71520-8

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COA No. 71520-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHAD CHENOWETH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF ~~KING~~ SKAGIT COUNTY
The Honorable David R. Needy

APPELLANT'S OPENING BRIEF

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2. The court erred in admitting hearsay testimony under the fact of complaint exception.

3. The trial court erred in giving the jury Instruction 9a, stating that the complainant's testimony need not be corroborated.

4. The trial court erred in striking the defense argument in closing that pointed out that certain persons had not testified about relevant matters regarding the alleged commission of the crime.

5. Cumulative error requires reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The spousal privilege of RCW 5.60.060(1) allowed Mr. Chenoweth to prevent his wife from testifying unless the matter involved any child. Where the complainant was age 19 at the time of the alleged act, and not a child, did the trial court abuse its discretion in preventing Mr. Chenoweth from asserting his spousal privilege?

2. Where the complainant's assertions that the defendant engaged in intercourse with him were not timely made, did the court

abuse its discretion in admitting the hearsay testimony under the fact of complaint or "hue and cry" exception?

3. Did jury instruction 9a, stating that the complainant's testimony need not be corroborated to prove the crime of Incest, erroneously mislead the jury, comment on the evidence, dilute the standard of proof of beyond a reasonable doubt, and impinge on the defendant's ability to argue his theory of reasonable doubt?

4. Did the trial court abuse its discretion in striking the defense argument in closing that pointed out that certain persons had not testified about relevant matters regarding the alleged commission of the crime, where the defendant was entitled to point out the lack of evidence?

5. The trial court errors, in particular the instructional error, individually require reversal – as argued infra – but they also aggregated and carried a cumulative prejudicial impact on the verdict. Should this Court reverse for that additional reason?

C. STATEMENT OF THE CASE

Mr. Chenoweth was charged with rape, and with Incest pursuant to RCW 9A.64.020(1), based on an allegation that he engaged in sexual intercourse with his biological son, C.C. CP 47-48. The trial court excluded the State's proffered ER 404(b)

evidence. 12/4/11RP at 5-23. The court allowed three State's witnesses, including the complainant C.C. who testified that the defendant engaged in intercourse with him on a date when he was 19 years old, to testify that C.C. complained of the claimed wrongdoing approximately one year after the alleged incident. 12/9/13RP at 80-83, 96-98, 100-02; 12/11/13RP at 33-35.

The charge of rape was dismissed. 12/11/13RP at 41-47; CP 73. Mr. Chenoweth was found guilty of Incest and was sentenced to a standard range term. CP 158-73. He appeals. CP 174-90.

D. ARGUMENT

1. THE TRIAL COURT IMPROPERLY ALLOWED THE DEFENDANT'S WIFE TO TESTIFY DESPITE MR. CHENOWETH'S INVOCATION OF THE SPOUSAL PRIVILEGE.

a. <u>The court allowed the testimony of the defendant's wife</u>. By pre-trial motion, Mr. Chenoweth invoked RCW 5.60.060(1), Washington's spousal privilege statute, to prevent his wife from testifying against him in the cause. Supp. CP ___, Sub # 43; 12/9/13RP at 22-28. The court denied the motion and allowed Jaianni Chenoweth to testify at his trial under the exception in the marital privilege statute for a parent in cases where a crime was allegedly committed against "any child." 12/9/13RP at 26-28.

The appellate courts review a trial court's decision regarding the admissibility of evidence for abuse of discretion. State v. Hamlet, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons, State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), and where the decision is based on an erroneous interpretation of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

b. The court abused its discretion. Washington's marital privilege is drafted broadly as a rule of incompetency to testify and, upon objection, bars any testimony, on any subject, against the party spouse invoking it. See 19 Washington Practice § 5.7 (2013) (competency of spouse as witness). Thus RCW 5.60.060(1) not only bestows a privilege for confidential communications made during the marriage, it also provides that a spouse may not testify against the other spouse without the consent of the nontestifying spouse. See, e.g., State v. Tanner, 54 Wn.2d 535, 341 P.2d 869 (1959) (also noting that an objection under the statute is normally made by pretrial motion, which constitutes a sufficient objection and eliminates the need to raise an objection in the presence of the jury).

The privilege is subject to a number of exceptions.

