SUPREME COURT NO. 100405-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ANDY WRIGHT,
Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 54420-2-II
Kitsap County No. 18-1-00909-18

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, ANDY WRIGHT, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part

B. COURT OF APPEALS DECISION

Wright seeks review of the October 26, 2021, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

1. The defense offered evidence from the parents of a key prosecution witness regarding their impressions at the time he made out-of-court allegations which led to the charges in this case. Where the offered evidence would have supported the defense theory that the witness fabricated the allegations, did the trial court's exclusion of the material evidence infringe on Wright's right to present a complete defense?

2. Do the issues raised in Wright's statement of additional grounds for review require reversal?

D. STATEMENT OF THE CASE

In 2008, appellant Andy Wright and his family moved to a neighborhood in Bremerton, Washington. 8RP[1] 1045. Wright's son became friends with three brothers who lived down the block, 11-year-old D.T., 7-year-old C.T., and 5-year-old H.T. 8RP 1043-47. The families became close and spent a lot of time together. 8RP 1049. The brothers often spent the night at Wright's house on weekends, where they played video games and watched TV late into the evening. 8RP 1048, 1050-51.

The Wrights moved to California in August 2011 and moved back to the Bremerton house in October 2014. 8RP 1052, 1055. The families' friendship continued, and the brothers again started spending nights at the Wrights' house. 8RP 1056. The Wrights moved away again in late 2015 or early 2016. 8RP 1061.

In January 2018, when C.T. was 16 years old, he was having behavior issues at school and at home. 8RP 1065-66. He

[1] The Verbatim Report of Proceedings is contained in ten volumes, designated as follows: 1RP—10/28/19 (Forbes); 2RP—10/28/19 (Hull); 3RP—11/4/19 and 11/5/19; 4RP—11/6/19; 5RP—11/7/19 (AM); 6RP—11/7/19 (PM); 7RP—11/12/19 and 11/13/19; 8RP—11/14/19 and 11/18/19; 9RP—11/19/19; and 10RP—11/20/19 and 11/21/19.

was caught with marijuana on more than one occasion, which was a serious concern because his father worked for the federal government. 8RP 1084; 9RP 1530-31. The first few times, his parents disciplined him by removing his cell phone and grounding him. 9RP 1531. When C.T. brought marijuana into the house again, however, his parents decided to have a deep conversation before disciplining him. 9RP 1532. His father, Douglas T., asked C.T. if there was something going on that he was running from. 9RP 1533. Douglas asked C.T. whether anything traumatic had happened to him, "such as, you know, sexual abuse or somebody touching you; you know, something like that." 9RP 1540. In response, C.T. made allegations that Wright had molested him. 9RP 1540.

After their conversation with C.T., the parents spoke to D.T., who said things that caused them concern. 8RP 1067. H.T. would not confirm or deny anything, however. 8RP 1067. Eventually, all three brothers were interviewed by law enforcement and charges were filed against Wright. 7RP 930-31;

8RP 1070; CP 26-33; RCW 9A.44.073; RCW 9A.44.076; RCW 9A.44.083; RCW 9A.44.086; RCW 9A.44.089.

Prior to trial, the State had moved to exclude examination inviting one witness to comment on the accuracy or credibility of another witness. CP 19-20. Defense counsel argued that he did not plan to ask any witness whether another witness was lying, but C.T.'s parents had said in pretrial interviews that when C.T. first made the allegations they questioned whether they should believe him because they were disciplining him and they thought he might be deflecting. Counsel sought to explore their observations at the time and the actions they took in response, rather than seeking an opinion on the credibility of C.T.'s statements. 2RP 25. Counsel argued that if C.T. was deflecting to avoid punishment, that was motive to say what he said, and that was relevant. 2RP 31-32.

In a memorandum in response to the State's motion, the defense argued that Wright should be given great latitude in cross examination to show motive, bias, and credibility of the

complaining witness. C.T.'s motive for making the allegations was an issue central to the defense, and evidence that established he was deflecting to avoid punishment was relevant and should be admitted. CP 35-36.

The court agreed that the jury should be able to explore the circumstances surrounding the complaint, but it would not permit comment on the validity or accuracy of the complaint. 2RP 39. The court granted the State's motion, ruling that under ER 608 a witness is not permitted to testify he believed another witness at the time that witness made an out of court statement. The court said it would not allow any comment on the witness's credibility and thus precluded the defense from asking C.T.'s parents if C.T. was deflecting. 3RP 18. When defense counsel objected to testimony from the lead detective that the mother said she believed C.T.'s allegations after talking to D.T. and H.T., however, the court overruled the objection. It found that the testimony was admissible to show the course of the investigation. 8RP 1263-64.

