news stories about “grooming.”

People Magazine’s headline from March 16, 2017 read, “Ex-Teacher Allegedly ‘Groomed’ Missing 15-Year-Old Student Who May Have Disappeared with Him: Lawyer.”² The People Magazine article states,

¹ This article can be found at http://articles.chicagotribune.com/1985-05-28/features/8502030203_1_molesting-child-pornography-business-pedophiles (last visited Sept. 29, 2017).

² This article is authored by Harriet Sokmensuer and can be found at <http://people.com/crime/missing-tennessee-teen-high-school-teacher-groomed-her/> (last visited Sept. 29, 2017).

But her family’s lawyer, Jason Whatley, says whether she went willingly or not, she is still a victim. ‘This is a 15-year-old girl – and if they are together, she has been groomed by a 50-year-old authority figure, so how could we even define ‘willingly’?’

Id.

The Tulsa World used the term “grooming” in a story, on April 4, 2017 about a woman dealing child pornography and encouraging a 15-year-old girl to engage in prostitution. Harrison Grimwood, *Woman accused of grooming child for prostitution named Most Wanted*, Tulsa World, April 4, 2017.³ The subheadline simply states, “Police allege she groomed teenage girl for prostitution.” *Id.*

Forbes Magazine did an in-depth article about the problems with the Kik cellular phone messaging app and how easy it was for child predators and those peddling child pornography to use it. Thomas Fox-Brewster, *This \$1 Billion App Can’t ‘Kik’ Its Huge Exploitation Problem*, Forbes, August 3, 2017.⁴ The article mentions that streaming apps found on Facebook and Twitter are now being used to potentially groom children. *Id.* Similarly, NBC did a story regarding Roblox, a popular gaming website for children, warning of the dangers of the online chat function. Pei-Sze Cheng,

³ This article can be found at http://www.tulsaworld.com/news/crimewatch/woman-accused-of-grooming-child-for-prostitution-named-most-wanted/article_e5a7d7f7-c042-589b-800f-b4a2bbc30d96.html (last visited Sept. 29, 2017).

⁴ This article can be found at <https://www.forbes.com/sites/thomasbrewster/2017/08/03/kik-has-a-massive-child-abuse-problem/#3b1834ce1a14> (last visited Sept. 29, 2017).

Evan Stulberger, and Dave Manney, *I-Team: Popular Online Gaming Site for Kids Is Breeding Ground for Child Sex Predators, Mother Says*.⁵ In that story, the mother of an eight-year-old boy tells the reporters that “she believes her son was ‘groomed’ by a sexual predator who was lurking in the virtual adventure world.” *Id.*

In an article about human trafficking cases in Wichita, Kansas, a woman explains that girls typically get into human trafficking through the grooming process, “and that can happen to anybody.” Stan Finger, *Human trafficking cases soar in Wichita*, *The Wichita Eagle*, November 29, 2015.⁶ In 2016, the Oakland Press ran an article regarding a former journalism professor who created a “how-to guide” for grooming children to participate in sexual acts. Lisa Yanick-Jonaitis, *Mark Ranzenberger, ex-CMU journalism professor, had child porn, how-to guide for grooming young children, police say*, *The Oakland Press*, May 21, 2016.⁷

The prevalence of the term “grooming” is not limited to America media. A 2017 newspaper article from India describes grooming as the

⁵ This article can be found at <http://www.nbcnewyork.com/news/local/Video-Game-Warning-ROBLOX-Child-Sex-Predator-Online-Site-Investigation-What-to-Know-418483173.html> (last visited Sept. 29, 2017).

⁶ This article can be found at <https://www.kansas.com/news/local/crime/article47100755.html> (last visited Sept. 29, 2017).

⁷ This article can be found at <http://www.theoaklandpress.com/article/OP/20160520/NEWS/160529969> (last visited Sept. 29, 2017).

