No. 46721-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Cochran,

Appellant.

Lewis County Superior Court Cause No. 13-1-00688-4

The Honorable Judge Richard Brosey

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

B.A. was six or seven years old when her mother moved their family in with James Cochran. B.A. liked living with her uncle, with whom she had been living, with her mother and younger sister, before living with Mr. Cochran. She didn't want to live at Mr. Cochran's, and she didn't like it when he kissed her mother. RP (7/16/14) 42, 74-75, 85; RP (7/17/14) 110, 114, 151.

BA's mother, on the other hand, wanted to marry Mr. Cochran. The couple argued about this over the course of their 2 year relationship. RP (7/16/14) 40; RP (7/17/14) 110, 113, 220-221.

At some point, after B.A. had gone to bed, she got up briefly and saw that Mr. Cochran was watching television. She saw a woman on the couch, and a man putting his penis into her mouth. RP (7/16/14) 59-60, 71; RP (7/17/14) 149. She also saw a man moving on top of a woman. RP (7/16/14) 72-73. Two days later, B.A. told her mother that Mr. Cochran had done that to her. RP (7/16/14) 61. She described the show, as well as her claim about what Mr. Cochran had done, together. RP (7/17/14) 128, 150, 154.

The state charged Mr. Cochran with rape of a child in the first degree, and three counts of child molestation in the first degree.[1] CP 31-34. The family moved back in with the uncle. RP (7/16/14) 61.

B.A.'s mother faced deportation after Mr. Cochran was charged. RP (7/17/14) 132. The means by which she sought to stay in the country legally was to work with the state on the prosecution of Mr. Cochran.[2] RP (7/17/14) 151-152.

By the time B.A. was interviewed by police, she had talked with her mother several times about her allegations. F.A. was angry and sad and asked her daughter questions during these discussions, at least one of which lasted an hour. RP (7/16/14) 66-68; RP (7/17/14) 139.

B.A. testified at trial that Mr. Cochran put her on his lap and moved her around two times, and that he laid on top of her one time. RP (7/16/14) 46, 51. She said the incidents were close in time to her eighth birthday. RP (7/16/14) 48. She also described an incident where Mr. Cochran had her guess what he put into her mouth. She wore her bunny sleep eye cover, and didn't see what he had.[3] RP (7/16/14) 54, 57.

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[1] The state also alleged several aggravating factors. While the jury found these factors, the court declined to give an aggravated sentence. CP 30-35, 138-154; RP (10/1/14) 302-303.

[2] The parties agreed that F.A. was seeking a U-visa, which is the method one uses to stay in the U.S. and assist in a prosecution. RP (7/16/14) 19-21.

[3] Her younger sister testified that she was there for the game, and didn't see what Mr. Cochran put into B.A.'s mouth either. RP (7/16/14) 57, 78-80.

F.A. told the jury her daughter often describes things as if she was present even if she was not, such as television shows and the like. RP (7/17/14) 136-138.

The state also offered testimony about B.A.'s statements to her principal, a sexual assault doctor, and the police. Principal David Roberts told the jury that B.A. was a good student, and that he had not heard of or seen any changes in her behavior. RP (7/16/14) 88, 99. B.A. had told him her claims, which he described as "the most graphic and explicit thing a child has ever said to me." RP (7/16/14) 100. Dr. Hall also repeated to the jury the claims made by B.A. RP (7/17/14) 201-206.

Detective Hughes interviewed B.A. and repeated her allegations to the jury. RP (7/17/14) 161-164. He described B.A. as "consistent", "graphic", and "articulate". RP (7/17/14) 160. He testified:

> She was descriptive on what she said. It was something that shocked me because I've never been given that kind of description for this incident by any other child that I've ever interviewed. And it was pretty plain. I mean, she didn't describe that she saw what it was; she described what she thought it was and how it felt.
> RP (7/17/14) 165.

Later in his examination, the prosecutor asked:

> Q: [D]id you review Dr. Hall's report in this case?
> A: Yes....
> Q: Did you review Principal Roberts' report?
> A: I did.
> Q: And you have reviewed your taped interview with [B.]?
> A: Yes.