After Douglas testified about the conversation he had with C.T. concerning marijuana, the State asked whether C.T. had ever previously said he had taken some bad action because something was done to him. 9RP 1537. Douglas said no. The State then asked whether, in any of the previous conversations about marijuana, C.T. had ever tried to deflect and blame somebody else. Again Douglas said no. 9RP 1538.

In response to the State's questions and Douglas's answers, defense counsel sought to ask Douglas whether he thought C.T. was deflecting when he made allegations against Wright. Counsel argued that the State had opened the door to this observation when it asked Douglas whether C.T. had tried to deflect on previous occasions. Counsel made an offer of proof that Douglas had said in his interview that he thought C.T. was deflecting. 9RP 1550-52. The court denied the defense request, saying the State's questioning did not open the door to a comment on the veracity of these accusations. 9RP 1555.

Defense counsel argued in closing that the State had not been able to rule out reasonable doubts. 10RP 1699. The case started with accusations made by C.T., who had been getting in trouble for a while and was again caught with marijuana, which was a significant offense in his household. When his father confronted him, suggested something had happened, and asked if he had been molested, a seed was planted and C.T. said yes. 10RP 1700. He picked the person who was gone from the area, thinking the claim couldn't be investigated. 10RP 1701. Counsel argued that D.T. and H.T. could have made up their claims to protect C.T., who was in trouble again. There was time for them to talk about it, because none of the brothers was interviewed for months. 10RP 1705.

The jury entered guilty verdicts, and Wright appealed, arguing that the exclusion of material evidence relevant to his defense infringed on his constitutional right to present a defense. He also raised numerous issues in a statement of additional grounds for review. The Court of Appeals affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS DECISION THAT EXCLUSION OF MATERIAL EVIDENCE DID NOT VIOLATE WRIGHT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION THIS COURT SHOULD ADDRESS. RAP 13.4(b)(3).

Criminal defendants have the constitutional right to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. Relevant, admissible evidence offered by the defense may be excluded only if the prosecution demonstrates a compelling state interest in doing so. *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983).

Defense evidence need only be relevant to be admissible. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence … more probable or

less probable than it would be without the evidence." ER 401. If the defense evidence is relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Darden*, 145 Wn.2d at 622.

The appellate court reviews the trial court's ruling excluding evidence for abuse of discretion and considers *de novo* whether the ruling violated the defendant's Sixth Amendment right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015).

The State moved in limine to exclude examination inviting one witness to comment on the accuracy or credibility of another witness. CP 19-20. In discussing this motion, defense counsel explained that he did not intend to have any witness express an opinion on the credibility of another witness's testimony. He argued, however, that he should not be precluded from asking

C.T.'s parents about their observation of C.T. when he made the initial allegations, which they had previously described as "deflecting." 2RP 25, 31-32. Counsel argued that this observation was relevant to the defense that C.T. fabricated the allegations because he was in serious trouble, and his brothers backed him up to keep him out of trouble. 2RP 32-33.

The court granted the State's motion, ruling that it was improper for one witness to comment on the credibility of another witness. 3RP 18. The defense was not seeking to elicit comments on C.T.'s credibility, however. It was seeking to cross examine C.T.'s parents about their observations of his demeanor at the time he made the allegations about Wright, because his demeanor was relevant to his motive and credibility.

A witness's demeanor outside the courtroom is admissible when relevant to the witness's credibility. Witnesses can testify to the demeanor or apparent emotional state of another person when relevant and based on personal observation. *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008). In *Magers*, a

police officer responding to a call of domestic violence assault testified that although the victim said Magers was not in the house, she was scared, her eyes were huge, and she kept looking behind her. He said her demeanor indicated "something was terribly wrong." *Magers*, 164 Wn.2d at 178. Based on his observations he asked her to step outside. The officer testified that as he was talking to her, she appeared to be "obviously traumatized." *Id*. at 179. Magers argued on appeal that the officer's testimony was impermissible opinion as to guilt, and its admission was constitutional error. This Court disagreed, holding that the officer described the victim's demeanor in conjunction with other observations, providing context to the scene he had witnessed, and his statements did not constitute impermissible opinion testimony. *Magers*, 164 Wn.2d at 190.