The statute states:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage. **But this exception shall not apply** to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse if the marriage occurred subsequent to the filing of formal charges against the defendant, nor **to a criminal action or proceeding for a crime committed by said husband or wife against any child of whom said husband or wife is the parent or guardian**.

(Emphasis added.) RCW 5.60.060(1). The exception for crimes committed by a spouse against any child of whom the spouse is a parent or guardian is at issue in this case. That exception, by its plain language, applies to crimes against any child, thus excluding a person of 19 years of age such as C.C.

If the meaning of a statute is plain on its face, the courts give effect to the plain meaning as an expression of legislative intent. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Where the statute does not define a term, the courts look to the ordinary meaning of the word. State v. McConnell, 178 Wn. App. 592, 315

P.3d 586 (2013). Courts may look to a dictionary for such meaning. McConnell, 178 Wn. App. at 593; see, e.g., State v. Perrone, 59 Wn. App. 687, 697, 800 P.2d 1132 (1990) (citing Black's Law Dictionary, 217 (5th ed.1979) for the definition of child as "one who had not attained the age of fourteen years."). Black's Law Dictionary online makes clear that the word "child" has two meanings in law:

> (1) In the law of the domestic relations, and as to descent and distribution, it is used strictly as the correlative of "parent," and means a son or daughter considered as in relation with the father or mother[; and]
> (2) In the law of negligence, and in laws for the protection of children, etc., it is used as the opposite of "adult," and means the young of the human species, (generally under the age of puberty,) without any reference to parentage and without distinction of sex.

http://thelawdictionary.org/child; see also State v. Besabe, 166 Wn. App. 872, 271 P.3d 387 (2012) (noting that RCW 9A.42.010(3) defines a child as "a person under eighteen years of age").

Reading the word "child" to mean a person under the age of 18 is consistent with the case law discussing this exception to the spousal privilege, which indicates that the purpose of the exception is to accord *children* the special protection of the courts and the laws. State v. Waleczek, 90 Wn.2d 746, 751, 585 P.2d 797 (1978)

(noting that in carving out the parent or guardian exception to the marital privilege, the legislature acknowledged the paramount intent to protect children from physical and sexual abuse); State v. Sanders, 66 Wn. App. 878, 884, 833 P.2d 452 (1992) (purpose of exception was to effectuate the strong public policy of protecting children).

It was error, therefore, to read this exception to the spousal privilege to include a person of 19 years of age such as C.C., which was contrary to the plain language of RCW 5.60.060(1). Mr. Chenoweth should have been entitled to invoke the spousal privilege as to his wife as a witness in this cause, and the trial court abused its discretion. State v. Quismundo, 164 Wn.2d at 504.

c. The error by the trial court requires reversal. Within reasonable probabilities, the outcome would have been different but for the error. Although the testimony in the case was limited, Mrs. Chenoweth provided "hue and cry" evidence and testimony regarding C.C. that placed him in a sympathetic light, and suggested that after the date of the alleged act, he behaved sadly. 12/10/13RP at 69-70, 83. This testimony was highly material to Mr. Chenoweth's conviction by the jury.

2. THE TRIAL COURT ADMITTED HEARSAY TESTIMONY THAT DID NOT FALL UNDER THE "HUE AND CRY" EXCEPTION TO THE HEARSAY RULE.

a. The trial court admitted the fact of C.C.'s untimely complaint over defense objection, through multiple witnesses.

Mr. Chenoweth sought by motion *in limine* to exclude any proposed evidence to the effect that C.C. made a complaint of the claimed incident to various persons, including his sister Laura, and his mother Jaianni. 12/9/13RP at 5-6; CP 54-55 (Defense brief). Counsel argued that evidence of statements that an incident occurred, made over a year after the October/November, 2011 time frame of the claimed conduct, were not "timely" under the crucial timeliness criteria that is the core of the "hue and cry" or fact of complaint exception to the rule of hearsay inadmissibility. 12/9/13RP at 5-6.

> The theory is that if the abuse occurs that a victim will timely complain, and one can hardly call a year later timely.

12/9/13RP at 5. As counsel argued below, inadmissible hearsay also includes a witness's own testimony repeating his out-of-court statements. 12/9/13RP at 7.

