No. 91126-6
(Court of Appeals No. 70561-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRENT Y.
(DOB 4/29/1997),

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Trent Y. (dob 4./29/97), juvenile respondent and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Trent seeks review of the Court of Appeals decision affirming his Snohomish County Juvenile Court adjudication for child molestation in the first degree, State v. T.Y, No. 70561-0-I. A copy of the Court of Appeals decision, dated November 17, 2014, is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Due process is violated if a juvenile adjudication is based upon testimony from an incompetent witness. D.B.'s understanding of the obligation to tell the truth was unclear, she had a faulty and inconsistent memory of recent events, and she had difficulty expressing what happened in words. The Court of Appeals, however, refused to determine if Trent's right to due process was violated by the testimony of an incompetent witness because his attorney did not object to her testimony at the fact-finding hearing. May Trent argue for the first time on appeal that his due process rights were violated when he was found guilty based upon the testimony of an incompetent witness?

2. A juvenile accused of violating the criminal law has a due process right to a fair trial, and a prosecutor's improper arguments may violate that right. The State had the burden of proving every element of the crime beyond a reasonable doubt, but the prosecutor's argument shifted that burden to Trent. Must Trent's juvenile adjudication be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not be cured by timely objections?

D. STATEMENT OF THE CASE

15-year-old Trent Y. lived with his mother, Chrissy Mannhalter, stepfather, and two younger siblings in Bothell in the summer of 2012. CP 28; RP 136-37, 147-48.[1] Mrs. Mannhalter ran a licensed day-care on the main floor of the house. RP 31, 148. There were up to eight children in the day-care, including Trent's little sister. RP 151, 164. Mrs. Mannhalter employed her mother-in-law, her husband, and another woman to provide child care with her, and Trent sometimes helped. RP 138-39, 150-51. Mrs. Mannhalter was careful to adhere to licensing requirements that the children be in line-of-sight of an adult at all times. RP 74-75, 148-52, 165-66, 167-68, 177-78.

[1] The verbatim report of the proceedings of the fact-finding hearing on May 20, 2013, is referred to as RP. The other two volumes are referred to by date.

D.B. began attending Mrs. Mannhalter's day-care when she was 14 months old in 2009, and she stayed until the summer of 2012 when she was 4 years old. RP 14, 31, 152. D.B. was friends with Mrs. Mannhalter's daughter, who was the same age. RP 12, 63, 141. That summer D.B. was in the bathroom with her mother and said, "I hurt down there," indicating her private area. RP 36. Ms. B. got out lotion and noted that D.B. was red, adding that Trent kept touching her down there. Id.

Ms. B. called Mrs. Mannhalter, who reported the incident to CPS. RP 36-37, 53, 159. Mrs. Mannhalter asked Trent if he had inappropriately touched D.B., and he said he had not. RP 157. Trent Y. was charged in Snohomish County Juvenile Court with one count of child molestation in the first degree. CP 88.

At a fact-finding hearing before the Honorable Eric Lucas in May 2013, D.B. was the first witness. D.B. knew that she was 5 years old, but did not know her birthday. RP 12. She also remembered a birthday party and presents. RP 11-12. She said she played with friends at the party, but could only give the name of one friend. RP 12. She could not remember last Christmas and said she did not get any presents for Christmas. RP 14.

The prosecutor asked questions about the difference between the truth and a lie, and D.B. answered in the affirmative when asked "are you going to talk about only things that actually really are the truth and actually really happened." RP 15-16.[2]

D.B. did not know where she was attending day-care at the time of the fact-finding hearing. RP 16. She did remember attending day care at Mrs. Mannhalter's home in the past. RP 17. D.B. said the only thing she did at the day care was play with toys. RP 17. In response specific questions, however, D.B. remembered watching a Justin Bieber tape and eating food while at day-care. RP 17-18. D.B. was unable to name any of the toys she played with, relating only that there was a box full of toys. RP 17. D.B. knew the names of only two of the other children at the day care. RP 17.

When asked if it made her sad when she stopped attending Mrs. Mannhalter's day care, B.D. answered "no," but later gave conflicting testimony, stating that she liked day-care and missed Mrs. Mannhalter. RP 16-17, 20, 29.