Likewise, in *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990), a man was attacked as he left the restaurant where he worked. He escaped his attackers and ran back inside the restaurant, where he told his

employer he had been attacked by the defendant. *Contreras*, 57 Wn. App. at 473. Over defense objection, the employer was permitted to testify at trial that the victim expressed no doubt about the identification. *Id*. The Court of Appeals affirmed, noting that in context the testimony was "as much a description as an opinion." *Id*. at 477. Because the employer testified from his personal observation of the victim's demeanor, his testimony about his employee's state of mind was not improper opinion. *Id*. at 477-78.

Here, as in *Magers* and *Contreras*, the challenged testimony was offered to establish another witness's demeanor when making out of court statements. The defense sought to present testimony from C.T.'s parents regarding his demeanor at the time he made the allegations about Wright. The defense established that both parents were present during this conversation with C.T. and had personally observed his behavior. They were confronting him about his repeated marijuana use, and the discipline would be more severe than

previous instances, and they had said in interviews that it appeared C.T. was attempting to deflect from his current situation to avoid punishment. 2RP 32-33; 9RP 1531-33. Because the parents would be testifying from their personal observations of C.T.'s demeanor and not commenting on the credibility of his statements, their testimony would not constitute improper opinion. *See Magers*, 164 Wn.2d at 190; *Contreras*, 57 Wn. App. at 477-78. Moreover, C.T.'s demeanor was relevant to his credibility, because if he was deflecting to avoid punishment, the jury could conclude he fabricated the allegations.

The court cited ER 608 as the basis for excluding the evidence.

That rule provides as follows:

> a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

> (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608. The court's reliance on ER 608 was misplaced. The defense was not seeking to challenge C.T.'s credibility by proving he was an untruthful person. If that were the case, the court should properly limit the defense to evidence of reputation of character for untruthfulness. *See* ER 608(a). Nor was the defense offering extrinsic evidence of a specific incident of conduct to attack C.T.'s credibility. *See* ER 608(b). Instead, the defense was offering personal observations of C.T.'s demeanor at the time he made the allegations which led to the charges in this case. Such evidence is not excluded by ER 608. ER 608 does not prohibit one witness from recounting facts or circumstances

personally observed by that witness and casting doubt on the credibility of another witness. 5A K. Tegland Wash. Prac., *Evidence Law and Practice* § 608.15 (6th ed.).

Defense counsel made it clear he would not ask the parents' opinion regarding the credibility of C.T.'s statements or testimony. 2RP 25. Instead, the defense sought to present their observations of C.T. in the context of the conversation when he first made the allegations, in order to establish his motive. 2RP 25, 31-33. The offered evidence was relevant and did not constitute improper opinion. *See Magers*, 164 Wn.2d at 190; *Contreras*, 57 Wn. App. at 477-78. Because of the court's ruling, the defense was precluded from fully cross examining C.T.'s mother about her observation of C.T. at the time of the allegations. The court also denied the defense request to respond when, in cross examining C.T.'s father, the State specifically raised the issue of C.T.'s demeanor on other occasions.

The defense called Douglas as a witness to describe the circumstances surrounding C.T.'s allegations. Douglas testified

that C.T. was being disciplined for marijuana use, which was a serious issue for which he had previously been punished. 9RP 1530-32. On cross examination, the State asked whether C.T. had deflected on other occasions when he was being disciplined, and Douglas said he had not. 9RP 1537-38. Despite this testimony, the court again denied the defense request to ask Douglas whether C.T. appeared to be deflecting when he made the allegations about Wright, characterizing the proposed testimony as a comment on the veracity of C.T.'s accusations. 9RP 1550-55.

Once Douglas responded to the State's questions about whether C.T. had been known to make up accusations to deflect, the defense should have been permitted to ask about C.T.'s conduct at the time he made the allegations against Wright. Under ER 608(b) specific instances of conduct may be inquired into "on cross examination of the witness … concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has

testified." While the rule gives the court discretion, allowing the State to offer testimony that C.T. had not deflected in the past while excluding testimony that he appeared to be deflecting when making the statements which led to the charges in this case was an untenable decision, presenting an incomplete picture to the jury, unfairly bolstering the State's case, and infringing on Wright's right to present a defense.