> Q: And did you observe [B.] testify here in court?
> A: Yes.
> Q: And have all of those statements been consistent?
> A: Yes, they have.
> RP (7/17/14) 185.

The defense attorney did not object to any of this testimony. RP (7/17/14) 165, 185.

The state proposed a couple of non-standard instructions, which the court gave. Instruction No. 11 stated that sexual contact "may occur through a person's clothing." CP 124. Instruction No. 18 stated that, for the aggravating factor of ongoing pattern of sexual abuse, that a "'prolonged period of time' means more than a few weeks." CP 131.

The court also defined reasonable doubt for the jury in an instruction which included an exhortation that if they have "an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt." CP 115.

During the closing argument, the prosecutor told the jury:

> If you have an abiding belief -- if you feel it in your mind, in your gut, if you have an abiding belief to the truth of the charge, you are satisfied beyond a reasonable doubt. That's what the law says.
> RP (7/18/14) 267.

The jury convicted Mr. Cochran. The court sentenced him within his standard range, and Mr. Cochran timely appealed. CP 138-154, 155.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE, TIPPING THE JURY TOWARD CONVICTION BY RELIEVING THE STATE OF ITS BURDEN TO PROVE SEXUAL CONTACT.

A. The court should not have endorsed the state's theory by adding language to the pattern instruction defining sexual contact.

The Washington constitution provides "Judges shall not charge juries with respect to matters of fact, nor comment thereon…" Art. IV, § 16. In this case, the court gave a nonstandard instruction that violated both of these rules. CP 124.

In keeping with the statutory definition, Washington's pattern instruction defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." WPIC 45.07; *see* RCW 9A.44.010. Here, the court added to this language, instructing jurors that "[s]exual contact may occur through a person's clothing." CP 124. This was improper.

Where the evidence consists of touching through clothing, courts require "some additional evidence of sexual gratification." *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). When the court gave its nonstandard instruction here, it did not tell jurors of the requirement for "additional evidence." *Id.; see* CP 124.

The instruction here included a half-truth. *Id.* It highlighted the idea that touching through clothing *can* support a molestation charge,

without clarifying that the state must prove sexual gratification through "additional evidence" when it relies on touching through clothing. *Id.*

Mr. Cochran denied molesting B.A. RP (7/17/14) 224. The state's evidence consisted of B.A.'s testimony and statements that Mr. Cochran inappropriately touched her through her clothing. By emphasizing that "[s]exual contact may occur through a person's clothing," the court gave credence to the state's theory. CP 124.

The nonstandard instruction favored conviction. By emphasizing that the jury *could* convict based on touching through clothing, the court tipped the balance in favor of a guilty verdict. CP 124. Had the court given a fairer instruction, making clear that conviction requires "additional evidence" of sexual gratification when the state relies on contact through a person's clothing, the problem would have been ameliorated.[4] *Id.*

The court's instructions favored the prosecution, and improperly commented on the evidence. Such comments are presumed prejudicial.[5] *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). A comment on

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[4] Having instructed jurors about touch through clothing, the court was obligated to provide the "additional evidence" language. *Id.;* CP 124. However, the court had no obligation to add to the pattern instruction in the first place. *See State v. Veliz*, 76 Wn. App. 775, 779, 888 P.2d 189 (1995).

[5] A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). From the record, it appears that neither the court nor defense counsel noticed that the state's proposed instruction differed from the standard instruction proposed by Mr. Cochran. RP (7/17/14) 228-238.

the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted. *Id.*

This is a higher standard than that normally applied to constitutional errors. *Id.* Here, the record does not affirmatively show an absence of prejudice. The comment went directly to the contested facts at trial: whether or not Mr. Cochran inappropriately touched B.A. through her clothes, acting for the purpose of sexual gratification.

The judicial comment infringed Mr. Cochran's right to a fair trial, free of improper influence, and a decision by an impartial jury. *Id.* His child molestation convictions must be reversed and the charges remanded for a new trial. *Id.*

B. The court's nonstandard instruction relieved the state of its burden to prove "sexual contact."

Due process prohibits a trial judge from instructing jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Here, the court's nonstandard instruction relieved the state of its burden to prove "sexual contact." CP 124.

Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215

P.3d 177 (2009). The instructions in this case did not make the requirements for conviction manifestly clear.

As noted above, the state must produce some "additional evidence" of sexual gratification when it relies on touch through clothing to prove molestation. *Powell*, 62 Wn. App. at 917. The instructions here did not make clear the state's burden of providing some "additional evidence." *Id.;* CP 124.

Instead, the instructions misrepresented the "sexual contact" element. The nonstandard language allowed for conviction based on a showing that Mr. Cochran touched B.A. through her clothing, without any "additional evidence" of sexual gratification. *Id.;* CP 124.

If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. U.S. Const. Amend. XIV; *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). The court's instructions in this case can be construed to allow conviction based on touching through clothing, without additional evidence of sexual gratification. Because of this, the convictions violate due process. *Id.*

Such an error requires reversal unless the state shows beyond a reasonable doubt that it did not contribute to the verdicts. *State v. Brown*,

147 Wn.2d 330, 341, 58 P.3d 889 (2002). This requires proof that the element is supported by uncontroverted evidence. *Id.*

Here, the error went to the very heart of the case. Mr. Cochran denied touching B.A. inappropriately. RP (7/17/14) 224. The court's instructions allowed conviction based on touching through clothing, unaccompanied by additional evidence of sexual gratification. CP 124.

The court's instructions failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.[6] This relieved the state of its burden to prove an intentional assault. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

II. THE PROSECUTOR IMPROPERLY URGED JURORS TO CONVICT IF THEY HAD A GUT FEELING THAT MR. COCHRAN WAS GUILTY.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here, the prosecutor improperly told jurors that the law

[6] This created a manifest error affecting Mr. Cochran's right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). The court should review the error even if it does not qualify under RAP 2.5(a)(3). *State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). The Rules of Appellate procedure require courts to decide cases on their merits "except in compelling circumstances where justice demands…" RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

allowed conviction "if you feel it in your mind, in your gut…" RP (7/18/14) 267.[7]

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. The prosecutor's arguments in this case emphasized the jury's feelings rather than "probative evidence and sound reason." *Id.;* RP (7/17/14) 267.

According to the prosecutor, the reasonable doubt standard boiled down to "feel[ing] it" in the mind or gut. RP (7/17/14) 267. Such a feeling, the prosecutor argued, satisfied the requirement of an abiding belief in the truth of the charge:

> If you have an abiding belief – if you feel it in your mind, in your gut, if you have an abiding belief to the truth of the charge, you are satisfied beyond a reasonable doubt. That's what the law says. RP (7/17/14) 267.[8]

This is not true. A juror's verdict may not rest on the juror's gut feelings.[9] *Id.* A verdict must result from rational thought and deliberation. *Id.*

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[7] Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* That is the case here. In addition, Mr. Cochran argues that counsel was ineffective for failing to object.

[8] The prosecutor's reliance on Instruction No. 2's "truth" language presented further problems as argued elsewhere in this brief.

[9] Indeed the court instructed jurors not to let their "emotions overcome [their] rational thought process," and not to reach a decision based on "sympathy, prejudice, or personal preference." CP 114. These general proscriptions do not cure the misconduct, however. The prosecutor did not urge jurors to decide based on sympathy, prejudice, or personal

Like an inappropriate puzzle analogy or a comparison to everyday decision-making, the prosecutor's argument that about gut feelings trivialized the presumption of innocence and undermined the burden of proof. *See, e.g., State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010).

Prosecutorial misconduct prejudices the accused if there is a substantial likelihood that it affected the verdict. *Glasmann*, 175 Wn.2d at 704. In this case, there is such a likelihood. A prosecutor's misstatement of the burden of proof creates "great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

Here, the trial boiled down to a credibility contest. The state's argument focused jurors on feelings rather than reason. Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight. *Glasmann*, 175 Wn.2d at 706. In this case, the prosecutor made it palatable for jurors to convict if they had a gut feeling that Mr. Cochran was guilty.[10] RP (7/17/14) 267.

