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NO. 69032-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re the Detention of
ZACHARY NELSON,
Appellant.

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BRIEF OF RESPONDENT

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A. INTRODUCTION

Nelson's allegation of prosecutorial misconduct rests entirely on phrasing by the deputy prosecutor that Nelson's trial attorney found to be unobjectionable, which dictates a high standard on appeal that Nelson cannot meet. Moreover, rather than merely failing to object, Nelson's trial counsel willingly engaged in the complained of conduct by using the same phrasing as the prosecutor, which amounts to a waiver of these issues on appeal. The complained of phrasing, in most cases, was simply an informal and colloquial manner of speaking used by experienced trial attorneys in courtrooms every day. Finally, if any error occurred it was harmless because the evidence at trial was overwhelming and sufficient to sustain the jury's verdict of commitment.

B. STATEMENT OF THE ISSUES

Whether phrasing by the deputy prosecutor in a civil commitment proceeding that was not only not objected to at trial but willingly engaged in by defense counsel should result in reversible error on appeal?

C. STATEMENT OF THE CASE

On June 13, 2011, shortly before Zachary Nelson was scheduled to be released on his exceptional juvenile sentence, the State filed a petition

to civilly commit him as a sexually violent predator pursuant to RCW 71.09. CP 1-2.

At the commitment trial, the jury learned that Nelson was born in 1992, making him 20 years old at the time of the trial, and that Nelson first exhibited sexual behavior problems at a very early age. 8RP 150. In 1996, Child Protective Services (CPS) received a referral from a daycare reporting that 4 year old Nelson and another 4 year old boy had their pants down and were fondling one another. 4RP 49. Nelson admitted to daycare providers that he had asked the other boy to put his finger “up his (Nelson’s) butt.” 4RP 49.

In 2000, CPS received another report involving then 9 year old Nelson and a 6 or 7 year old girl. 4RP 50. This referral described Nelson threatening to hurt the girl if she wouldn’t suck his penis. 4RP 50. Nelson has admitted to sexually assaulting this girl, stating that he threatened to punch her in the eye if she wouldn’t perform oral sex on him. Nelson also admitted to performing oral sex on the girl. 4RP 51.

By 2001, Nelson had his first criminal referral. 4RP 52. The incident was investigated by the King County Sheriff’s Office. The investigation stemmed from a report that Nelson had forced a 4 year old boy to perform oral sex on him. 4RP 52. An investigator at CPS interviewed the boy, who described being sexually assaulted by Nelson.

7RP 60-62. The investigator next interviewed Nelson, who admitted that he had asked the boy to suck on his penis and that he had done the same to the boy. 7RP 63-64. This incident was not prosecuted due to Nelson's age at the time of the offense; however, Nelson was referred for a Sexually Aggressive Youth (SAY) evaluation, which found that Nelson had sexual fantasies about younger children and was at moderate to high risk for further sexual misconduct. 4RP 54; 5RP 60; 7RP 64-65. Following the SAY evaluation, Nelson was placed in a series of out-of-home placements at Ryther, Epic Center, and Ruth Dykeman where he was offered sexual deviancy treatment. 4RP 54; Ex. 13 at 13:18 to 14:26.

Shortly after he returned to live with his mother in Shoreline, Nelson's pattern of sexually offending against children resumed. In September of 2006, 5 year old J.S. lived next to Nelson. 7RP 72. One afternoon, J.S. stood with her mother as her mother visited with Nelson's mother in the Nelson's front yard. 7RP 74-76. As the mothers visited, Nelson came out of the house and offered to show J.S. his pet bunny. 7RP 76. He then brought J.S. inside his house and his bedroom to show her another pet. Minutes later, J.S. ran out of Nelson's house shaking and crying. 7RP 77. J.S. told her mother that Nelson had touched her on her "private bottom." 7RP 78. Nelson, who had followed J.S., told J.S.'s mother that J.S. was lying and that he would never do that. 7RP 78.

When interviewed about the incident inside Nelson's bedroom, J.S. described Nelson pulling down her pants and underwear when she wasn't looking and touching her privates with his fingers. 4RP 64. J.S. described Nelson also pulling down his pants and underwear and showing her his penis. 4RP 64. When King County Sheriff's Office Detective Jeanne Schneider interviewed Nelson, he initially adamantly denied sexually assaulting J.S. Ex. 6, 23-24. Nelson eventually confessed that he had touched J.S. under her underwear with one finger and exposed himself to her; however, he claimed that J.S. had voluntarily pulled her own underwear down while inside his bedroom. Ex. 6, 24-25. Nelson denied touching J.S. on any other occasion and expressed anger that her parents would now prevent him from seeing her again. Ex. 6, 26-27. Post sentencing on this offense, which resulted in a conviction for one count of Child Molestation in the First Degree under King County cause number 07-8-02745-1, Nelson admitted to molesting J.S. on at least one other occasion. 7RP 37. Nelson described "finding" J.S. sleeping in her bedroom after J.S.'s mother had left J.S. in Nelson's care. Ex. 14 at 1:23. Nelson claimed that she was wearing only a T-shirt and that she had no pants or underwear on. 7RP 38-40; Ex. 14 at 1:54. Nelson admitted that he touched J.S.'s vagina, felt horny while doing so, had an erection, and that he only stopped touching her when she almost woke up. 7RP 38-42.

Nelson described it as “positive” that he got to touch J.S. while she was sleeping. 7RP 42.