“generally understood ... practice of befriending and forming an emotional bond with a child by a person with the objective of sexual abuse.” Devika Agarwal, *Child grooming: India must take measures to protect children from online sexual abuse*, Firstpost, May 11, 2017.⁸ The article discusses child grooming, online aspects of grooming, and what needs to be done in regards to laws to protect children and punish those who prey upon them. *Id.*

Similarly, a 2016 Malaysian newspaper article discusses the police drafting laws to make sexual grooming of children a criminal offense. *Police draft new law against sexual grooming of children*, Free Malaysia Today, June 25, 2016.⁹ A similar news article in the Irish Examiner discusses child grooming laws in Ireland. *New laws aim to provide greater protection against grooming and child pornography*, Irish Examiner, February 22, 2017.¹⁰ The article simply states, “Legislation providing stronger protection for children against grooming and child pornography has become law.” *Id.* It is clear from the article that the author believes the

⁸ This document can be found at <http://www.firstpost.com/india/child-grooming-india-must-take-measures-to-protect-children-from-online-sexual-abuse-3438528.html> (last visited Oct. 5, 2017).

⁹ This document can be found at <http://www.freemalaysiatoday.com/category/nation/2016/06/25/police-draft-new-law-against-sexual-grooming-of-children/> (last visited Sept. 29, 2017).

¹⁰ This document can be found at <http://www.irishexaminer.com/breakingnews/ireland/new-laws-aim-to-provide-greater-protection-against-grooming-and-child-pornography-778445.html> (last visited Sept. 29, 2017).

readership needs no further explanation as to what grooming is, that the term is self-explanatory. Also in Ireland, the Clare Champion ran an article simply titled, “MAN ADMITTED [sic] GROOMING CHILD ON FACEBOOK”, which detailed how a man planned to travel to another city to meet a 10-year-old boy. *Man admitted grooming child on Facebook*, Clare Champion (date unknown).¹¹

Grooming is also discussed on message board articles on popular parent websites, such as BabyCenter’s Australia community. When2becomes4, *Online grooming and parents invading children’s privacy*, July 24, 2017.¹² The thread is a post that discusses grooming and links to a story about child grooming. *Id.*

In the United Kingdom grooming is the topic of magazine articles and television subplots. An article in Marie Claire gives readers a glimpse of grooming from a victim’s point of view. *How my experience of child grooming still haunts me as an adult*, Marie Claire, August 25, 2017.¹³ The author tells the audience she experienced “textbook grooming.” *Id.* The article details her experience as a teenage girl being groomed by an adult

¹¹ This document can be found at <http://clarechampion.ie/man-groomed-child-on-facebook/> (last visited Sept. 29, 2017),

¹² This document can be found at <https://www.babycenter.com.au/thread/3259106/online-grooming-and-parents-invading-childrens-privacy->

¹³ This article can be found at <http://www.marieclaire.co.uk/opinion/child-grooming-531126> (last visited Sept. 29, 2017).

assistant basketball coach. *Id.* Also in the United Kingdom, a popular soap opera, Coronation Street, had an entire subplot this year on grooming, which was the subject of many news articles. *Coronation Street's child grooming plot caused 'heated debate' among writers*, ITV Report, February 16, 2017¹⁴; *Coronation Street's Lucy Fallon: Acting out child grooming plot is 'horrific'*, The Press, April 18, 2017.¹⁵

Indeed, the grooming of children for sexual abuse is such a well-understood world-wide phenomenon that it was the topic of side discussions at the 25th Session of the Human Rights Council of the United Nations Office of the High Commissioner for Human Rights. *Protection of children from sexual exploitation in the context of major sports events*, March 11, 2014.¹⁶ The discussion at the side event was the protection of children from sexual exploitation at major sport events. *Id.* One participant acknowledged that “child grooming is an emerging phenomenon in Poland...” *Id.*

People who work with children also come in contact with the concept of grooming through education, such as mandated training on the

¹⁴ This article can be found at <http://www.itv.com/news/2017-02-16/coronation-streets-child-grooming-plot-caused-heated-debate-among-writers/> (last visited Sept. 29, 2017).

¹⁵ This article can be found at http://www.yorkpress.co.uk/leisure/showbiz/15230404.Coronation_Street_s_Lucy_Fallon_Acting_out_child_grooming_plot_is_horrific/ (last visited Sept. 29, 2017).