However, the trial court admitted these several instances of hearsay testimony proffered by the prosecution, despite finding that

"[a] year or approximately a year is certainly what I would not consider timely in that sense." 12/9/13RP at 8. The court concluded, "I don't believe that prevents the State from presenting or the jury from hearing how these matters came to be where they are." 12/9/13RP at 8. The court also appeared to reason that the matter was relevant and admissible to show "how it came to law enforcement's attention." 12/9/13RP at 8.

b. The ruling *in limine* was final and the defendant may appeal. During trial, witness Jaianni Chenoweth, the complainant's mother, was permitted to testify in accordance with the court's pre-trial ruling that she "learned about the allegations in the present case" after the summer of 2012. 12/9/13RP at 80-83.[1]

Witness Laura Lind, the complainant's sister, was allowed to testify that C.C. made the allegations to her in approximately the Fall of 2012. 12/11/13RP at 33-35.

C.C. himself was permitted to testify that, some period of time afterward, he told his mother about the matter. 12/9/13RP at 100-01. He was further permitted to testify that he also made the complaint to an Officer Holmes, who was with Adult Protective

[1] The charges of rape and incest, alleged as occurring on or about October/November of 211, were read to the petit jury after empanelment. CP 47 (second amended information); 12/9/13RP at 3 (reading of charges to jury).

Services. 12/9/13RP at 102. Kim Tyler and Officer Holmes also testified to the fact of complaint. 12/9/13RP at 121-22, 137-38.

Mr. Chenoweth had no need to object to this testimony contemporaneously; his objection had been preserved *in limine*. RAP 2.5. When a party moves prior to trial to exclude certain testimony, and the trial court considers and issues a final ruling on the matter adverse to the party, as here, the party is deemed to have standing objection to the evidence admitted during trial. State v. McDaniel, 155 Wn. App. 829, 853 n. 18, 230 P.3d 245 (2010); State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

c. The testimony was impermissible hearsay. The claimed incident was asserted to have occurred in October or November of 2011. The general rule is that in criminal trials for sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). However, the rule admits this evidence only if the complaint was timely made. Ferguson, 100 Wn.2d at 135–36.

The rule – an exception to the hearsay bar -- is grounded in the assumption that, in rape cases and the like, an outcry very shortly after an incident – compared to a claim made against a

person some time later – is reliable *enough* to *overcome* the general prohibition against hearsay. See State v. Bray, 23 Wn. App. 117, 121–22, 594 P.2d 1363 (1979) (citing State v. Griffin, 43 Wash. 591, 86 P. 951 (1906)). The doctrine centrally requires that the complaint be timely.

The Washington Supreme Court has not overruled the timeliness requirement. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Below, the prosecutor contended – and obtained agreement in the court's reasoning -- that under State v. Alexander, 64 Wn. App. 147, 152, 822 P.2d 1250 (1992), the complaint need not be timely. 12/9/13RP at 6-8. This was not correct, as the defense also argued. CP 55. Rather, the Alexander decision involved a ruling on appeal that the prosecutor exceeded the *scope* of the evidence allowed under the fact of complaint rule (it was error to allow details of the complaint), but regarding timeliness, the Court simply stated that the prosecutor need not show timeliness if "the defendant did not expressly raise as an issue the timeliness of her complaint." Alexander, at 150. The Court did not eliminate the timeliness requirement.

Additionally, also erroneous was the State's contention that this hearsay evidence was admissible because its absence would

allow the defense to argue that the complainant's trial accusations were a fabrication. The prosecutor contended, "if the State were to remain silent as to when the victim complained the inference of fabrication could still exist." 12/9/13RP at 7. This broad general statement – which could always be said of a case involving allegations of crime -- is inadequate to the meet the specific requirements of ER 801(d)(1)(ii). That rule provides that a statement is not hearsay if it is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. State v. Stacy, ___ Wn. App. ___, ___, 326 P.3d 136 (2014) (statement defendant made to police after being booked into jail was not admissible where there was no express or implied charge of recent fabrication). Importantly, the proponent of the testimony must show that the witness's prior consistent statement was made before the purported motive to fabricate arose. State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970 (2004). None of this was shown below.

Finally, this testimony was not admissible to show how the matter came to the attention of law enforcement. Inadmissible hearsay is not admissible under the rubric that it is offered to show

'what the officer did next' and the like. See, e.g., People v. Crump, 319 Illinois. App.3d 538, 543-44, 745 N.E.2d 692 (2001).