Nelson’s sexual offending against his neighbors was not limited to just J.S. On the evening of June 1, 2007, around midnight, 15 year old Nelson crept into the home of the neighbors who lived on the other side of his mother’s house. Ex. 1, 1. Entering through the unlocked back door, Nelson was intent on finding two little boys who lived in the home – 3 year old J.W. and 4 year old J.W. Ex. 1, 1. Nelson first went to the little boys’ bedroom. Ex. 1, 2. When he found the boys’ room empty, Nelson continued to their mother’s bedroom. Ex. 1, 2; Ex. 14 at 23:18 to 24:00. After entering the mother’s room, and standing inside the mother’s bedroom for 10 to 15 seconds for his “eyes to adjust” to the darkness, Nelson saw the boys sleeping next to their mother in her bed. Ex. 1, 2. Nelson, “trying to be quiet because he didn’t want to wake them,” walked to the bed and grabbed the boy closest to him, 4 year old J.W., who was sleeping on his stomach next to his mother. Ex. 1 at 1; Ex. 14 at 23:18 to 24:00. Gripping J.W.’s calves, Nelson yanked J.W. away from his mother “so he wouldn’t move and wake her up.” Ex. 1, 2. Nelson flipped J.W. onto his back, pulled J.W.’s pants and underwear down, fondled J.W.’s penis, and then digitally penetrated J.W.’s anus. Ex. 1, 2; 3RP 33, 34.

Nelson's sexual assault on J.W. was interrupted by 19 year old Anthony Johnson, an older brother of the victim, who unbeknownst to Nelson was home and had heard a noise coming from his mother's room. 3RP 34. When Johnson entered his mother's room, he was horrified to find Nelson standing in his mother's room, next to her bed sexually assaulting his little brother, J.W. 3RP 34.

King County Sheriff's Deputies responded to the scene and placed Nelson under arrest. 3RP 33; 4RP 5-6. During their search of Nelson, police removed a small fishing bait jar containing a yellow liquid, a battery operated razor handle that vibrated, and several pages of pornographic images of adult females from his pockets. 3RP 35. Post sentencing, Nelson admitted that the small jar contained oil that he intended to use to masturbate with. 4RP 57. Nelson also admitted that he brought the vibrating razor handle to insert in his or the victim's anus. 4RP 58; Ex. 14 at 28:40 to 29:01.

Post Miranda, Nelson admitted that he had sexually assaulted both boys on previous occasions. Nelson described the sexual assaults taking place inside or near a shed in Nelson's backyard. Nelson admitted that the boys would play there because Nelson kept some tennis and soccer balls there that the boys liked to play with. 4RP 15, 16; Ex. 1, 3; Ex. 6, 11. Nelson told the investigating detective that he had a problem with

children, but claimed that he had dealt with it and was done with it. Ex. 6, 14. He admitted that he had been having thoughts about kids all his life. Ex. 6, 14, 15. Initially, Nelson denied sexually assaulting the boys at any other location, however, post sentencing, Nelson admitted that he had assaulted J.W. on another occasion inside his (Nelson's) home. Ex. 14 at 18:20 to 19:38. Nelson claimed that J.W.'s mother had dropped J.W. off at Nelson's house wearing only a big shirt – no pants or underwear. 4RP 61. Nelson fondled J.W.'s penis, but stopped when his (Nelson's) mother came into the room and asked him what he was doing. 4RP 61.

In August of 2007 while Nelson was in custody on the child rape and molestation charges against J.S., J.W., and J.W., 15 year old B.J. reported to the police that he had been sexually assaulted by Nelson. 4RP 68. B.J. reported that Nelson attacked him in a broom closet. 4RP 68. Nelson approached B.J. from behind, put his left arm around B.J.'s throat, and held B.J.'s right wrist with his left hand. 4RP 68. Nelson then reached inside B.J.'s underwear and digitally penetrated B.J.'s anus. 4RP 68. When doctors examined B.J., they observed an abrasion below his left shoulder blade, an abrasion inside his right forearm, a laceration on his right wrist, and redness and swelling around his anus. 4RP 69-70. Although he pled guilty to the reduced charge of assault in the fourth degree, Nelson has denied assaulting B.J. Ex. 26; 4RP 70.

For his crimes against his neighbor children, Nelson pled guilty to one count of Child Molestation in the First Degree against J.S. and one count of Child Molestation in the First Degree and Burglary First Degree with Sexual Motivation against J.W. Ex. 24; Ex. 25. A court sentenced Nelson to an exceptional sentence and ordered him to complete sex offender treatment. Ex. 15; Ex. 16; 9RP 36. While serving his sentence at the Juvenile Rehabilitation Administration's Maple Lane facility, Nelson accrued an extensive number of infractions. 7RP 23-24. Nelson's 80 infractions included exposing himself to another resident, shutting a smaller, weaker resident in a dishwasher causing scalding injuries, assaulting a lower functioning resident, and possessing photos and drawing of animals engaged in potentially sexual behaviors. 7RP 22, 55-56, 52-53; 6RP 32-33. Counselors who worked with Nelson described him as someone who always denied wrong doing, even if he was caught in the act, even going so far as claiming that counselors had planted the contraband in his cell. 7RP 50-51, 55; 8RP 28. Although intensive, inpatient sex offender treatment was available and recommended for Nelson, he was resistive to participating in it and made little progress in treatment. 4RP 45; 7RP 9-13, 49.

In March of 2011, as Nelson's release date approached, the Department of Corrections' End of Sentence Review Committee hired

Dr. Harry Hoberman, a forensic and clinical psychologist, to conduct an evaluation of Nelson to determine whether Nelson met criteria to be considered a sexually violent predator. 4RP 26, 27, 35. Dr. Hoberman is a member of the Joint Forensic Unit, a special panel of experts selected by the State of Washington to evaluate persons who might be candidates for civil commitment as a sexually violent predator. 4RP 26. In reaching his opinion about Nelson, Dr. Hoberman initially reviewed over 1600 pages of records that included CPS records, police reports, victim statements, the SAY evaluation of Nelson, and JRA records. 4RP 35-37. Dr. Hoberman conducted a two day direct evaluation of Nelson (4RP 38), that included the administration of four psychological tests including the adolescent version when available, a structured set of questions, and a lengthy interview. 4RP 39-44; 8RP 29. He also spoke with Brian McElfresh, the sex offender treatment coordinator, and Dr. Jeffrey Crinean, the staff psychologist, at Maple Lane regarding Nelson's lack of progress in sex offender treatment. 4RP 45, 73. During his interview of Nelson, Nelson told Hoberman that his sexual arousal with children had not gone completely away, however, the feelings were highly suppressed. 4RP 77.