After this discussion, D.B. asked the prosecutor if she could leave. RP 20. D.B. announced, "I brushed my teeth," but later

[2] The record does not show if D.B. understood the term "actually."

admitted that she wanted to brush her teeth, perhaps as a reason to leave the courtroom, which she again asked to leave. Id. Earlier D.B. made the comment, "Grandpa said I can talk," which was not in response to any question. RP 14. The court then found that D.B. was a competent witness. RP 21; CP 2-3, 5 (Findings of Fact 1-5; Conclusion of Law 2).

The State also presented D.B.'s out-of-court statements to CPS licensing investigator Corrie Hayes, forensic nurse practitioner Paula Newman-Skomski, and Child Interview Specialist Gina Coslett. RP 52-53, 55-56, 82, 84, 92, 97. D.B. told Ms. Hayes that Trent was her friend and she liked to play with him. RP 58. When asked what they played, D.B. pulled up her dress, patted the front of her underpants, and said "he touches me there." RP 58. She said that Mrs. Mannhalter and her mother-in-law were present when this occurred. RP 76. Ms. Hayes later spoke to Trent, who denied the abuse. RP 67.

Ms. Newman-Skomski questioned D.B. about safety rules. RP 98-99, 105. When asked about improper touching, D.B. told the nurse that Gunther touched Jayden's private area. When asked if anyone touched her, D.B. said no, but then stated that Trent did at day-care.

RP 100. Ms. Newman-Skomski did not find any physical signs of abuse or trauma. RP 102.

A few days later D.B. was interviewed at Dawson's Place Child Advocacy Center by Ms. Coslett. RP 80, 84. D.B. told Ms. Coslet that "Trent touched my pee pee down there and I can't go to Chrissy's anymore."[3] RP 85-86, 89; Ex. 2 at 14:26. When asked for details, D.B. said "I can't remember. Can you tell me?" Ex. 2 at 14:27. Eventually D.B. demonstrated what happened by pulling up her dress and pointing to her stomach. Ex. 2 at 14:39.

Trent testified that he did not touch D.B.'s private area. RP 139-40. He explained that he did not usually spend time in the day-care portion of his home when the children were there, but did help his mother once in a while. RP 138-39. He played games with the children and tickled them, but only tickled D.B.'s stomach. RP 140, 142-43. Trent further explained he was never alone with the children; there was always an adult present. RP 139.

Mrs. Mannhalter also testified that Trent was not left alone with the children. RP 152. The day-care was on the main floor of her home, which contained a living room, dining room, and kitchen. RP 148-49.

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[3] Chrissy is Mrs. Mannhalter.

The rooms were open, and there was no wall between the living room and the kitchen. RP 149-50, 177. Because Mrs. Mannhalter did not work alone, there was always an adult within sight of the children. RP 151-52. Mrs. Mannhalter testified that D.B. did not appear to have any behavioral issues. RP 154. D.B. had occasionally made things up and taken things home from the day-care. Id.

The juvenile court found Trent guilty of first degree child molestation. CP 2-5. On appeal, Trent argued that D.B. was not a competent witness. Brief of Appellant at 10-20 (hereafter BOA). The Court of Appeals refused to address the issue because Trent's trial attorney did not object to the court's competency determination and because counsel was able to cross-examine the five-year-old. Slip Op. at 4-5. The Court of Appeals also rejected Trent's argument that the prosecutor impermissibly shifted the burden of proof in closing argument. BOA at Slip Op. at 6-8. Trent seeks review in this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **The competency of a young child to testify in court is an important due process issues that should be addressed by this Court.**

On appeal Trent argued that the five-year-old witness D.B. was not competent to testify because her testimony revealed (1) she did not understand the obligation to speak the truth on the witness stand, (2) she did not have the necessary mental capacity at the time of the alleged incident or the needed memory of the alleged incident at the time of her testimony, and (3) she lacked the capacity to understand simple questions and express her memory of the incident in words. BOA at 10-20. The Court of Appeals, however, refused to address the issue because Trent's trial attorney did not challenge B.D.'s competency at the fact-finding hearing. Slip Op. at 4-5. Without reviewing the testimony, the Court of Appeals concluded that Trent could not show its admission was a manifest constitutional issue because he had the opportunity to cross-examine the witness. Slip Op. at 5.