It is fundamental that an accused be given great latitude in cross-examining prosecuting witnesses to show motive or credibility, especially in prosecutions for sex crimes. *State v. Wilder*, 4 Wn. App. 850, 854-55, 486 P.2d 319 (1971) (error to refuse to permit defendant to establish complaining witness's motive to lie through cross examination of witness's mother about prior incidents of behavior); *State v. Peterson*, 2 Wn. App. 464, 469 P.2d 980 (1970). In *Peterson*, the defense theory was that charges of indecent liberties were based on a fabrication initiated by an older sister of the complaining witness. He sought to establish this theory through cross-examination of the girls'

mother, but the court sustained the State's objections to questions about the older sister. *Peterson,* 2 Wn. App. at 465. The Court of Appeals held that failure to permit the defendant to pursue a valid theory was error which seriously jeopardized his defense and required retrial. *Id*. at 467.

Likewise here, the court's rulings seriously jeopardized Wright's ability to present a valid defense theory, that C.T. fabricated the allegations in order to deflect attention from the acts for which he was being punished. The parents' observations were direct evidence of C.T.'s demeanor which would have supported the defense theory.

The denial of the right to present a complete defense is constitutional error. *Crane*, 476 U.S. at 690. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The Court of Appeals' holding that exclusion of material evidence did not infringe on Wright's right to present

a defense raises a significant constitutional question this Court should address. RAP 13.4(b)(3).

2. THIS COURT SHOULD REVIEW ISSUES RAISED IN THE STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW.

Wright raised several arguments in his statement of additional grounds for review, which the Court of Appeals rejected. Those arguments are incorporated herein by reference.

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Wright's convictions.

I certify that this document contains 3182 words, as calculated by Microsoft Word.

DATED this 23rd day of November, 2021.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____

CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Andy Wright*, Court of Appeals Cause No. 54420-2-II, as follows:

Andy Wright/DOC#420485
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Catherine E. Glinski
Done in Manchester, WA
November 23, 2021

Filed
Washington State
Court of Appeals
Division Two

October 26, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDY WRIGHT, Appellant.	No. 54420-2-II UNPUBLISHED OPINION

GLASGOW, J.—Andy Wright's family had a close friendship with the T family when the Wrights lived in Washington. The three sons of the T family were friends with Wright's son and frequently spent the night at Wright's home. A few years after the Wrights moved from Washington to California, the middle T son, CT, disclosed to his parents that Wright had touched him inappropriately many times over the years. The other two sons, DT and HT, also disclosed that Wright had sexually abused them.

Following a jury trial, Wright was convicted of first degree child rape, second degree child rape, two counts of first degree child molestation, second degree child molestation, and third degree child molestation, with abuse of trust and pattern of abuse enhancements on each count. Wright appeals his convictions, arguing that the trial court violated his right to present a defense by restricting Wright's ability to question the T parents about their first reaction to CT's initial disclosure. Wright sought to elicit testimony that the T parents each initially asked themselves if CT was fabricating the allegations to get out of trouble for smoking marijuana. In a statement of

additional grounds for review, Wright also argues that the trial court violated his due process and confrontation rights and that the State improperly withheld exculpatory evidence. We disagree with all of Wright's claims and affirm his convictions.

FACTS

I. BACKGROUND

In 2008, DT, who was 11 years old at the time, became friends with Wright's son who lived in the same neighborhood. Over time, the T family, including DT's two younger brothers, CT and HT, started spending time with the Wright family. The families became close, spending holidays, birthdays, and vacations together. Eventually, all three T boys began regularly spending the night at the Wrights' home. They would typically set up an air mattress in the living room where the boys and Wright would watch television and play video games late into the night. Wright typically slept downstairs with the boys.

In summer 2011, CT stopped spending the night at the Wrights' home. Later that year, the Wrights moved to California. The Wrights returned to Washington in 2014 and resumed their friendship with the T family before moving back to California again in 2016.

In January 2018, Christine and Douglas T were concerned that CT was using marijuana. Marijuana was not allowed in their household, and CT had been in trouble for having marijuana several times. When Douglas had a heart-to-heart with CT and asked why he felt like he needed to use marijuana, CT disclosed that Wright had sexually abused him several times over the years.

After the conversation with CT, Christine talked to DT and HT who eventually disclosed that Wright had sexually abused them too. Christine arranged for CT to begin counseling. The

counseling service referred Christine to the Washington State Child Abuse Center. The case was then referred to the Kitsap County Sheriff's Office.