Based on his evaluation of Nelson, Dr. Hoberman diagnosed Nelson with pedophilia, a condition where a person has either intense recurrent sexual fantasies or urges or sexual behaviors involving

prepubescent children. 4RP 80-81. His diagnosis was supported by Nelson's history of sexually offending against children, Nelson's responses to the psychological tests where he was disclosing of having had deviant sexual desires or having been sexually aroused by fantasies involving a child, and Nelson's admission that he has had sexual thoughts about kids all his life. 4RP 86-89. Dr. Hoberman also diagnosed Nelson with antisocial personality disorder, which includes an individual's failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing behaviors that could be the basis for arrest; deceitfulness, as evidenced by repeated lying; impulsivity or failure to plan ahead; irritability or aggressiveness; reckless disregard for the safety of others; consistent irresponsibility; and lack of remorse, as indicated by being indifferent to or rationalizing having hurt another. 4RP 93-94. His diagnosis was supported by Nelson's responses to the psychological tests and Nelson's longstanding pervasive pattern of behavior where he was deceitful, impulsive, and broke rules stemming from Nelson's history of running away, lying, stealing, cruelty to animals, fire setting, and being suspended from schools for bringing a knife and bullets. 4RP 103-08. Dr. Hoberman found that both or each of Nelson's conditions creates a serious difficulty for Nelson to control his behavior. 4RP 110.

After diagnosing Nelson with pedophilia and antisocial personality disorder, Hoberman next conducted an assessment of Nelson's risk to commit a sexually violent offense if not confined. 4RP 112. In conducting the risk assessment, Hoberman utilized two methods – an actuarial method relying on three different actuarial measures (the Static 99, the Minnesota Sex Offender Screening Tool – Revised, and the Sex Offender Risk Appraisal Guide) and structured professional judgment relying on four different measures (the Hare Psychopathy Checklist Revised, the Sexual Violence Risk Assessment, Juvenile Sex Offender Assessment Protocol, and the ERASOR). 4RP 114, 116, 136. Hoberman found that all of the instruments that he used converged to identify Nelson as a person with the characteristics of someone who is more likely than not to commit a future act of sexual violence. 4RP 139.

After filing its petition, the State retained Dr. Henry Richards to evaluate Nelson. Like Dr. Hoberman, Richards is a forensic psychologist assigned to the Joint Forensic Unit. 8RP 9-10. Dr. Richards conducted a records review and considered Dr. Hoberman's evaluation. 8RP 29. In conducting his evaluation, Dr. Richards considered Nelson's age at the time of offense and diagnosis explaining that Nelson would be considered to be an adolescent, which can continue into a person's 20's, with a still developing brain. 8RP 30. Based on his evaluation, Dr. Richards

diagnosed Nelson with pedophilia, nonexclusive type, attracted to males and females. 8RP 31. His diagnosis was supported by Nelson's statements expressing fantasies about children, Nelson's sexual behavior and offenses against children, and Nelson's responses to the tests that were administered by Dr. Hoberman. 8RP 32. Dr. Richards also diagnosed Nelson with antisocial personality and narcissistic personality disorders. 8RP 31. He explained that personality disorders are pervasive patterns of behavior that begin early in life. 8RP 40-41. In order for a person to be diagnosed with antisocial personality disorder, there must be evidence to support at least three of the seven listed criteria. 8RP 40-41. Like Dr. Hoberman, Dr. Richards found that Nelson met all of the listed criteria. 8RP 41. Following the diagnosis of antisocial personality disorder, Richards tested Nelson for the characteristics or traits of psychopathy, which is a more concentrated form of antisocial personality disorder with its hallmark being the unemphathetic callous use of others, shallow emotional attachment to other people, and chronic rule breaking. 8RP 45. Dr. Richards used an instrument called a Hare Psychopathy Checklist Revised (PCL-R) to measure Nelson's level of psychopathy. 8RP 45. He determined that Nelson's score of 35.3 on the PCL-R placed Nelson in the very high category of psychopathy, and placed him in the top 1% of offenders. 8RP 58-59. This finding was consistent with

Dr. Hoberman's finding that Nelson scored a 36 on the PCL-R youth version. 8RP 59. Richards explained that research shows that the combination of deviant sexual arousal and high psychopathy create a situation where an individual is much more likely to reoffend with violent sexual offenses than individuals who don't have that combination.

8RP 62. Richards found that in addition to Nelson's very high level of psychopathy, Nelson had deviant sexual arousal stemming from his pedophilia and his deviant interest in animals and sadism. 8RP 63.

Richards found that all of Nelson's disorders – pedophilia, antisocial personality disorder, narcissistic personality disorder – singly and together, undermine Nelson's ability to control his behavior. 8RP 66.

After diagnosing Nelson, Richards next conducted a risk assessment. 8RP 67. He first used four actuarial risk assessment measures (the Static 99R, the Static 2002R, the MnSOST-revised, and the Sex Offender Risk Assessment Guide). 8RP 67-68. All indicated that Nelson was in the high risk category of reoffending. 8RP 68. In addition to using the actuarial risk assessment measures, Dr. Richards looked at a group of clinical risk factors and dynamic risks. 8RP 73. From his risk assessment, Dr. Richards concluded that Nelson posed a high risk for committing a new predatory sexual offense. 8RP 80.