The ability to cross-examine an incompetent witness does not solve the due process violation created when a juvenile adjudication is based upon the testimony of a witness who is too young to testify

truthfully or accurately. This Court should accept review of Trent's case to address whether his constitution right to due process was violated and to provide guidance to the lower courts in interpreting RAP 2.5 in a manner than honors the constitutional right to appeal. RAP 13.4(b)(3), (4).

Due process protects the accused against a conviction based upon incompetent evidence. State v. Brousseau, 172 Wn.2d 331, 336, 259 P.3d 209 (2011); U.S. Const. amend. XIV; Const. art. I §§ 3, 22. This right is protected by RCW 5.60.020, which permits only competent witnesses to testify in court. RCW 5.60.020. While witnesses are presumed to be competent, they may not testify if they "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(2); State v. S.J.W., 170 Wn.2d 92, 100, 239 P.3d 568 (2010). The constitution right to conviction only upon competent evidence is further protected by criminal rules which prohibit children under the age of 10 from testifying if they "do not have the capacity of receiving just impression of the facts about which they are examined or who do not have the capacity of relating them truly." CrR 6.12(c); JuCR 1.4(b).

The Court of Appeals decision not to review Trent's issue was based upon RAP 2.5(a)(3), a prior Court of Appeals decision, and its reading of this Court's opinion in Brousseau. Slip Op. at 5, n.4. The two cases and the court rule, however, do not support the Court of Appeals' reasoning. In State v. Cooley, 48 Wn. App. 286, 290, 738 P.3d 705 (1987), the defendant alleged for the first time on appeal that a child witness's memory had been rendered false by the a social worker's interview techniques and that he was therefore denied his constitutional right to confront the witness. The Cooley Court found no evidence to support this claim and noted rigorous cross-examination of both the social worker and the child. Id. at 291. Court of Appeals therefore found allowing the child to testify created a manifest constitutional error that violated the defendant's confrontation rights. Id. In contrast, Trent argued the testimony of an incompetent witness violated his due process right to a fair trial; Cooley is simply not on point.

In Brousseau, this Court held that the testimony of the child witness is not required at a pre-trial competency hearing absent a showing of incompetency. Brousseau, 172 Wn.2d at 349. In reviewing

the Mathews[4] factors, this Court noted found that the risk of error created by this procedure was not great because competency may be challenged at any time, and the witness will testify at trial and be subject to cross-examination. Id. at 347-48. Brousseau is not properly read to support the determination that witness competency is not a due process issues that can be raised on appeal.

RAP 2.5 also does not provide support for the Court of Appeals refusal to address Trent's issue. As the Court of Appeals stated in Cooley, "Except as to issues of manifest error affecting a constitutional right, we will not consider an issue or theory that was not raised in the trial court. Cooley, 48 Wn. App. at 290. A violation of due process may present a manifest constitutional issue that may be raised for the first time on appeal. See State v. Burke, 163 Wn.2d 204, 225-26, 181 P.3d 1 (2008) (direct comment on defendant's exercise of Fifth Amendment right to silence is due process violation that may be raised for the first time on appeal); State v. Sanchez, 146 Wn.2d 339, 345-46, 46 P.3d 774 (2002) (prosecutor's violation of plea agreement); State v. Stein, 144 Wn.2d 236, 27 P.3d 1284 (2001) (jury instructions that do not clearly set forth the elements of the crime); Conner v. Universal

[4] Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (procedural due process in civil litigation); In re Welfare of H.Q., 182 Wn. App. 541, 330 P.3d 195, 200 (2014) (due process right to voluntarily relinquish parental rights).

This Court has provided five factors for the court to consider in determining if a child is competent to testify. State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The court must decide if the child has:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Id. On review, the appellate court may examine the entire record and not just the competency hearing. Brousseau, 172 Wn.2d at 340.