¹⁶ This article can be found at <http://www.ohchr.org/EN/Issues/Children/Pages/SideEventHRC25.aspx>

topic. For example, to volunteer with Boys Scouts of America¹⁷ one must complete Youth Protection training every two years.¹⁸ The Boy Scout's Youth Protection guide explains grooming and how it relates to sexual abuse of children by adults. *Youth Protection, How to Protect Your Child From Child Abuse: A Parent's Guide*.¹⁹

Further, in Washington State educators are provided training materials regarding preventing sexual abuse, commercial sexual abuse, and exploitation of minors. The Office of Superintendent of Public Instruction Provides a link to a guide about the commercial sexual exploitation of children on its website.²⁰ The guide explains that most perpetrators of commercial sex abuse gain the trust of their victims through grooming. *Commercial Sexual Exploitation, Abuse and Trafficking of Children and Youth, A Prevention and Intervention Resource Guide for Educators, Parents and Community Members*.²¹

¹⁷ A 2003 Volunteer Outcome Study cites there to be more than 1.2 million adult volunteers in the Boys Scouts of America organization. <http://www.scouting.org/filestore/marketing/pdf/factsheet.pdf> (last visited Sept. 29, 2017).

¹⁸ This article can be found at <http://www.scouting.org/Training/YouthProtection.aspx> (last visited Sept. 29, 2017).

¹⁹ This pamphlet can be found at http://www.scouting.org/filestore/pdf/100-014_WEB.pdf (last visited Sept. 29, 2017).

²⁰ <http://www.k12.wa.us/safetycenter/CSEC/default.aspx> (last visited Sept. 29, 2017).

²¹ This guide can be found at <http://www.k12.wa.us/safetycenter/CSEC/pubdocs/Sexual-Exploitation-and-Trafficking-of-Children-and-Youth.pdf> (last visited Sept. 29, 2017) (Characteristically, the grooming process with the child begins with seemingly harmless touching, such as hugging, massages, exposure, and questionable touching. The sex offender usually seeks a child who craves affection or attention and makes that child feel special by spending a lot of

Lawmakers also use “grooming” in the crafting of statutes. Indeed, an Illinois law makes grooming a criminal offense,

(a) A person commits grooming when he or she knowingly uses a computer on-line service, Internet service, local bulletin board service, or any other device capable of electronic data storage or transmission to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure, or entice, a child, a child’s guardian, or another person believed by the person to be a child or a child’s guardian, to commit any sex offense as defined in Section 2 of the Sex Offender Registration Act, to distribute photographs depicting the sex organs of the child, or to otherwise engage in any unlawful sexual conduct with a child or with another person believed by the person to be a child. As used in this Section, “child” means a person under 17 years of age.

720 ILCS 5/11-25. And in this state, the Washington Administrative Code uses the term “grooming,” without further definition, to define “sexual misconduct” in regulations pertaining to educators’ mandatory disclosure obligations: “Sexual misconduct’ means...(d) [a]ny activities determined to be grooming behavior for purposes of establishing a sexual relationship.” WAC 181-88-060. That the term “grooming” is left undefined by legislatures and regulators demonstrates that its meaning is considered to be within the public’s common knowledge. Indeed, when analyzing its own grooming statute, Illinois appellate court observed,

In the context of sexual abuse of a child, grooming is commonly understood as a method of building trust with a

time with him or her and giving gifts and money. But all young children are vulnerable to sexual abuse because of their innocence and total trust in and dependence upon adults.”).

child or an adult around the child in an effort to gain access to the child, make the child a cooperative participant in the abuse, and reduce the chance that the abuse is detected or disclosed.

People v. Vara, 68 N.E.3d 1018, 1025 (Ill. App. 2016).

2. Because Grooming Is Within A Jury's Common Understanding, Expert Testimony Is Unnecessary.

The purpose of expert testimony is to assist the trier of fact if the testimony is of such a nature that is technical, scientific, or other specialized knowledge possessed by such an expert. ER 702; *In re Det. of Coe*, 160 Wn. App. 809, 824, 250 P.3d 1056 (2011). Accordingly, expert testimony on a commonly understood topic should not be admitted by the trial court. *In re Det. of Coe*, 160 Wn. App. at 824.