Prior to trial, the State conducted a videotaped deposition of Nelson. A redacted version of the deposition was played to the jury during which Nelson denied that he had ever had sexual feelings or attraction toward children. Ex. 13 at 19:56 to 20:20. Nelson admitted to a fascination with fire when young and that he once killed a pet hamster by squeezing its neck and “popping it” in order to take the hamster out of its misery. Ex. 14 at 35:38 to 35:42; Ex. 14 at 45:33 to 45:50. Nelson stated that he was aware of the State’s experts’ opinions that he needed sexual offender treatment, however, he disagreed with the experts and didn’t believe that he needed any sex offender treatment. Ex. 13 at 41:49 to 42:52. Nelson asserted that he deserved to go home no strings attached (Ex. 14 at 1:01:04), that he had fixed himself, and that he made plans to prevent being prone to sexually gratify himself with anything that walks with two legs. Ex. 14 at 1:03:30 to 1:03:44. In response to questions about how many times he had offended against the known victims, how many other unknown and uncharged victims he had sexually offended against, how many animals he had been cruel to, and how many times he had crept into the Wallace’s home in the middle of the night to molest the boys, Nelson asserted his Fifth Amendment right against incrimination. Ex. 14 at 11:07 to 11:32 (J.S.); Ex. 14 at 32:45 to 33:05 (unknown victims); Ex. 14 at 38:09 to 38:35 (animal cruelty); Ex. 14 at 32:40 to

33:23 (broke into Wallace home). The court instructed the jury that it was allowed to draw inferences about what happened in those instances when Nelson asserted this privilege. CP 63A, Instruction 5.

During the defense case, Nelson testified and affirmed his prior denial that he has ever been sexually attracted to children. 9RP 18. Nelson stated that he was aware of and disagreed with the opinions of the State's experts. 9RP 12. He expressed his personal opinion that he did not need sex offender treatment and that he did not have a sexual deviancy problem. 9RP 23. Nelson told the jury that he believed that the State's doctors had used unorthodox procedures in evaluating him. 9RP 24. Nelson explained that he knew himself better than any doctor can. 9RP 42. Regarding a prior statement during his deposition, Nelson explained that his proffered plan to have sex with an animal to avoid sexually offending was just a hypothetical. 9RP 43. When questioned about the answers he had provided on the Multiphasic Sexual Inventory that indicated a sexual arousal to animals, Nelson claimed that Dr. Hoberman had cheated on the tests by either filling in responses for him or changing his answers. 9RP 44, 45. Nelson told the jury that if he were released, his plan was to be released to his grandparents. 8RP 151.

In support of their claim that Nelson did not meet criteria for being a sexually violent predator, the defense called Dr. Diane Lytton. The

defense had first contacted Dr. Lytton in November of 2011. 5RP 89. Dr. Lytton reviewed all discovery provided by defense, including the reports of Drs. Hoberman and Richards. 5RP 89-90. She interviewed Nelson in 2011, and then arrived at what she referred to as a provisional diagnosis where she thought there was a chance that Nelson had pedophilia. 5RP 92. In April of 2012, weeks before Nelson's trial was scheduled to start, Dr. Lytton changed her opinion and concluded that Nelson did not suffer from a mental abnormality or personality disorder. 5RP 92, 93. She offered differing reasons for the change in her opinion – new discovery, that turned out not to be new, a consult with a colleague, that turned out to be a brief telephone call, and finally a reliance on her knowledge that “we know that they're (juvenile only sex offenders) a very low risk to reoffend.” 5RP 93-94, 136, 160-63; 6RP 6. Calling Nelson's history of sexual offenses against children “distractions,” Dr. Lytton explained that once she “took a step back and caught her breath” and got rid of the distractions, she was able to conclude that he did not suffer from pedophilia. 5RP 158. During her interview of Nelson, Dr. Lytton did not administer any psychological tests. 5RP 91. Instead, based on her interview of Nelson, she concluded that she believed Nelson when he told her that he was no longer attracted to children. 6RP 19. She told the jury that even though Nelson only admitted to the sexual offenses that were

already known, she found Nelson to be highly disclosing and stated that she found no reason to not believe him. 6RP 12, 13, 19. She told the jury that even if there were other victims, no matter how many, it would not affect her diagnosis. 6RP 19.

Contrary to the State's experts and Nelson's treatment providers at Maple Lane, Dr. Lytton told the jury that she believed that Nelson had made substantial progress in sex offender treatment while at Maple Lane. 6RP 30. She stated that during her interview of Nelson she didn't pick up on any signs of antisocial disorder. 5RP 105. She claimed that Dr. Hoberman did not understand the instruments that he had used (5RP 141), that she had grave concerns about both of the State's experts (5RP 143), and that the State's experts had acted unethically (6RP 48). Dr. Lytton concluded her testimony by telling the jury that it wasn't easy to be a defense expert in an SVP case, and defense counsel responded by thanking her for her "courage." 6RP 47. Defense counsel reiterated his praise of Dr. Lytton in closing, by stating to the jury, "Let's talk about courage for a minute. Let me – allow me to talk about courage. And by that I'm referring to Dr. Diane Lytton." 10RP 35.

A unanimous jury then found Nelson to be a sexually violent predator.

D. ARGUMENT

1. THE PROSECUTOR DID NOT COMMIT MISCONDUCT BY USING “WE KNOW” AND SIMILAR PHRASING DURING CLOSING ARGUMENT.

The appellant alleges that the prosecutor committed misconduct by using “we know,” “we learned,” “we see” and similar phrasing in closing argument, claiming that to have been an improper aligning of the prosecutor with the jury. Appellant’s brief at 25-29. There is no merit to appellant’s argument. The phrasing used by the deputy prosecutor was a common method used by trial attorneys to summarize and argue reasonable inferences from the evidence admitted at trial. The appellant provided no Washington case law that establishes or even suggests that the manner in which the prosecutor used “we know” is prosecutorial misconduct, or even objectionable. The federal case cited by appellant, United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005), held that a prosecutor’s similar uses of “we know” in closing argument “were not improper” because the prosecutor had not been vouching for the veracity of a witness or suggesting that evidence not produced would support a witness’s statements.

Appellant also cites United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009), which, like Younger, also fails to support his argument.