D.B's testimony at the competency hearing and during the fac0-finding showed that she did not understand the "the obligation to speak the truth on the witness stand" required by Allen, 70 Wn.2d at 692. D.B. gave contradictory answers to questions when the prosecutor posed questions designed to demonstrate competency. RP 16-20, 22-23, 27, 31, 137-38, 148-49. For example, she said she could not

remember who Trent was, and said that Trent was and was not at the day care when she was enrolled there. RP 22-23. Trent was obviously in the courtroom, and D.B. seemed to say he was either in the courtroom or at the daycare. RP 22-23. In addition D.B. made a number of spontaneous statements while on the witness stand that show she did not understand her obligation as a witness, RP 20, 25, 26-27, and asked several times if she could leave. RP 20, 25, 29.

D.B. thus did not show that she understood the requirement that she tell the truth in court, and the juvenile court abused its discretion in finding that she could distinguish between the truth and a lie.

The juvenile court found that D.B. could accurately perceive and remember events because she was able to testify about her birthday, Halloween, and her day care experience. RP 21; 5/29/13 RP 3-4; CP 2 (Findings of Fact 2-4). There is little evidence that what D.B. perceived and related about the past events, however, was accurate and her memory was quite limited. See RP 12-13, 14. D.B.'s ability to remember her day-care experience was limited even though she attended the day-care for three years. RP 17, 31, 152.

In addition, D.B.'s responses to questions were often inconsistent. D.B. said the touching occurred in the "bedroom part" of

the house and then said it occurred in the living room. RP 27. She first said she was not sad to leave Mrs. Mannhalter's day care, but later said she was sad because she liked it there. RP 16-17, 20, 29. Other statements were not logical responses to questions. RP 20, 25, 26-27

D.B.'s testimony does not support the conclusion that she (1) understood the obligation to tell the truth in court, (2) had the mental capacity at the time of the incident to receive an accurate impression or sufficient memory to retain an independent memory of the occurrence, or (3) had the ability to answer questions and express in words what she experienced. Trent's constitutional right to due process was violated when he was found guilty of a serious offense based upon the testimony of an incompetent witness, the Court of Appeals incorrectly declined to address the issue. This Court should accept review.

2. **The prosecutor's misconduct in closing argument shifted the burden of proof to Trent and violated his constitutional right to a fair fact-finding hearing.**

The prosecutor in Trent's case committed misconduct in closing argument by shifting the burden of proof. The Court of Appeals, however, concluded that the prosecutor's argument was proper. Slip Op. at 7-9. This Court should accept review because the prosecutor's argument was misconduct that violated Trent's constitutional right to a

fair trial and because the Court of Appeals opinion is in conflict with State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). RAP 13.4(b)(2), (3).

Juveniles facing criminal charges have the due process right to a fair trial. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). This Court has long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for propriety in closing argument. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-04, 715, 286 P.3d 673 (2012); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may

be violated. Glasmann, 175 Wn.2d at 703-04; Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

"[The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364. The requirement of proof beyond a reasonable doubt has consistently played an instrumental role in protecting the integrity of the American criminal justice system.[5] Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); Winship, 397 U.S. at 361-63; State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977). It is therefore misconduct for the prosecutor to argue to the jury in a manner that reduces its high burden of proof of every element of the crime or shifts the burden to the defendant. Glasmann, 175 Wn.2d at 713 (misconduct for prosecutor to imply that jury could not acquit defendant unless it believed his testimony); State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008) (misconduct for prosecutor to argue that the presumption of innocence did not mean the jury had to give the defendant the benefit of the doubt), cert. denied, 556 U.S. 1192 (2009); accord Emery, 174 Wn.2d at 759-60 (misconduct for

[5] This standard applies to children in juvenile court as well as adults. Winship, 397 U.S at 365.

prosecutor to argue that the jury has to fill in the blank with a reason in order to find the defendant not guilty); State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (misconduct for prosecutor to argue that jury could only acquit if it believed the defendant); Fleming, 83 Wn. App. at 213, 921 P.2d 1076 (1996) (misconduct for prosecutor argue jury could only acquit if found complainant was lying). "[I]t is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise." Warren, 165 Wn.2d at 27.