II. TRIAL

A. Charges and Victim Testimony

The State charged Wright with first degree child rape, second degree child rape, two counts of first degree child molestation, second degree child molestation, and third degree child molestation. Each charge included special allegations that Wright abused his position of trust in the commission of the crime and that the offense was part of an ongoing pattern of sexual abuse.

DT, CT, and HT each testified at trial. Each of them testified to instances when Wright sexually abused them during the time they spent at the Wright home. DT testified that when he was around 12 or 13 years old, Wright inappropriately touched his genitals "[t]oo many [times] to count." Verbatim Report of Proceedings (VRP) (Nov. 18, 2019) at 1379. CT also testified to several instances of abuse, including instances where Wright had intercourse or attempted intercourse with CT or HT. CT further testified that he eventually disclosed these incidents with Wright after getting in trouble for smoking marijuana.

B. Motion in Limine and Testimony Regarding Credibility

Wright moved in limine to prohibit the State from asking a witness to comment on the truthfulness or veracity of another witness. The State likewise moved to prohibit any examination inviting one witness to comment on another witness's accuracy or credibility. In a memorandum regarding the State's motion in limine, Wright argued he should be permitted to question CT's parents about how each of them initially asked themselves if CT was fabricating the allegations to get out of trouble for smoking marijuana.

During argument on the State's motion, Wright explained that he generally agreed with the motion, but intended to ask CT's parents, "'Did you have any questions about whether [CT] was telling the truth?'" VRP (Oct. 28, 2019) at 25. The State responded that the parents' initial reaction to CT's disclosure was irrelevant. The trial court ultimately granted the State's motion, explaining that under ER 608, a witness cannot testify as to whether they believe a particular statement of another witness. CT's parents therefore were not permitted to testify about whether they believed him when he initially disclosed the abuse or whether they thought he had a motive to lie. However, the trial court permitted Wright to question the parents about what was occurring at the time CT made the disclosure in terms of CT being in trouble for using marijuana and facing possible punishment.

The State called Christine to testify at trial. Before Wright began his cross-examination of Christine, the trial court reiterated its ruling regarding the motion in limine.

> I am not going to allow him to ask whether or not [Christine] believed [CT]. . . . [W]e can talk about the context of disclosure, but what her immediate thoughts were as to whether or not this was true or wasn't true, that is a comment on the credibility of the information that she received, and I have excluded that.

VRP (Nov. 14, 2019) at 1080.

The attorneys and the trial court revisited the parameters of the trial court's ruling on the motion in limine again before a sheriff's deputy who had interviewed the children, Deputy Heather Kennedy,[1] testified at trial. The trial court distinguished between testimony about the children's demeanor, for example whether they were laughing or crying, and testimony interpreting that demeanor, which could be a comment about their truthfulness or credibility.

[1] Formerly Kitsap County Sheriff's Detective Heather Wright.

Wright called Douglas as a defense witness at trial. Douglas testified that he had multiple conversations with CT about his marijuana use, which was not allowed in their household. Douglas began to wonder if something bigger was bothering CT:

> So I had to actually have a regular, you know, heart to heart with him and ask him.
>
> > I was -- like growing up I was around this stuff. You know, I know about it. I know what it is. And I was like, "I need to know why you feel that you need it. Are you -- do you have something going on that you're running from or you need to elaborate on?" I was like, "There's only a couple of reasons why people do this. One, because they either had something tragic happen in their life or they just are experimenting." And I was like, "I don't feel it's an experimentation situation with you, son, anymore because of the number of times that we've had to have this conversation."

VRP (Nov. 19, 2019) at 1533-34.

On cross-examination, the State asked Douglas, "Had [CT] ever made any kind of -- to get out of trouble had he ever made any kind of accusations that he was forced to do it or he took some bad action because something was done to him prior to this occasion?" *Id.* at 1537-38. Douglas answered that CT had not. The State also asked if CT had ever tried to deflect and blame somebody else when he had previously been in trouble for marijuana. Douglas answered, "No." *Id.* at 1538.

Douglas testified that in previous conversations about his marijuana use, CT would "shut down" and not engage in the conversation. *Id.* at 1541. But during this conversation, CT "broke down" and "actually talked about why and what was going on." *Id.* Douglas described CT's demeanor during their conversation as "he was a little more engaged. He was actually talking with us. . . . He was actually communicating." *Id.* at 1557.