As in the case at bar, the defendant in Bentley complained of the prosecutor's frequent use of "we know" in closing argument. In that case, the prosecutor summarized a "top 10 list" of "ten things we learned during this trial," and then went on to frequently use "we know" in arguing inferences from the evidence. Id. The Bentley Court held that the use of "we know" is "only improper when it suggests that the government has special knowledge of evidence not presented to the jury, carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility." Id. The use of "we know" is proper when used to "suggest how the jury should view the trial evidence." Id., citing United States v. Beaman, 361 F.3d 1061, 1065 (8th Cir 2004). In the case at bar, an examination of the record indicates that the deputy prosecutor properly used "we know" to summarize the evidence and "suggest how the jury should view the trial evidence."

The Bentley Court also specifically rejected an argument that seems inherent to Nelson's presentation, that sheer volume of use of "we know" renders it misconduct:

Bentley tallies the uses of "we know" and "I submit" in his brief. "No such tallying is an indication of improper commentary nor can it measure the degree of impropriety if there is any.

Bentley, at 812, fn. 5, quoting United States v. Fresinger, 937 F.2d 383, 385 (8th Cir. 1991), overruling on other grounds recognized by United States v. Beaman, 361 F.3d 1061, 1064 (8th Cir. 2004).

Moreover, not only did Nelson’s trial counsel fail to object to any of the prosecutor’s uses of “we know” and similar phrasing in closing argument, he also repeatedly used the very type of phrasing of which Nelson on appeal now complains. To prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Thus, taking into consideration the record and all the circumstances of the trial, specifically Nelson’s trial attorney having engaged repeatedly in the now complained of phrasing, Nelson cannot establish error or prejudice. The following passage is how Mr. Nelson’s counsel began his closing argument:

There are a surprising number of things with which *I agree* with Ms. Snow, a surprising number of things, ... *We certainly agree* that Zachary Nelson is 20 years old. ... *We agree* that he is an emerging young man with significant intelligence, an intelligent young man. *We agree* that he has love and support, certainly from his grandparents and in the community. This case also in many respects is about a couple of other things, *if I may*. This case is about demonstrated courage, and here is where *I begin to differ* with counsel in her interpretation of the evidence – of the evidence that has been offered. 10RP 34-35.

This passage, along with numerous others, demonstrates how Nelson the appellant is now trying to hold the State to an overly formal standard that, by the choice of his trial attorney, was simply not applied at the trial. Nelson now argues that the uses of “we” and “we know” by the deputy prosecutor in closing argument were an improper assertion of her personal beliefs or an attempt to align herself with the jury, or both; yet at trial Nelson’s counsel and the deputy prosecutor each engaged a colloquial informal manner with the jury, frequently using “we know” in summarizing and arguing inferences from the evidence. Below are other examples of Nelson’s trial attorney’s closing argument that are of a similar vein to the deputy prosecutor’s argument that Nelson now, belatedly, finds objectionable:

- ... what *we know* from Zach’s history, is remarkable, admittedly, but also it’s remarkable not only because it may in your minds contradict what *we know* by way of our common sense, but Dr. Lytton gave to you a number of scientific bases about why what *we think we know* just simply isn’t right.”
10RP 36-37.
- “But what *we can also learn* from Zach, both in his deposition and as he testified under oath in front of you all, he is an emerging young man, and I say emerging because *not only did*

we show that he's just a kid now, with maturity issues, which *I agree* with counsel, would be a disservice to him, but he's a young man with intelligence” 10RP 42.

- “What *we know* from available information is that something began to click, and that as his stay at the institution was coming to a close, you know what, something started to click and he was – and he was making progress in sex offender treatment.” 10RP 43-44.
- Speaking of juveniles and young adults counsel argued: “... whom *we know* from all of our personal experience are far more likely to change, and that indeed we are not dealing simply with somebody who is a monster set in his ways, but a young man who is emerging, facing his difficulties, saying he needs specialized treatment, wanting to move on with his life in the community.” 10RP 44-45.

Minutes before listening to the closing arguments of the attorneys, the jurors were instructed by the Court:

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

CP 92. Jurors are presumed to follow the law, and Nelson's trial counsel's decision not to object to the prosecutor's argument coupled with his similar use of the phrasing in question makes it clear that what is now complained of was not perceived as prejudicial at the time of the trial, and that the standard instruction given by the Court was sufficient.

2. THE PROSECUTOR'S USE OF "TELL US" AND SIMILAR PHRASES WHILE EXAMINING WITNESSES WAS NOT MISCONDUCT.

The appellant complains that while cross-examining Mr. Nelson, Mr. Nelson's expert witness Dr. Lytton, and Mr. Nelson's grandmother, the deputy prosecutor repeatedly used phrasing such as "tell us ...," and "are you telling us" Appellant's brief at 18-22. The appellant asks "who is the 'us' in these questions" and urges the conclusion that the prosecutor had improperly aligned herself with the jury, "pitting the collective unit against Nelson and his witnesses." *Id.* There is no merit to this argument. Any experienced trial attorney will seek to break up a monotonous sounding method of examination by phrasing questions differently, and "tell us" is commonly used simply as a way of calling for the witness to answer a question, and "are you telling us" is often used to ask that a witness elaborate or flesh out a previous response. Nelson's

trial attorney clearly understands this, as the record shows he also repeatedly used the same phrasing when questioning witnesses:

- While crossing the State’s expert witness Dr. Hoberman: “And can you tell us why?” 5RP 38.
- On direct examination of Respondent’s expert Dr. Lytton: “Can you tell us why you made that original diagnosis ...” and “ ... can you tell us what your current opinion is” 5RP 92.
- Also during direct exam of Dr. Lytton: “Can you tell us why that is” 5RP 93.
- On direct examination of Dr. Lytton: “And if you can tell us, without going too far, have you reconsidered your opinion in favor of civil commitment?” 5RP 94.