In sum, the "hue and cry" or "fact of complaint" exception is narrow and allows only evidence establishing that a complaint was timely made. State v. Ferguson, 100 Wn.2d at 135. The evidence is otherwise inadmissible hearsay. ER 801, ER 803. It was inadmissible here absent the required timeliness of the complaints. Because the complaints by C.C. in this case were not "timely," the hearsay exception was inapplicable.

d. Reversal is required. A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is deemed prejudicial where, within reasonable probabilities, the outcome would have been different but for the error. Id.

The hearsay error requires reversal here. The prosecutor, in this case of no physical evidence, argued forcefully in closing that the circumstantial evidence and corroboration in the case included Jaianni Chenoweth's testimony about C.C. coming forward, a year later, because he was uncomfortable about what had happened. 12/11/13RP at 63-64. The State used the fact of the disclosure to bolster its argument that C.C.'s claim was credible for that reason.

12/11/13RP at 72. This theme was repeated in the prosecutor's rebuttal. 12/11/13RP at 93.

The admission of the hearsay, which was an abuse of discretion, within reasonable probabilities had an effect on the outcome of Mr. Chenoweth's trial.

3. THE TRIAL COURT'S ERRONEOUSLY GIVEN, MISLEADING "NON-CORROBORATION" INSTRUCTION REQUIRES REVERSAL AS CONSTITUTIONAL ERROR.

a. Mr. Chenoweth objected and took exception on constitutional grounds. Towards the close of trial, after the parties had initial discussions regarding instructions, the court indicated its decision to instruct the jury regarding the crime of Incest, in instruction 9A. The court stated it would do so,

> per the statute that the testimony of the alleged victim need not be corroborated in order to find a person guilty and the additional language that . . . [t]he jury is to decide all questions of the witness's credibility.

12/11/13RP at 47-48. This instruction was based on the State's proposed instruction submitted under the asserted authority of RCW 9A.44.020(1), which states that the testimony of a sex offense victim need not be corroborated. Supp. CP ___, Sub # 46 (Supplemental State's Proposed Instructions to the Jury (with citations) (citing RCW 9A.44.020(1)); see discussion infra.

The trial court then invited objections and exceptions. 12/11/13RP at 48. Mr. Chenoweth, in the alternative to his objection to any such instruction on this topic, had proposed additional language telling the jurors that it was up to them to decide the credibility of witnesses. However, he made clear that that he specifically objected and took exception to any instruction whatsoever that would state that corroboration of C.C.'s testimony was unnecessary for guilt. 12/11/13RP at 47-52; see Supp. CP ___, Sub # 48 (Defense proposed instructions). Counsel stated:

> With regard to 9A, I do object to any instruction whatsoever being given.

12/11/13RP at 50. Mr. Chenoweth contended that any instruction on non-necessity of corroboration was (1) a comment on the evidence, (2) invaded the jury's province to determine credibility and weigh the testimony of the trial witnesses, and (3) was inconsistent with the reasonable doubt instruction which instructs the jury to consider not only the State's evidence adduced, but any lack of evidence. 12/11/13RP at 47-58.

The court rejected the defendant's arguments, citing RCW 9A.44.020 and reasoning that the instruction "is an exact almost word-for-word statement of the law [and] it's not error for the Court

to restate the law." 12/11/13RP at 52. The instruction given to the jury read as follows:

> In order to convict a person of Incest it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

CP 89 (Instruction 9a). Mr. Chenoweth may appeal. RAP 2.5. Additionally, a defendant may appeal where the trial court's action constituted manifest constitutional error. RAP 2.5(a)(3).

b. <u>The instruction had no proper predicate in any Washington statute and was constitutional error</u>.

(i). The non-corroboration statute applies, by its terms, only to sex offenses under RCW 9A.44.

The Legislature has declared that it is not necessary for the testimony of an alleged sex offense victim to be corroborated. Specifically, the statute reads in pertinent part:

> RCW 9A.44.020. Testimony--Evidence--Written motion--Admissibility
>
> (1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

RCW 9A.44.020(1). Notably, the Supreme Court's committee on jury instructions has commented negatively on the idea of giving the jury any instruction based on the above statute:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 Washington Practice, WPIC 45.02, Rape--No Corroboration Necessary ("No pattern instruction is proposed") (2005).