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preference, and was careful not to use the word "emotion." RP (7/17/14) 267. Jurors would not have understood the general instruction to guilty verdicts based on a gut feeling.

[10] The resulting deliberative process was so upsetting to one juror that she cried for two days and couldn't sleep. CP 136.

The requirement that juries base their verdicts on reason and evidence has been a cornerstone of Washington law for more than a century. *See, e.g., Edwards v. State*, 2 Wash. 291, 308, 26 P. 258 (1891). By violating this basic precept, the prosecutor here committed misconduct that is flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct prejudiced Mr. Cochran. His convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402, 411 (2012). Here, over Mr. Cochran's's objection,[11] the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge*." CP 115 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its

[11] RP 232-237; CP 42, 81.

otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 115.[12]

The problem was compounded by the prosecutor's misconduct. Rather than simply reiterating the improper instruction, the prosecutor went further in her closing argument, equating an abiding belief in the truth of the charge with a gut feeling about the truth of the charge. RP 267. This magnified the error.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 115.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery.* The problem here is greater than that presented in *Emery.* In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited

[12] Mr. Cochran does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Cochran objects to the instruction's focus on "the truth." CP 115.

language reached the jury in the form of an instruction from the court. CP 115. Jurors were obligated to follow the instruction. CP 115.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[13] *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Cochran his constitutional right to a jury trial.[14]

Mr. Cochran's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

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[13] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

[14] U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22.

IV. THE PROSECUTOR SHOULD NOT HAVE EXPOSED JURORS TO DETECTIVE HUGHES' OPINION THAT B.A.'S STATEMENTS WERE ALL CONSISTENT.

At trial, the prosecutor hoped to show that B.A.'s statements "were all consistent." RP (7/15/14) 108. In fact, the statements were not all the same.

For example, when speaking to Principal Roberts, B.A. did not mention the "game" she described in other statements. RP (7/16/14) 97. She told him Mr. Cochran had hurt her "inside," something she did not say to her mother or police. RP (7/16/14) 98. She sometimes described the object placed in her mouth as hard; other times she said it was soft. CP (7/11/14) 25, 46, (7/16/14) 45, 56, (7/17/14) 144-145.

Despite these inconsistencies, Detective Hughes testified that he'd reviewed all of B.A.'s statements and observed her testimony, and that "all of those statements [have] been consistent." RP (7/17/14) 185. Defense counsel did not object. RP (7/17/14) 185.

Testimony providing an "explicit or nearly explicit" opinion on the credibility of an alleged victim invades the exclusive province of the jury and violates an accused person's right to a jury trial.[15] *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009); *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) *aff'd on other grounds,* 165 Wn.2d 870, 204

[15] U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.

P.3d 916 (2009). In this case, Detective Hughes' opinion that B.A.'s statements and testimony were consistent comprised a "nearly explicit" opinion that she was credible. *Id.*

No witness may offer improper opinion testimony by direct statement or inference. *King*, 167 Wn.2d at 331. Furthermore, a law enforcement officer's improper opinion testimony may be particularly prejudicial because it carries "a special aura of reliability." *Id.* Because Detective Hughes is a police officer, his opinion carried such an aura of reliability. *Id.*

Courts assess the propriety of opinion testimony by examining the type of witness, the nature of the testimony, the charges and the defense, and the other evidence before the jury. *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). In this case, these factors establish that Detective Hughes' testimony violated Mr. Cochran's jury trial right.[16]

The jury was likely to view Detective Hughes as authoritative, because he is a police officer. *Id.* His opinion related directly to the primary issue at trial—B.A.'s credibility—and bolstered her testimony by encouraging jurors to disregard inconsistencies in her statements. Mr.

[16] The testimony created manifest error affecting Mr. Cochran's right to a jury trial. *King*, 167 Wn.2d at 332. It may be reviewed for the first time on appeal. RAP 2.5(a)(3).