As with the defense attorney’s frequent use of “we” and “I agree” in his closing argument, his use of “tell us” while questioning witnesses are part of the record and circumstances at trial that must be considered by this appellate court in evaluating whether the prosecutor’s actions were misconduct and prejudicial. Thorgerson, at 442. Both trial attorneys understood that using “tell us” in this manner while examining a witness is nothing more than a colloquial way of avoiding repetitive sounding questioning. Simply using “tell us” in this manner while questioning a

witness does not have the effect of aligning the jury with the prosecutor and against the defendant.

The appellant cites only two cases for the proposition that such questioning is somehow misconduct by the prosecutor; both cases are nonprecedential from other jurisdictions and are also factually inapposite. In State v. Mayhorn, 720 N.W.2d 776, 789-90 (2006), the Minnesota Supreme Court held that a prosecutor had committed misconduct by the combination of attacking the defendant's character by impeaching him with evidence of adultery, and by aligning himself with the jury against the defendant and his "drug world." It was not using "tell us" while questioning a witness but the following statement of the prosecutor that resulted in the finding of misconduct: "This is kind of foreign for all of us, I believe, because we're not really accustomed to this drug world and drug dealing." Id. at 789.

Similarly, in State v. Spencer, 81 Conn.App. 320, 329 n.6 (2004), the objectionable conduct was not merely the prosecutor using "tell us" while questioning a witness, but rather the statement, "The defendant is trying to mislead us about the kidnapping and forcibly raping the victim." Thus, the appellant offers no suitable authority to support his argument that the manner in which both trial attorneys used "tell us" and similar phrases while examining witnesses amounts to prosecutorial misconduct.

In State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), another case cited by appellant, the defendant's murder conviction was reversed because of repeated and truly egregious misconduct by the prosecutor, which, unlike in the case at bar, was objected to at trial. The deputy prosecutor, from the relatively less populous Pacific County, engaged in several instances of misconduct, including, *inter alia*, calling the defendant a liar at least four times, stating that the defense attorney didn't have a case, saying that the defendant was clearly a "murder two," and implying that the defense witnesses should not be believed because they were from out of town and drove fancy cars. Reed, at 145-46. In discussing the prosecutor's improper emotional appeal to the jury, the Court stated:

The prosecutor's comments struck directly at the evidence which supported petitioner's theory by appealing to the hometown instincts of the jury. He emphasized the fact that petitioner's counsel and expert witnesses were outsiders, and that they drove expensive cars. Each of these statements was calculated to align the jury with the prosecutor *and against the petitioner*.

Id. at 147 (emphasis added). Thus, in addition to the fact that there were several instances of serious misconduct, it was important to the Court that the argument had been intended to alienate the jury by grouping the prosecutor with the relatively small town jurors and *against* the defendant and his team of outsiders. In the case at bar, the prosecutor's use of "tell

us” while questioning a witness had neither the intention nor effect of aligning the prosecutor with the jurors and *against* Mr. Nelson by highlighting any racial, cultural, or socioeconomic differences between Nelson and the jury.

3. THE PROSECUTOR DID NOT ERR BY USING “WE” AND “US” WHILE CROSS-EXAMINING NELSON.

Nelson also argues that the prosecutor committed misconduct by using “we” and “us” while cross-examining Mr. Nelson. Appellant’s brief at 11-16. The appellant claims such usage amounted to “improper expressions of vouching, personal opinion and alignment.” Brief at 11. While some of the prosecutor’s phrasing in using “we” or “us” may not be the best practice, in the context of the proceedings she did not commit misconduct, and certainly not reversible error.

The appellant identifies a number of instances of alleged misconduct, including two passages wherein the prosecutor used the phrases “... we believe you suffer from a mental abnormality or personality disorder ...,” and “... we, based on the knowledge that we have dealing with these offenses for years, believe that you have to honestly confront your behavior”. Brief at 11. In the context of the case this was not an improper expression of the prosecutor’s opinion nor

was it improperly vouching for a witness. It must be understood that the two State's experts, Drs. Hoberman and Richards, had already testified and provided their opinions as to the mental condition of Mr. Nelson. Most significantly, the prosecutor's line of questioning was in response to Nelson's testimony on direct examination that he was familiar with the opinions of Drs. Hoberman and Richards and that he disagreed with them. 9RP 12-13. Expert witnesses provide opinions that "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. In these two instances, the prosecutor was merely, and entirely legitimately, asking Mr. Nelson to respond with his perspective to the opinion testimony of the State's experts. She used "we" as a shorthand way of encompassing those expert opinions, rather than using a lengthy and awkward recitation of the separate testimony of two expert witnesses as a preface to the questions she asked Mr. Nelson.

Expert witnesses don't simply "assist the trier of fact to understand the evidence," as a practical matter they also help a party in the introduction of complex information and make it possible for the party to present a coherent and persuasive case. A party's position on the key issues of a case is often communicated through expert testimony. In the case at bar, as in most cases involving expert testimony, both parties had expert witnesses that assisted them in communicating their positions to the

jury. The prosecutor's use of "we believe" in these instances was simply shorthand for a more formal manner of questioning that would have begun with, "It is the State's position, based on the testimony of the two expert witnesses, Drs. Hoberman and Richards, that you suffer from a mental abnormality". Thus, the prosecutor's use of "we" was not truly an improper expression of her own personal opinion, but a way of prefacing a question calling for Mr. Nelson to respond to *the State's position* as had been articulated by the experts.

Nelson also points to a few instances when the prosecutor used phrases such as "we are concerned," "we may not believe," and "we may not be comfortable," or the like. Brief at 13-14. In those situations, the prosecutor's phrasing simply denoted the expression of a generalized reasonable concern and did not create a literal alignment of the prosecutor with the jury. Again, this is informal language, and perhaps not a best practice, but not clearly misconduct or prejudicial.