In disapproving of any jury instruction in this area, the committee cited State v. Mellis, 2 Wn. App. 859, 470 P.2d 558 (1970), in which it was held not to be error to refuse an instruction that a rape charge is easily made and hard to disprove, because the instruction would be an unconstitutional comment on the evidence in violation of Article IV, § 16 of the Washington Constitution. 11 Washington Practice, WPIC 45.02 (comment).

However, Washington courts have *rejected* constitutional challenges to jury instructions based on RCW 9A.44.020(1), under the reasoning that such instructions are not comments on the evidence but are instead proper because they are based on the statute. See generally State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999).

Thus in the case of State v. Clayton, 32 Wn.2d 571, 202 P.2d 922 (1949), the Court considered the following non-

corroboration instruction which, though lengthier, was similar to the one given in Mr. Chenoweth's trial:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572. The Clayton Court rejected the challenge on appeal, stating that this instruction was premised on a correct statement of the law, and "[o]ur Constitution provides that the court shall declare the law." Clayton, 32 Wn.2d at 572 (quoting State v. Smith, 127 Wash. 588, 221 P. 603 (1923) (and citing Wash. Const., art. 4, § 16 and Rem.Comp.Stat. § 339 [P.C. § 8504]).

The Washington Courts have followed Clayton, and relied on RCW 5.60.060(1) to uphold this sort of jury instruction. In State v. Malone, the Court of Appeals upheld a non-corroboration instruction in the face of the appellant's challenge that it was a comment on the evidence, reasoning that the instruction was instead a "correct statement of the law in Washington" and "it is the

duty of the court to instruct the jury on pertinent legal issues." State v. Malone, 20 Wn. App. 712, 714, 582 P.2d 883 (1978). And in State v. Zimmerman, 130 Wn. App. 170, 181-82, 121 P.3d 1216 (2005), the Court held that the non-corroboration instruction correctly stated the law:

> As just discussed, it is improper for a judge to communicate to the jury an opinion as to the truth or value of witness testimony. [State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)]. But an instruction that accurately states the applicable law is not a comment on the evidence. State v. Ciskie, 110 Wn.2d 263, 282–83, 751 P.2d 1165 (1988). Here, the trial court's instruction mirrored RCW 9A.44.020(1), which provides: "In order to convict a person of any crime defined in (chapter 9A.44 RCW, sex offenses) it shall not be necessary that the testimony of the alleged victim be corroborated." Thus, the instruction at issue accurately stated the law.

Zimmerman, 130 Wn. App. at 180-81. The Zimmerman decision noted that the Supreme Court's committee on jury instructions recommends against using such an instruction, and the Court of Appeals further noted that it did "share the Committee's misgivings," the Court held that it was bound by Clayton. (Emphasis added.) Zimmerman, 130 Wn. App. at 182–83.

(ii). Incest is not a Chapter 44 crime.

In the present case, Mr. Chenoweth was originally charged not only with Incest pursuant to RCW 9A.64.020(1), but also with

rape pursuant to RCW 9A.44.050 and 060, by several amended informations. CP 1-2, 26-27, 47-48.

But the charge of rape under RCW 9A, Chapter 44, was *dismissed* by the trial court after the close of the evidence. 12/11/13RP at 41-47; CP 73 (Order of Dismissal).

Thus the crime of Incest was the only charge submitted to the jury. CP 77-93 (Court's instructions). That crime, set out at RCW 9A.64.020, is not a Chapter 44 crime. See RCW Title 9A, Chapter 44 (Sex Offenses). The non-corroboration statute does not apply to Chapter 64. RCW 9A.44.020(1) (requiring no corroboration for "any crime defined in this chapter[.])"

(iii). The instruction was a comment on the evidence in violation of Article IV, § 16 of the Washington Constitution.

The instruction given by the court in Mr. Chenoweth's trial was a violation of Article IV, § 16 of the Washington Constitution, which directs that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon[.]" (Emphasis added.) State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Through this constitutional provision,

> the framers of the constitution could not have more explicitly stated their determination to prevent the judge from influencing the judgment of the jury on what the testimony proved or failed to prove.

(Emphasis added.) Zimmerman, at 174 (quoting Bardwell v. Ziegler, 3 Wash. 34, 42, 28 P. 360 (1891)); see also Jankelson v. Cisel, 3 Wn. App. 139, 145, 473 P.2d 202 (1970), review denied, 78 Wn.2d 996 (1971).