Since the 1980s, the term grooming has been used without much further explanation in news articles across the United States and the world over. It is a term so commonly understood that lawmakers and regulators use it without definition, which necessarily signifies they believe the plain language meaning is sufficient notice to the average citizen of what the word and law means.

In the last 30 years the term grooming has become part of our lexicon. It is an activity within the common understanding of those who make up our jury pools. Indeed, comments by jurors in Phelps' case established broad familiarity with the concept. VRP 113-17. Jurors 8, 9, 10,

21, 39, and 46 actively discussed what grooming was during voir dire. *Id.*

In one example, Juror 9 stated,

Well, could establish a relationship with the family, doesn't have to be just the victim, be the victim's family, just get everybody to trust in you. Said something about a six-year-old before. If a six-year-old said they did this, number 3, nobody would believe them. This perpetrator has gained the trust of the people around the victim.

VRP 114. The jurors understood, just as the general public does, that grooming is manipulative behavior to make a child and/or their family more compliant, thereby allowing a person the opportunity to offend against a more willing victim.

Grooming does not require expert testimony. It is not a magic word; a prosecutor, defense attorney, lay witness, expert witness, all could as easily use the word “manipulate” to mean the same thing because the two behaviors and words are analogous. This Court should hold that introduction of the topic of grooming is within the sound discretion of the trial court and does not require expert testimony for it to be admissible.

B. PROSECUTORS DO NOT COMMIT FLAGRANT OR ILL-INTENTIONED MISCONDUCT SIMPLY BECAUSE THEIR CONDUCT DOES NOT ANTICIPATE AND CONFORM WITH FUTURE CHANGES IN THE LAW.

To prove prosecutorial error, it is the defendant’s burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v.*

Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). The standard of review in prosecutorial error cases depends on whether the defendant lodged a contemporaneous objection to the alleged misconduct. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If a defendant objects to the alleged error, the inquiry is whether the error “resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *Emery*, 174 Wn.2d at 760 (internal citations omitted).

In contrast, a defendant’s failure to object waives the alleged error, “unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Id.* at 760-61, *citing State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). A defendant must show the reviewing court, “(1) no curative instructions would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Id.* at 761 (internal quotations and citations omitted).

Phelps’ trial counsel did not object to the deputy prosecutor using the term grooming throughout his closing argument. Thus, to demonstrate reversible error, Phelps must show that use of the term was flagrant and ill-

intentioned. The Court of Appeals acknowledged that the question of whether grooming required expert testimony was a case of first impression in Washington State. The Court of Appeals then determined grooming did require expert testimony. Despite acknowledging that no Washington court had ever so held, the Court of Appeals concluded the deputy prosecutor's use of the word "grooming" without expert testimony was "flagrant and ill-intentioned" misconduct. It is impossible to reconcile these two conclusions.

A defense attorney is not found to be ineffective for failing to file a motion to suppress evidence in anticipation of future changes in the law. *State v. Slighte*, 157 Wn. App. 618, 625, 238 P.3d 83 (2010). There is no requirement that defense attorneys be able to predict changes in the law. *Slighte*, 157 Wn. App. at 625. Such a standard would be impossible for any attorney to meet. Why then is the Court of Appeals imposing such a standard for prosecutors here?