The deputy prosecuting attorney's closing argument placed the burden on the defense to prove that D.B. made up a story or that she was coached. 5/21/13 RP 2-11. The prosecutor began by stating that the only reasonable explanation for D.B.'s statements "is that what she said is what happened," adding, "What doesn't make sense is the implication that either she made it up or that somehow she was coached." Id. at 2. The prosecutor then related reasons why it was not logical that D.B. was coached or made up a story: D.B.'s youth and related inability to consistently tell an untrue story, D.B. liked the

respondent and Mrs. Mannhalter's daycare, and the likelihood that D.B. was occasionally alone with Trent. Id. at 2-10.

The prosecutor's argument is like that found to be misconduct in Fleming, supra. In Fleming the prosecutor told the jury it could only acquit the defendants in a rape case if the jury found that the complainant was lying, confused or fantasizing. Fleming, 83 Wn. App. at 213. The Court of Appeals explained the argument was improper because it misstated the law, the burden of proof, and the jury's function.

> The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find D.S. was lying or mistaken, in order to acquit.

Id. (Emphasis in original). Here, the prosecutor argued that the court had to find Trent guilty unless he showed the D.B. was making up a story or was coached. Like the argument in Fleming, this argument was misconduct.

In Trent's case, the prosecutor subtly shifted the burden of proof to the defense by arguing that the court had to find Trent guilty unless it found that D.B. was mistaken or coached. This argument improperly shifted the burden of proof. The Court of Appeals, however, distinguished Trent's case from Fleming because prosecutor did not specifically argued that the court had to find D.B. was lying to acquit Trent. Slip Op. at 7.

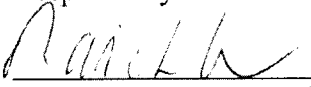
The prosecutor's argument, however, shifted the burden of proof to Trent. This Court should accept review to review the propriety of the prosecutor's argument and resolve the conflict between this case and Fleming. RAP 13.4(d)(2), (3).

F. CONCLUSION

Trent Y. asks this Court to accept review of the Court of Appeals affirming his juvenile adjudication

DATED this 17th day of December 2014.

Respectfully submitted,



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APPENDIX A

COURT OF APPEALS DECISION TERMINATING REIVEW

November 17, 2014

APPENDIX B

ORDER GRANTING MOTION TO PUBLISH

July 24, 2014

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. T.Y. (D.O.B. 4/29/1997), Appellant.	No. 70561-0-I DIVISION ONE UNPUBLISHED OPINION FILED: November 17, 2014

LEACH, J. — T.Y. appeals his juvenile court adjudication and disposition for child molestation in the first degree. He challenges the trial court's finding that complaining witness D.B., who was five years old at the time of trial, was competent to testify. He also contends that prosecutorial misconduct deprived him of a fair trial. Because T.Y. did not object at trial to the court's competency ruling and he does not show manifest error affecting a constitutional right, he may not raise this issue for the first time on appeal. Because he has also failed to establish prosecutorial misconduct, we affirm.

Background

In the summer of 2012, 15-year-old T.Y. lived in Bothell with his mother, Chrissy Mannhalter, his stepfather, and two younger siblings. Mannhalter ran a licensed day care on the main floor of the family home, usually caring for about

eight children. She employed her husband, mother-in-law, and a friend as her assistants, and T.Y. also helped.

D.B. was four years old that summer. She had attended Mannhalter's day care since 2009. One day in July, while in the bathroom with her mother, D.B. pointed to her "private area" and told her mother that she "hurt down here." Her mother noticed her vaginal area was red and applied rash ointment. D.B. then told her mother that she was red because "[T.Y.] keeps touching me down there."

D.B.'s mother called Mannhalter and told her what D.B. said. Mannhalter reported the incident to her licensor. On July 24, Child Protective Services (CPS) investigator Corrie Hayes interviewed D.B. at home. While they played with stuffed animals, Hayes asked D.B. about day care. D.B. asked Hayes if she knew who T.Y. was. When Hayes said she didn't and asked D.B. to tell her more, D.B. said T.Y. was a "big kid," that they liked to play together, and that she really liked him. When Hayes asked what they did, D.B. "picked up her dress, patted the front of her panties in her vaginal area and said he touches me here." She told Hayes that T.Y. would tickle her, and they would sit on the couch together, and he would kiss her on the cheek "when it was over" and hug her. The next day, Hayes interviewed T.Y., who denied inappropriately touching D.B.