Similarly, the appellant claims it was misconduct when on three occasions while cross-examining Mr. Nelson the prosecutor used the expression "we now know" in questions designed to have the witness concede that he had not previously been truthful. Brief at 14-15. In fact, a review of the transcript establishes that Mr. Nelson in each of the three instances admitted that he had previously denied or minimized his sexual

offense history before eventually admitting it. 9RP 31-33. The prosecutor's use of "we now know" in this fashion was actually a gentle manner of cross-examining a 20 year old witness, rather than the more formal and aggressively confrontational approach of, e.g., "Isn't it true that you repeatedly lied to Detective Schneider when you said you had no other victims?" The prosecutor's use of "we now know that isn't true" was a civilized way to bring into evidence facts that were no longer being contested. The "we" in these instances encompassed Mr. Nelson. "We now know" used in this manner was not intended to, nor did it have the effect of aligning the prosecutor with the jury in some improper way.

4. IF THE PROSECUTOR ENGAGED IN ANY MISCONDUCT AT ALL IT WAS NOT SO FLAGRANT AND ILL-INTENTIONED AS TO REQUIRE REVERSAL, AND NELSON'S TRIAL COUNSEL WAIVED THE RIGHT TO APPEAL BY WILLINGLY ENGAGING IN THE SAME PHRASING.

If the prosecutor erred at all by her phrasing it does not constitute reversible misconduct for several reasons. First, the phrasing of the prosecutor that is now complained of could have been objected to and easily cured by requesting that the judge instruct the jury and admonish the prosecutor to rephrase. Even a single objection and request for a curative instruction in response to "we know" or "tell us" would have

served two important functions: 1) putting the prosecutor on notice so that she would have had the opportunity to alter her presentation; and, 2) allowing any prejudice to be cured by the court's simple reminder to the jury that what the attorneys say is not evidence and that any expression of a personal opinion by counsel is improper and must be disregarded. A party may not "remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver ... on appeal." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991), (quoting Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

Another reason that the alleged phrasing errors by the prosecutor fall short of reversible misconduct is that the defense attorney waived any error by repeatedly using the same or similar phrasing during the trial. The willing engagement of defense counsel in the use of the now complained of language implicates two important standards on review: first, the Thorgerson standard that requires the reviewing court to consider the complained of conduct in light of the overall record and circumstances of trial; and second, the waiver that occurred by the lack of objection coupled with the use of the same or similar language. Swan, at 661, citing State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978).

Finally, to the extent that any question or statement by the prosecutor may have been objectionable, though not objected to at the time, there is nothing in the record that even approaches the type of misconduct that would require reversal. The colloquial and informal phrasing used by the prosecutor (and by Nelson's trial counsel) was of a type used in courts on an everyday basis and, therefore, if it was error at all, cannot be thought of as flagrant and ill-intentioned. The failure of Nelson's trial attorney to object to any of the phrasings of the prosecutor is significant. Failure to object and request a curative instruction or move for a mistrial "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

Moreover, absent a proper objection to the comments at trial, a request for a curative instruction, or a motion for mistrial, a jury's verdict will not be reversed on appeal unless the prosecutor's behavior was "so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Nelson seems to recognize that none of the prosecutor's phrasing, standing alone, meets the high standard for

reversal: “flagrant and ill-intentioned” conduct that could not have been cured at the trial.

- “In many instances the prosecutor’s choice of language, considered in isolation, does not amount to much. But considered as a whole, the repeated use of such language takes on a thematic significance with inflammatory effect.”

Appellant’s brief at 18.

- “Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice.” Id. at 35.

The appellant faces a conundrum: How can phrasing so subtle that it “does not amount to much” also be flagrant, ill-intentioned, and incurable by instructions to the jury? The appellant cites several cases for the proposition that “the cumulative effect of misconduct can overwhelm the power of instruction to cure.” Appellant’s brief at 35. But the cited cases only demonstrate the difference between the egregious nature of the cumulative prosecutorial misconduct in the cases resulting in reversal and the relatively minor errors, if any, committed by the prosecutor in the case at bar.

In State v. Glasmann, __ Wn.2d __, 286 P.3d 673 (2012), the prosecutor’s closing argument included a PowerPoint presentation that

incorporated at least five slides showing the defendant's unkempt and bloody image in a booking photo, coupled with the prosecutor's commentary questioning the defendant's credibility and, in one slide, with the word "GUILTY" superimposed in red three times over the defendant's image. In holding that the misuse of this highly prejudicial inflammatory imagery could not have been cured by an instruction, the Court stressed the impact of the prosecutor having incorporated the flagrant conduct into a PowerPoint presentation:

Given the multiple ways in which the prosecutor attempted to improperly sway the jury and the powerful visual medium he employed, no instruction could erase the cumulative effect of the misconduct in this case. The prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts on the counts against Glasmann.

Id. at 679.

In State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956), our Supreme Court reversed the defendant's conviction after the prosecutor had several times expressed his personal opinion, including an unqualified and forceful statement in closing argument of his personal belief that the defendant had raped his daughter, and had referred to the defense witnesses as "the entire herd."

In State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), the Court of Appeals reversed the defendant's murder and assault convictions

because of repeated misconduct by the prosecutor in closing argument despite lack of objections at the trial. The charges against the defendant arose out of a bar fight that led to a shooting, and trial testimony of several witnesses was conflicting as to what occurred inside and outside the bar.

In closing argument, the prosecutor repeatedly committed serious error:

... the prosecutor made the improper comments not just once or twice, but frequently. He used them to develop themes throughout closing argument, such as the repeated references to the jury's duty to declare the truth and that the jury would not have done it too. These statements were only further emphasized by the prosecutor's PowerPoint slides. Because of the conflicting evidence and the frequent use and repetition of improper statements, there is a substantial likelihood that the prosecutor's mischaracterization and minimization of the reasonable doubt standard, improper argument that the jury declare the truth, and misstatement of the defense of others standard affected the jury's verdict, and that further instructions would not have cured the effect of the prosecutor's comments.