Prosecutors recognize the dual role they play, prosecuting those who have broken our laws while also being "the representative of the people in a quasijudicial capacity in a search for justice." *State v. Walker*, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). A prosecutor cannot fulfill this role if he or she secures a conviction where the accused's right to a fair trial has been

violated. *Walker*, 182 Wn.2d at 476. Such a conviction would “undermine the integrity of our entire criminal justice system.” *Id.*

Recognizing such standards should not require a prosecutor to predict the future or be held to be acting with malice. Here, the deputy prosecutor used the term “grooming” in his closing argument before any Washington court held that he could not do so absent expert testimony on the subject. The deputy prosecutor included grooming on eight of 97 power point slides.²² The deputy prosecutor used the term grooming in a manner that is commonly understood. In each instance, the deputy prosecutor could have replaced “grooming” with “manipulating” or “rendered more compliant” without changing his meaning. It cannot plausibly be argued that expert testimony is necessary for the jury to understand the concept of manipulation. Where “grooming” is commonly understood to mean the same thing in the context of child sexual abuse, why should the result be any different? Would the State be required to produce expert testimony to show Phelps’ was manipulating AA and her family to facilitate his sexual misconduct?

The deputy prosecutor provided a closing argument drawing together eight days’ worth of testimony. As part of that argument, he used

²² The State is filing a RAP 9.10 motion to complete the record with the entire power point that was shown during closing argument. The State realized that only the eight slides containing grooming were submitted to the Court instead of all 97 slides.

the term groom/grooming to group together Phelps' manipulative behaviors. At the time of this argument, there was no case that prevented the deputy prosecutor from using the term groom without the use of expert testimony regarding grooming. Without such an existing standard, the deputy prosecutor's actions cannot be said to be flagrant and ill-intentioned. This Court should hold that when a reviewing court articulates a new standard for the admission of evidence, it cannot conclude that a prior failure to meet such a standard is flagrant and ill-intentioned misconduct.

C. PROSECUTORIAL ERROR IS THE CORRECT STANDARD TO EVALUATE PROSECUTOR'S CONDUCT.

This Court has previously held that in an analysis for prosecutorial misconduct, the courts

do not focus on the prosecutor's subjective intent in committing misconduct, but instead on whether the defendant received a fair trial in light of the prejudice caused by the violation of existing prosecutorial standards and whether that prejudice could have been cured with a timely objection.

Walker, 182 Wn.2d at 478, *citing Emery*, 174 Wn.2d at 762. Yet, where a defendant raises the issue for the first time on appeal, the analysis continues to be whether the prosecutor's actions were so flagrant and ill-intentioned that the prejudice inflicted could not have been cured by an instruction? *Walker*, 182 Wn.2d at 477-78. This inquiry requires the Court to consider

whether a prosecutor *intentionally and maliciously* conducted themselves in such a manner as to infect the defendant's trial with incurable prejudice.

Words matter. As lawyers we are wordsmiths, taught that our choice of words are important to the clarity and meanings of our arguments. A defense attorney who makes an unprofessional error is, at worst, called "ineffective." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). When a judge makes an error or mistake during the course of a trial, we do not call it misconduct, but instead properly refer to the mistake as judicial error. *Marchel v. Bunger*, 13 Wn. App. 81, 84, 533 P.2d 406, 408 (1975). Yet, when a prosecutor makes a mistake during the course of a trial, Washington courts refer to such a mistake, even a non-egregious or inadvertent one, as misconduct.

Misconduct is defined as "intentional wrongdoing: deliberate violation of a rule or law or standard of behavior esp. by a government official : MALFEASANCE...3a: bad conduct improper behavior. Webster's Third New International Dictionary, 1443. While error is defined as

1a: an act or condition of often ignorant or imprudent deviation from a code of behavior...b: an involving an unintentional deviation from truth or accuracy : a mistake in perception, reasoning, recollection, or expression ... c: an act that through ignorance, deficiency, or accident departs from or fails to achieve what should be done...

Webster's Third New International Dictionary, 772. Other courts have recognized the importance of the distinction between the words, "misconduct" and "error," and the effect they have on the reader.

Some courts have drawn a distinction in their analysis between "prosecutorial error" and prosecutorial misconduct, reserving the latter for intentional violations of clear standards, unambiguous obligations, or a rule of professional conduct. *State v. Plain*, 898 N.W.2d 801, 818 n. 4, 2017 Iowa Sup. LEXIS 80, (2017); *State v. Leutschaft*, 759 N.W.2d 414, 418, 2009 Minn. App. LEXIS 18 (2009). The Kansas Supreme Court concluded that "prosecutorial error" is the correct standard for reviewing prosecutors' behavior in the context of a criminal appeal. *State v. Sherman*, 378 P.3d 1060, 1074, 305 Kan. 88 (2016).