D.B.'s mother was reluctant to pursue the investigation. But after CPS initiated an investigation into her fitness as a parent, she agreed to cooperate and seek further professional help for D.B.

On December 5, forensic nurse examiner Paula Newman-Skomski examined D.B. Newman-Skomski talked to D.B. about personal safety and eventually asked her if anybody had touched her private areas. D.B. initially said no but then said that "[T.Y.] did at Chrissy's." D.B. said it happened more than once, in the living room.

On December 11, child interview specialist Gina Coslett conducted a videotaped interview of D.B. at Dawson's Place Child Advocacy Center. When Coslett began to explain the guidelines for the interview, D.B. interrupted, saying, "[T.Y.] touched my pee-pee down here and I can't go to Chrissy's anymore." When Coslett asked her to explain, D.B. said, "I don't remember. Can you tell me?" D.B. then told Coslett that this happened one time in the living room when others were present. She showed Coslett what happened by pulling up her dress and pointing toward her abdominal or pelvic area.

The State charged T.Y. in juvenile court with child molestation in the first degree. The trial court held a hearing at the start of trial to determine D.B.'s competency to testify. D.B. answered the prosecutor's questions about her birthday, Christmas, Halloween, her former day care, and the difference between the truth and a lie. The prosecutor then asked the court to find D.B. competent to testify. When the court asked for the defense's position, counsel replied, "I will defer to the Court." The trial court found D.B. competent to testify.

D.B. then testified that T.Y. tickled her under her clothes, pointing to her vaginal area. She said T.Y. did this "two times, every time," and answered

affirmatively when the prosecutor asked if she meant more than twice. When asked whether it happened in the "living room part or the bedroom part or the kitchen," she answered, "Bedroom part." When asked where she was sitting, she said, "On the floor, and on the couch, in the living room." D.B. appeared restless and reluctant during her testimony but answered all questions on direct and cross-examination.

T.Y. testified that he never touched D.B. inappropriately but played "tag, wrestl[ed] around, play[ed] with the little stuffed animals" with D.B. and all the other children at the day care. He said that he tickled her and the other children on the stomach. Both he and his mother testified that he was never alone with any of the children.

The trial court adjudicated T.Y. guilty of child molestation in the first degree.

T.Y. appeals.[1]

Analysis

Child Witness Competency

First, T.Y. contends that the trial court abused its discretion in finding D.B. competent to testify. He argues that D.B.'s testimony shows she didn't understand her obligation to speak the truth on the witness stand, that she had limited memory of past events, and that her accounts were inconsistent and contradictory. The State responds that the trial court properly admitted D.B.'s

[1] The State initially filed a cross appeal but withdrew it on June 27, 2014.

testimony but argues as a threshold matter that because T.Y. didn't object to this issue at trial and does not demonstrate manifest error, he cannot raise it on appeal.

We agree with the State. Generally, a party who fails to raise an issue at trial waives the right to appeal that issue.[2] RAP 2.5(a)(3), however, allows a party to raise for the first time on appeal a "manifest error affecting a constitutional right." If the reviewing court determines that an alleged error affects a constitutional right, it then decides if the alleged error is manifest, meaning the error actually prejudiced the defendant at trial.[3] Here, because T.Y. was able to cross-examine D.B. and other witnesses who testified about D.B.'s accounts of the abuse, he was able to exercise his constitutional right to confront witnesses. Because T.Y. does not show a manifest error affecting a constitutional right, we decline to review the trial court's competency determination.[4]

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[2] RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

[3] McFarland, 127 Wn.2d at 333.