Cochran denied committing the charges;[17] thus, acquittal depended on any doubts the jury had as to B.A.'s accusations. No physical evidence or independent witnesses supported the charges; only B.A.'s younger sister added circumstantial evidence supporting B.A.'s statements on count one. RP (7/16/14) 76-86; RP (7/17/14) 204. For all these reasons, Detective Hughes' improper opinion testimony violated Mr. Cochran's right to a jury trial. *Id.*

Detective Hughes' opinion that B.A.'s statements were consistent invaded the province of the jury and infringed Mr. Cochran's constitutional right to a jury trial. *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014). Mr. Cochran's convictions must be reversed and the case remanded with instructions to exclude such testimony on retrial. *Id.*

V. MR. COCHRAN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.[18]

A. Defense counsel shouldn't have let Detective Hughes convey his opinion that B.A. was credible.

Despite the clear inconsistencies in B.A.'s statements—which defense counsel elicited on cross-examination—counsel allowed Detective

[17] RP(7/17/14) 224.

[18] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo,* 166 Wn.2d at 862; RAP 2.5(a).

Hughes to give his opinion that "all of those statements [have] been consistent." RP (7/17/14) 185. Counsel's failure to object to this improper opinion testimony deprived Mr. Cochran of the effective assistance of counsel.

Improper opinion testimony on an alleged victim's credibility violates the constitutional right to a jury trial, as outlined above. *Sutherby*, 138 Wn. App. at 617. Defense counsel should have objected to the improper testimony on constitutional grounds.

Testimony on witness credibility is also inadmissible under ER 701, which limits the subjects of lay opinion testimony. ER 701; *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Counsel should have objected to the improper testimony as an inadmissible opinion under ER 701.

Without a valid tactical reason, failure to object to improper opinion testimony constitutes deficient performance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). Here, counsel had no strategic reason to allow the testimony.

In fact, the defense strategy hinged on pointing out inconsistencies in B.A.'s statements, undermining her credibility. Detective Hughes' improper opinion—that the statements were "consistent" despite their differences—undid counsel's efforts to cast doubt on B.A.'s accusations.

Counsel's deficient performance prejudiced Mr. Cochran, because there is a reasonable probability that it affected the verdict. *Kyllo*, 166 Wn.2d at 862. Absent Detective Hughes' testimony, jurors would have reached their own conclusions as to B.A.'s consistency and credibility.

Detective Hughes' testimony was especially damaging, because the jury most likely viewed his opinion with "a special aura of reliability." *King*, 167 Wn.2d at 331. By allowing Detective Hughes to substitute his own judgment for the jury's, counsel aided the prosecution in obtaining a conviction.

Defense counsel provided ineffective assistance by failing to object to testimony providing an improper opinion of Mr. Cochran's guilt. *Hendrickson*, 138 Wn. App. at 833. Ineffective assistance of counsel requires reversal of Mr. Cochran's conviction. *Kyllo*, 166 Wn.2d at 871.

B. Defense counsel should have objected to the prosecutor's misconduct in closing.

Failure to object to prosecutorial misconduct is objectively unreasonable under most circumstances: "At a minimum, an attorney… should request a bench conference… where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Here, defense counsel did not even take this minimum step.

The prosecutor encouraged jurors to convict based on their gut feelings rather than reason and evidence. RP (7/18/14) 267. Counsel should have objected to this misconduct. At a minimum, counsel should have requested a sidebar to lodge an objection. *Id.*

There is a reasonable probability that counsel's failure to object prejudiced Mr. Cochran. The prosecutor trivialized the reasonable doubt standard and unfairly urged the jury to convict for improper reasons. The state's version of events was hotly contested; its evidence was far from overwhelming. Had counsel objected, there is a reasonable probability that the verdicts would have been more favorable to Mr. Cochran. *Kyllo*, 166 Wn.2d at 862.