Other courts have also addressed the policy reasons why courts should avoid using the words "prosecutorial misconduct." For example, the Supreme Court of Connecticut explained,

The use of the term "prosecutorial impropriety," when reviewing allegedly improper statements by a prosecutor at trial, is more appropriate than the traditional term of "prosecutorial misconduct" in light of our analysis under *State v. Williams*, 204 Conn. 523, 529 A.2d 653 (1987). Prosecutors make countless discretionary decisions under the stress and pressure of trial. A judgment call that we later determine on appeal to have been made improperly should not be called "misconduct" simply because it was made by a prosecutor. To label what is merely improper as misconduct is a harsh result that brands a prosecutor with a mark of malfeasance when his or her actions may be a

harmless and honest mistake. Though our analysis does not change, this new terminology better reflects the actions of a prosecutor under *Williams* because the first part of our analysis looks at whether the actions of the prosecutor are improper rather than the effects of those actions on the fairness of the trial.

State v. Fauci, 917 A.2d 978, 982 n. 2, 282 Conn. 23 (2007).

Similarly, in *Walker* and *Emery* this Court has indicated that the analysis should be focused on the error and the resulting prejudice from the error, not a prosecutor's subjective intent. *Walker*, 182 Wn.2d at 478; *Emery*, 174 Wn.2d at 762. Since the proper analysis focusses on the error, this Court should use that word instead of misconduct when analyzing the prosecutor's behavior in a criminal appeal or post-conviction action. Misconduct denotes malfeasance and intentional wrongdoing. The majority of errors prosecutors make in the course of trials are simply that, errors. Prosecutors make mistakes based upon misapplying a particular rule or case, being ignorant of a law or rule, or unintentionally making any number of mistakes that can happen during a dynamic trial. None of this behavior rises to the level of intentional wrongdoing or misconduct.

The deputy prosecutor in this case should be judged under a prosecutorial error standard. While the State does not agree that error was committed, if it was improper to argue grooming, this Court should be analyzing whether the improper argument caused incurable prejudice. This Court should not perpetuate the improper labeling of errors and mistakes as

misconduct. To do so unfairly targets prosecutors' behavior as misconduct when other attorneys' similar behavior is simply error.

Words matter. The continued use of "prosecutorial misconduct" erodes the public's confidence in our criminal justice system. This Court should use the more accurate term "prosecutorial error" and conduct the analysis this Court has already determined proper, focusing on the effect of the error and not the subjective intent of the prosecutor.

//
//
//
//
//
//
//
//
//
//
//
//
//
//
//
//

IV. CONCLUSION

Grooming is a term and concept commonly understood by the average juror and therefore it is not necessary to require expert testimony to discuss grooming. A prosecutor who follows the current confines of the law cannot be said to act flagrantly or with ill-intent in an analysis of prosecutorial (error) misconduct. Finally, this Court should move away from using the inflammatory phrase “prosecutorial misconduct,” as it is a misnomer for most of the behavior classified as such. This Court should adopt the use of “prosecutorial error” for describing and analyzing mistakes and errors committed by prosecutors in the course of their duties.

RESPECTFULLY submitted this 5th day of October, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

October 05, 2017 - 3:03 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 94185-8
Appellate Court Case Title: Personal Restraint Petition of Todd Dale Phelps
Superior Court Case Number: 11-1-00790-6

The following documents have been uploaded:

- 941858_Briefs_20171005145351SC914956_8712.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was Phelps.tod Supp. Brief 94185-8.pdf
- 941858_Motion_20171005145351SC914956_5663.pdf
This File Contains:
Motion 1 - Other
The Original File Name was motion to supp record.phelps.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- eric.eisenberg@lewiscountywa.gov
- lori.cole@lewiscountywa.gov
- suzanne-elliott@msn.com
- suzanne@suzanneelliottlaw.com

Comments:

Other: Motion to Supplement the Record

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20171005145351SC914956