Wright argued to the trial court that by asking if CT had ever tried to deflect or blame somebody else when he previously had gotten into trouble, the State opened the door to Wright asking if Douglas believed CT was making up the sexual abuse allegations. The trial court

disagreed and reiterated its ruling on the motion in limine prohibiting the parties from asking a witness to comment on the truthfulness of another witness.

C. Wright's Closing Argument

In his closing argument, Wright argued that CT accused Wright of abuse to avoid getting in trouble for using marijuana.

> [CT] is the lynchpin of when the whole thing started too, so we want to look at what happened in this case. You have [CT] who had been in trouble for a long time. He had been caught with marijuana. You had the testimony of his father and his mother that that was a significant thing. They couldn't have marijuana in the house.
>
> And so he is confronted by his father who, in the testimony, unfortunately had been molested, he said, when he was younger. I would argue that you consider that and think that he knew about that in his house and how significant it was, and his father told you that he suggested, "Is there something that's happened to you? Have you been molested?" The seed was planted at that point. The seed was planted, and he said yes.
>
> So who do you pick when that seed is planted? You pick the person that's gone, clear out in California.

VRP (Nov. 20, 2019) at 1700-01. Wright also argued that HT and DT made up their allegations to support their brother.

The jury found Wright guilty of all charges and special allegations. Wright appeals his convictions.

ANALYSIS

I. RIGHT TO PRESENT A DEFENSE

Wright argues that the trial court violated his right to present a defense by excluding CT's parents' testimony about CT's demeanor at the time he initially disclosed the abuse. We disagree.

To determine whether the exclusion of evidence violates a defendant's constitutional right to present a defense, we engage in a two-part analysis. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). In addition to reviewing the trial court's evidentiary rulings for an abuse of discretion, we consider de novo whether those rulings deprived the defendant of their right to present a defense. *Id.* Under *Arndt*, this constitutional question must be analyzed even where there is no evidentiary error. *See id*. at 812.

We review evidentiary decisions for an abuse of discretion. *State v. Scherf*, 192 Wn.2d 350, 387, 429 P.3d 776 (2018). Evidentiary error is harmless unless the defendant shows a reasonable probability that the error materially affected the outcome of the trial. *State v. Barry*, 183 Wn.2d 297, 317-18, 352 P.3d 161 (2015).

Wright acknowledges that it is improper to ask one witness if another witness is lying. *See State v. Wright*, 76 Wn. App. 811, 888 P.2d 1214 (1995). Wright attempts to distinguish the evidence the trial court excluded here, arguing, "[D]efense counsel made it clear he would not ask the parents' opinion regarding the credibility of [CT]'s statements or testimony. . . . Instead, the defense sought to present their observations of [CT] in the context of the conversation when he first made the allegations." Br. of Appellant at 12. On appeal, Wright repeatedly characterizes the evidence he sought to elicit as evidence of CT's demeanor. This argument mischaracterizes the record and the trial court's ruling.

At trial, Wright explicitly told the trial court that he intended to ask CT's parents, "'Did you have any questions about whether [CT] was telling the truth?'" VRP (Oct. 28, 2019) at 25. This type of opinion testimony regarding the veracity of witnesses is "clearly inappropriate." *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); *see also State v. Jerrels*, 83 Wn. App. 503,

508, 925 P.2d 209 (1996) (holding that the prosecutor committed misconduct by improperly asking the mother of alleged child rape victims if she believed her children were telling the truth: "A mother's opinion as to her children's veracity could not easily be disregarded."). To the extent Wright sought to elicit testimony regarding CT's *demeanor* at the time of disclosure, the trial court's ruling on the motion in limine permitted such evidence. Initially, the trial court explained its ruling as "the circumstances surrounding the disclosure can be explored by the defense." VRP (Nov. 4, 2019) at 21. When the trial court revisited the issue before Christine's testimony, the trial court explained, "[W]e can talk about the context of disclosure." VRP (Nov. 14, 2019) at 1080. Before Deputy Kennedy testified, the trial court expressly addressed the difference between testimony about the children's demeanor and opinion about their veracity.

The trial court's ruling permitted Wright to elicit testimony about CT's demeanor during his disclosure, and it properly prohibited opinion testimony about the veracity of CT's statements. Accordingly, we hold that the trial court did not abuse its discretion by granting the motion in limine.