Defense counsel provided ineffective assistance. *Id.* Mr. Cochran's convictions must be reversed and the case remanded for a new trial. *Id.*

VI. THE TRIAL COURT IMPROPERLY COMMENTED ON THE EVIDENCE AND RELIEVED THE STATE OF ITS BURDEN TO PROVE A PATTERN OF ABUSE OVER A PROLONGED PERIOD OF TIME.[19]

The "ongoing pattern of sexual abuse" aggravating factor requires proof of "multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(g). Whether a pattern of abuse stretches over a prolonged

[19] A similar challenge is currently pending in the Supreme Court. *State v. Brush*, 181 Wn. App. 1009 *review granted in part,* 181 Wn.2d 1007, 335 P.3d 940 (2014).

period of time is a factual question to be decided by the jury. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010) *reconsideration denied*, *review denied,* 170 Wn.2d 1011, 245 P.3d 773 (2010).

Evidence of a two-week period has been held insufficient to establish a prolonged period of time. *State v. Barnett*, 104 Wn. App. 191, 203, 16 P.3d 74 (2001). By contrast, evidence of a six-week period has been found sufficient to support the aggravating factor. *Epefanio*, 156 Wn. App. at 392.

In this case, the court instructed jurors that "[t]he term 'prolonged period of time' means more than a few weeks." CP 131.[20] This amounted to a comment on the evidence. *Levy*, 156 Wn.2d at 725. It relieved the state of its burden to prove the aggravating factor beyond a reasonable doubt, and directed the jury's verdict in the prosecution's favor.

The instruction conflates the court's duty to determine evidentiary sufficiency with the task of instructing the jury. The test for evidentiary sufficiency is whether the evidence, viewed in a light most favorable to the state, could persuade a rational factfinder beyond a reasonable doubt. That is not the standard the jury applies.

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[20] The court's instruction here was based on WPIC 300.16. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 300.16 (3d Ed).

Instead, due process requires the jury to apply the reasonable doubt standard. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury does not take the evidence in a light most favorable to the state. Nor does the jury examine the case to determine if a verdict of guilty would be merely rational. *Id.*

The phrase "more than a few weeks" may describe evidence that is sufficient to submit the aggravating factor to the jury (or to sustain it on appeal). *Epefanio*, 156 Wn. App. at 392. But a finding of sufficiency does not make the phrase "prolonged period of time" mean "more than a few weeks." A pattern of abuse lasting more than a few weeks does not automatically establish a prolonged period of time as a matter of law.

It is up to the jury to determine whether the facts show a length of that qualifies as "prolonged" in a particular case. *Epefanio*, 156 Wn. App. at 392. The court's instruction told jurors that any period longer than a few weeks automatically qualified as "prolonged," taking the essence of the question from them.

By defining "prolonged period of time" as "more than a few weeks," the judge commented on the evidence and relieved the prosecution of its burden to establish the aggravating factor beyond a reasonable doubt. *Levy,* 156 Wn.2d at 725; *Aumick,* 126 Wn.2d at 429.

Accordingly, the aggravating factor must be stricken.[21] *Levy,* 156 Wn.2d at 725.

CONCLUSION

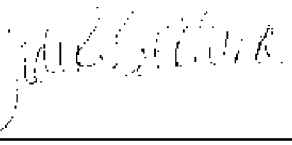
Mr. Cochran's convictions must be reversed. The trial court improperly commented on the evidence and relieved the state of its burden to prove sexual contact. In addition, the prosecutor's misconduct in closing exacerbated problems caused by the court's "reasonable doubt" instruction. Furthermore, the lead investigator improperly provided an opinion on B.A.'s credibility. Finally, defense counsel's errors deprived Mr. Cochran of the effective assistance of counsel.

In the alternative, if the convictions are not reversed, the "pattern of abuse" aggravating factor must be stricken, because the court improperly directed a verdict for the prosecution.

[21] The sentencing court did not impose an exceptional sentence. CP 135-136. Mr. Cochran includes his challenge to this aggravating factor to forestall reliance on it at any future sentencing hearing.

Respectfully submitted on April 14, 2015,

BACKLUND AND MISTRY



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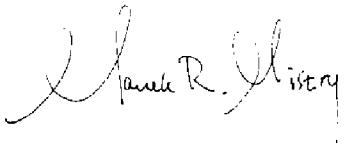

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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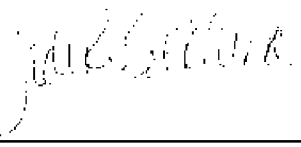
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 14, 2015.



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