Here, the instruction was a comment on the evidence because a statement by the court to the effect that the allegations of C.C. at trial were, alone, enough to convict Mr. Chenoweth, would directly influence the judgment of the jury as to how a verdict of guilty could properly and lawfully be reached. The statement by the court in Instruction 9a constituted a comment because it appeared to express an attitude toward the merits of the case – implying that the complainant's testimony, alone, could well merit conviction of his father. Clayton, at 572-74; Lane, 125 Wn.2d at 838; State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986).

The instruction was a comment on the evidence and violated the Washington Constitution.

(iv). Reversal is required.

Reversal is required under Washington's "adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16." Lane, 125 Wn.2d at 838. On review, the Court will

presume a comment on the evidence was prejudicial. State v. Bogner, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963).

In this case, the State therefore bears the burden to show that no prejudice resulted to Mr. Chenoweth. Lane, 125 Wn.2d at 838-39 (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974)). Reversal is required under this standard. For example, the Court in Lane reversed because the trial court commented on a matter of fact which, in turn, supported the credibility of a prosecution witness -- who was not the complainant. Lane, 125 Wn.2d at 839.

Here, jury instruction 9a was more prejudicial. The instruction expressly singled out the accuser as a particular witness from among all the evidence proffered or elicited by the parties, and announced that this particular witness – unlike any other piece of evidence – carried such a value that the jury could properly find Mr. Chenoweth guilty because of it alone. Zimmerman at 174, 180-81. It cannot be shown that such a legal endorsement of the value of the accusing witness's testimony could not have influenced Mr. Chenoweth's jury. Lane, at 839 (stating that "[a] comment by the trial court, in violation of the constitutional injunction, is reversible

error unless it is apparent that the remark could not have influenced the jury") (quoting State v. Bogner, 62 Wn.2d at 249). Reversal is required.

(iv). The instruction was misleading, prevented the defense from arguing its theory of the case, invaded the province of the jury, and diluted the standard of proof of beyond a reasonable doubt.

Jury instruction 9a was misleading. There is nothing special in Washington law about the crime of "Incest" that warrants a statement to the jury that no corroboration of the victim's testimony is required to convict the accused of this crime. But the jury instructions must *not* be misleading, they must allow counsel to argue the defense theory of the case, and when read as a whole must properly inform the trier of fact of the applicable law. Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

The appellate courts review jury instructions *de novo*. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Here, the jury instruction was misleading in a manner that diluted the State's burden of proof. For example, in State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011), the jury instruction defining recklessness was misleading because it defined "reckless" with the erroneous language referring to a wrongful act, rather than using the specific statutory language of "substantial bodily harm."

Harris, at 387 (citing State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968)).

In this case, jury instruction 9a even more centrally misled or confused the jury with regard to what could or could not constitute proof of the State's case. The instruction defining reasonable doubt told the jury that

> [a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 81 (Instruction 2). This instruction indicated that the State's burden was to prove Incest beyond a reasonable doubt based on all the evidence or lack of evidence. U.S. Const. amend. 14; State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

However, because of instruction 9a, the State in closing argument was able to pronounce – with support in the court's instructions – that the absence of other evidence beyond C.C.'s words was of little or no importance. Although the prosecutor also told the jury that instruction 9a did not mean the jury was required

to convict, the State relied on instuction 9a to emphasize all the things that the State had *no burden to do*:

> Now, I want to talk to you, though, a little bit about what corroborative evidence is and whether the State has to have it. So I'm going to refer you to Instruction Number 9A. And instruction 9A tells you that in order to convict a person of Incest it shall not be necessary that the testimony of the alleged victim be corroborated. Now, I want to be clear about what this instruction does and doesn't say. So this instruction doesn't tell you that you have to convict or that you should convict. What this instruction merely tells you is that it is sufficient if you find the evidence credible, if you find the witness credible, and you feel the State has proved to you beyond a reasonable doubt based on that testimony that the crime was committed, we don't have to provide any other evidence. We don't have to provide any corroboration.

12/11/13RP at 63-64. The prosecutor then emphasized to the jury that the testimony of the alleged victim, C.C., was credible based on "the manner with which [C.C.] testifies." The prosecutor then concluded with the contention that the jury should not be doubting the disclosures C.C. made in this testimony. 12/11/13RP at 64-66, 73. Instruction 9a was constitutional error and allowed this argument.