[4] See State v. Cooley, 48 Wn. App. 286, 290-91, 738 P.2d 705 (1987) (finding that because defendant was able to "vigorously cross-examine" interviewer and child witness, no manifest error occurred); see also State v. Brousseau, 172 Wn.2d 331, 335, 347, 259 P.3d 209 (2011) (defendants have a due process right to competent evidence, but because the consequence of even an erroneous pretrial finding of witness competency is that the witness will testify at trial and be subject to cross-examination, risk of due process violation is minimal).

Prosecutorial Misconduct

Next, T.Y. argues that the prosecutor violated T.Y.'s right to a fair trial. In closing argument, the prosecutor told the court, "The only reasonable explanation for [D.B.]'s repeated disclosures of what happened is that what she said is what happened, and that [T.Y.] molested her. . . . What doesn't make sense is the implication that either she made it up or that somehow she was coached." Defense counsel did not object to the prosecutor's comments.

When a defendant did not object to the alleged prosecutorial misconduct at trial, this court does not review the alleged error unless the misconduct was so flagrant and ill intentioned that it caused prejudice incurable by a proper jury instruction.[5] Prejudice occurs only if "'there is a substantial likelihood the misconduct affected the jury's verdict.'"[6] In a bench trial, it creates a heavy burden for the defendant because we presume that a trial judge will disregard inadmissible matters when making findings.[7]

T.Y. argues that the prosecutor's statements "placed the burden on the defense to prove that D.B. made up a story or that she was coached" and misstated the burden of proof by implying that the court should convict T.Y. if it couldn't find a reason to disprove D.B. He contends that the prosecutor's

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[5] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

[6] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)).

[7] State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002); State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970).

conduct here was like that in cases such as State v. Fleming,[8] where the prosecutor told the jury it could only acquit the defendant if it found that the rape victim was lying, confused, or fantasizing.

We disagree. Unlike the prosecutor in Fleming, the prosecutor here did not tell the court that it could only acquit T.Y. if it found that D.B. was lying. And unlike other cases T.Y. cites,[9] the prosecutor did not say or imply that the court needed to believe the defendant or "fill in the blank" with a reason in order to acquit. Rather, the prosecutor's argument here was similar to that in State v. Killingsworth,[10] where the prosecutor argued that the only "reasonable explanation" for the evidence was the defendant's guilt. We affirmed Killingsworth's conviction, noting that the prosecutor "did not argue or imply that the defense had failed to offer other reasonable explanations or comment on Killingsworth's failure to testify. Rather, he simply argued that the evidence did not support any other reasonable explanation."[11] Here, as in Killingsworth, the prosecutor highlighted evidence that did not support a "reasonable explanation"

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[8] 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

[9] In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012) (misconduct for prosecutor to imply that jury could not acquit unless it believed defendant's testimony); Emery, 174 Wn.2d at 759-60 (improper for prosecutor to argue that in order to acquit, jury must "fill in the blank" with reason); State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007) (misconduct for prosecutor to argue that jury could only acquit if it believed defendant); State v. Barrow, 60 Wn. App. 869, 874-76, 809 P.2d 209 (1991) (misconduct for prosecutor to argue that in order to acquit, jury had to believe the defendant and "completely disbelieve" the police officers State called as witnesses).

[10] 166 Wn. App. 283, 290 n.5, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012).

[11] Killingsworth, 166 Wn. App. at 291.

other than T.Y.'s guilt: D.B.'s young age and lack of the sophistication that would be necessary to maintain a false account over a period of months, the fact that she liked T.Y. and considered him her friend, her consistent statements to her mother and three professionals, and the likelihood that T.Y. was sometimes alone with D.B. The prosecutor did not shift the burden of proof by asserting that the judge needed to find a reason to acquit T.Y. Rather, the prosecutor properly argued inferences from the evidence that weighed against a finding of reasonable doubt. No misconduct occurred. Moreover, we presume that the trial court disregarded inadmissible matters and followed the law. T.Y. does not overcome this presumption and therefore does not show prejudice.

Conclusion

Because T.Y. fails to show manifest error affecting a constitutional right, we do not review T.Y.'s challenge to the trial court's finding that D.B. was competent to testify. Because T.Y. does not establish prosecutorial misconduct, we affirm.

Leach, J.

WE CONCUR:

Schindler, J.

Eppelwick, J.

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Washington Appellate Project

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