Wright also argues that the trial court erred by denying his request to ask Douglas whether he believed CT was deflecting when he made the initial allegations against Wright. Wright contends that the State opened the door to such questioning by asking Douglas if CT had deflected on other occasions when he was being disciplined. But the trial court's evidentiary ruling in that instance was consistent with its ruling on the motion in limine. The State's cross-examination of Douglas included questioning him about CT's prior behaviors and actions when facing discipline; such testimony fell squarely within the parameters of what the trial court ruled in limine as permissible. Asking how CT *behaved* in the past was different from asking if Douglas believed

CT was being truthful when he made these allegations. The latter improperly seeks opinion testimony regarding the veracity of a witness, and the trial court did not abuse its discretion by denying Wright's request.

Having established that there was no evidentiary error, we turn to whether the trial court's evidentiary ruling violated Wright's Sixth Amendment right to present a defense. We balance the State's interest in excluding the evidence against Wright's need to admit it. *Arndt*, 194 Wn.2d at 812. In *Arndt*, the Supreme Court held that because the defendant was able to advance her defense theory despite the trial court's evidentiary rulings, the defendant's Sixth Amendment rights were not violated. *Id*. at 814. The court distinguished this circumstance from a situation where the excluded evidence "was 'evidence of extremely high probative value; it [was the defendant's] entire defense.'" *Id*. at 813 (quoting *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010)).

Here, like in *Arndt*, Wright was able to advance his defense theory despite the trial court's evidentiary rulings. Wright's defense theory was that CT fabricated the allegations about Wright in order to avoid punishment for using marijuana. Although the trial court limited Wright's ability to directly ask Christine and Douglas if they believed CT was deflecting to avoid punishment, Wright remained free to, and did, elicit testimony that CT was about to face punishment for marijuana use. Douglas also testified that CT had been punished for marijuana use before and that CT's parents considered marijuana use to be a serious problem.

In closing argument, Wright emphasized his defense theory, casting CT as "the lynchpin," and noting that CT had "been in trouble for a long time," and was aware that having marijuana "was a significant thing." VRP (Nov. 20, 2019) at 1700. Wright argued, "[CT's] in trouble again. He's got himself out of that trouble. He's deflected from what's happening to him, and now his

brothers have come to, you know, help him out." *Id.* at 1705. Because the trial court did not exclude Wright's entire defense, there was no constitutional violation.

II. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A. CT's Truthfulness

Wright argues that the trial court violated his due process rights by prohibiting evidence bearing on CT's truthfulness. In particular, Wright argues that some of the events CT described could not have occurred when he testified they did because Wright did not own a travel trailer or live in Washington during the year when CT alleged abusive incidents occurred. But the trial court did not limit the introduction of such evidence. Wright could have asked CT about the timeline during his cross-examination, or otherwise introduced evidence to rebut the timeline of abuse established by CT, but he chose not to. The trial court did not violate Wright's due process rights.

B. Right to Confrontation

Wright also argues that his confrontation clause rights were violated when Detective Mike Grant and Deputy Kennedy were not questioned about inconsistent statements DT had made in his previous interview.[2] The confrontation clause of the Sixth Amendment to the United States Constitution provides criminal defendants the right to confront the witnesses against them. *State v. Davis*, 154 Wn.2d 291, 298, 111 P.3d 844 (2005).

Nothing in the record supports Wright's claim that his right to confrontation was violated. The course of Wright's cross-examination of Detective Grant and Deputy Kennedy was a matter of trial tactics left to his defense attorney; the trial court did not restrict Wright's ability to question

[2] Wright refers to a video recorded interview with DT. But the record does not contain any reference to a video recorded interview with DT. Rather, Deputy Kennedy testified that the interview with DT was not video recorded.

these witnesses. At trial, Wright did not attempt to question Detective Grant or Deputy Kennedy about DT's prior statements. Wright's claim fails.

C. Video of Interview

Wright also argues that the State violated his right to due process by failing to provide the video recorded interview between DT and detectives. However, nothing in the record suggests that any such video exists. The existence of video recorded interviews of CT and HT, created during their forensic interviews, is well established throughout the trial record. However, Deputy Kennedy testified that her interview with DT was not video recorded.

Due process requires the State to disclose material exculpatory evidence to the defense, but the State cannot disclose something that does not exist. *State v. Donahue*, 105 Wn. App. 67, 77, 18 P.3d 608 (2001). To the extent Wright contends a video recorded interview of DT exists outside of our record on appeal, Wright's claim may be better suited for a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

I..., C.J.

Maxa, J.

GLINSKI LAW FIRM PLLC

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