Walker, at 738-39. It is self-evident that the Walker prosecutor's repeated mischaracterization of the key legal instructions in a case involving considerable disputed eyewitness testimony is far more serious than the prosecutor in the case at bar perhaps using the phrases "tell us" and "we know" too frequently.

To the extent that the prosecutor erred at all while examining witnesses or in closing argument, she on several occasions in closing argument minimized any prejudice by emphasizing the State's burden of

proof and by distinguishing between the role of the jurors and that of the testifying experts. Regarding experts:

- “... it was then that we turned to the evaluations by the experts in this case. And you’re instructed, and I wholeheartedly embrace this, that you don’t sit there as a juror and have to wholeheartedly accept an expert’s opinion just because they have a Ph.D. after their name or a doctor before, and just because they take the stand, because collectively you’re smarter than they are. Collectively as a group, when it comes to common sense and certain issues, you may be smarter than they are.” 10RP 19.
- “... you’ve had testimony come at you from various experts, and you can decide who you believe or who you don’t believe, that’s up to you.” 10RP 56.

The prosecutor repeatedly stressed the State’s burden of proof and the jury’s independence in determining whether the burden had been met:

- “... this is the instruction that will guide your deliberations. It’s the instruction that we’ve had before you from the beginning of this case, and it sets forth the three elements that the State has to prove to you beyond a reasonable doubt before

you can find that the respondent is a sexually violent predator” 10RP 23.

- “... the next thing you have to decide is whether or not the respondent’s mental abnormality or personality disorder make him likely to engage in predatory acts of sexual violence if not confined in a secure facility.” 10RP 27.
- “Right now you’re the fact finder and the law applier, and your job is to decide whether or not he meets the legal definition of being a sexually violent predator.” 10RP 32.
- “You’re told that your job here is to find out whether or not we have proved our case beyond a reasonable doubt. That is the burden to be applied here, and like I said, it’s one I wholeheartedly embrace. ... my burden is to prove the elements of whether or not he meets (the definition of a) sexually violent predator beyond a reasonable doubt, that is exactly what it is. That’s what I have to prove to you beyond a reasonable doubt.” 10RP 55.

Moreover, even if some of the prosecutor’s phrasing was improper, Nelson still bears the burden of showing a substantial likelihood that the misconduct affected the verdict. The sole argument made by Nelson is that because Nelson also had an expert witness who opposed the testimony

of the State's experts this reviewing court should not conclude that the verdict would likely have been the same regardless of the alleged misconduct. The only case cited by the appellant, Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 662, 833 P.2d 390 (1992), does not even involve a harmless error analysis. The matter cannot be that simple; experts can be hired, and experts have been known to differ. The reviewing court must still evaluate the evidence. Most importantly, none of the alleged errors involved the trial court in any way limiting the testimony of Nelson's expert. The jury heard everything Dr. Lytton had to say and still found that Nelson met criteria for commitment.

Given the overwhelming evidence that supported the jury's finding that Nelson should be civilly committed as a sexually violent predator, Nelson cannot meet his burden. Nelson had a lengthy history of sexually offending against children. By the time he was 10 years old, Nelson had undergone a mental evaluation and been identified as being at high risk for further sexual misconduct against children. His youth was marked by running away, lying, stealing, cruelty to animals, fire setting, and being suspended from school for bringing a knife and bullets. Two expert

psychologists independently determined that Nelson suffers from an extremely high level of psychopathy (top 1% of offenders).

Intensive, in-patient efforts to treat Nelson's sexual deviancy by placing him in a series of out-of-home placements failed. Soon after Nelson returned home to live with his mother, he started to sexually offend against the neighborhood children. His sexual desire for children compelled him to take startling risks including sexually abusing children while his (Nelson's) mother was nearby and while the victims' parents were nearby. On one occasion, Nelson broke into his neighbors' home in the middle of the night searching for two little boys he had previously sexually abused. Armed with a jar of oil to masturbate with and a vibrating razor to sodomize with, Nelson entered the boys' bedroom. After discovering that the boys' bedroom was empty, Nelson continued to their mother's room where he found the little boys sleeping next to their mother in her bed. Completely undeterred by the mother's presence, Nelson grabbed the little boy nearest him by the ankles, pulled the boy away from his mother, flipped the boy onto his back, and sexually assaulted him. This level of compulsion is truly startling.

Intensive, in-patient treatment efforts offered to Nelson during his confinement following his convictions for the sex offenses against the neighborhood children again proved unsuccessful. Nelson not only failed to progress in treatment, he accrued a startling number of infractions that included assaulting other inmates and hiding sexualized images of animals in his room. At trial, Nelson's claim that he was not currently sexually attracted to children, that he *never* had been, and that he did not believe that he needed sex offender treatment, offered the jury little hope that he would be able to control his behavior and avoid reoffending if released.

Even Nelson's expert had to concede that she initially was unable to say that he did not suffer from pedophilia. The "flip" in her opinion that she offered the jury by ignoring Nelson's prior sexual offenses against children, which she called "distractions," and her claim that she believed Nelson when he told her that he was no longer attracted to children because she had no reason not to, were far from persuasive and did little to counter the evidence and the opinions by two members of Washington State's Joint Forensic Unit that Nelson satisfied the criteria of a sexually violent predator.

E. CONCLUSION

For the reasons stated above, the State requests that this Court deny Nelson's appeal and affirm the order of commitment.

DATED this 18 day of January, 2013.

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In Re the Detention of)
ZACHARY NELSON,)
Appellant,)
DECLARATION OF SERVICE)
_____)

DAN KATZER, being first duly sworn on oath, deposes and says:

On this day, I arranged for service a copy of BRIEF OF RESPONDENT to be delivered by ABC messenger service upon the following:

Nielson, Broman & Koch
Attn. Casey Grannis
1908 E Madison St.
Seattle, WA 98122

DATED this 18th day of January, 2013



DAN KATZER

ORIGINAL