Further, the misleading jury instruction impinged on Mr. Chenoweth's own ability to argue his theory of reasonable doubt, and his ability to ask the jury to do its job to pass on the credibility of the entirety of the State's case. See, e.g., State v. White, 137

Wn. App. 227, 230, 152 P.3d 364 (2007). Mr. Chenoweth's counsel endeavored to argue that a lack of evidence in the case was crucial to the jury's determination of its verdict, and stated that the prosecution's case lacked corroboration. 12/11/13RP at 75-76, 85-86.

But the prosecutor, in rebuttal, again dismissed the need for any other proof, noting that acts such as the defendant was accused of in taking advantage of his son are secretive and do not get committed "in front of other people." 12/11/13RP at 90. The prosecutor then went on to again stress the theme that the complainant C.C.'s testimony was credible and certainly not delusional, and suffered merely from highly understandable inconsistencies. 12/11/13RP at 90-94.

Notably, among the defense's arguments was counsel's specific attempt to point out that the jury had not heard from C.C.'s brother or sister regarding where they supposedly were when the event was supposedly happening in their very home. 12/11/13RP at 81. Unfortunately, the error was compounded when the trial court sustained the State's objection that this argument about an absence of evidence was a missing witness argument that had been precluded by a motion *in limine*, and told the jury to disregard

it. 12/11/13RP at 81-82. In fact, as the court acknowledged later, it had not ever recognized or ruled on any such motion *in limine* brought by the State, although the court had also not pre-approved the argument. 12/11/13RP at 97-99. Mr. Chenoweth was entitled to argue, or try to argue, that the absence of certain evidence should be part of the jury's assessment of whether the State had proved its case beyond a reasonable doubt. U.S. Const. amend. 14; State v. Warren, 165 Wn.2d at 26; In re Winship, 397 U.S. at 364. The court's erroneous ruling striking down the defense effort to point out the lack of certain evidence heightened the prejudice of instructing the jury that it could assess this criminal case and come to a verdict based solely on the testimony of the alleged victim.

For all these reasons, Instruction 9a requires reversal, including because it was misleading and relieved the State of its burden of proof and was not harmless beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) (in a criminal case, it is reversible error if the instructions relieve the State of the burden to prove the crime beyond a reasonable doubt); State v. Stacy, 326 P.3d at 146-47 (misstatement of voluntary intoxication defense in jury instructions would have to be harmless beyond a reasonable doubt); State v. Brown, 147 Wn.2d 330, 344,

58 P.3d 889 (2002) (misstatement of law of accomplice liability relieved State of burden of proof and would require reversal unless harmless beyond a reasonable doubt); see also State v. Johnson, 116 Wn. App. 851, 857, 68 P.3d 290 (2003) (in deciding whether the error contributed to the verdict and whether it is harmless, the court must thoroughly examine the record and may consider how the case is argued to the jury). This Court should reverse Mr. Chenoweth's conviction.

3. THE DEFENDANT'S CONVICTION MUST BE REVERSED FOR CUMULATIVE ERROR.

The cumulative effect of the trial court's errors below requires reversal of Mr. Chenoweth's conviction, because the errors together carried such prejudice that they deprived him of a fair trial. See State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); U.S. Const. amend. 14. In this case, the defendant's wife should not have been permitted to testify but she did so at length, describing C.C.'s developmental disabilities, and in particular his disclosure to her and his resulting sad behavior. In fact, the trial should have included none of the testimony regarding disclosure that came from multiple witnesses under the fact of complaint rule, which repeatedly bolstered C.C.'s trial claim by suggesting he revealed it earlier (he did not do so in a

timely manner at all, rendering the evidence pure hearsay). And the jury should never have been told that it could rely on C.C.'s testimony alone, or told to ignore the defense argument that there was an absence of evidence – two related errors that dramatically favored the State in this case where there was a paucity of supporting evidence. These errors, in particular the instructional error, individually require reversal – as argued supra – but they also aggregated and together carried a cumulative prejudicial impact on the verdict. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court should reverse for that additional reason.

E. CONCLUSION

Based on the foregoing, Mr. Chenoweth respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 28 day of August, 2012.

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

STATE OF WASHINGTON, Respondent, v. CHAD CHENOWETH, Appellant.	)))))))))	NO. 71520-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	CHAD CHENOWETH 365992 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF AUGUST, 2014.

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