No. 48059-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shawn Brandenburg,

Appellant.

Thurston County Superior Court Cause No. 13-1-01606-4

The Honorable Judge Mary Sue Wilson

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Brandenburg of his Fourteenth Amendment right to a fair trial.

2. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing and mischaracterizing the state's burden of proof during closing argument.

3. The prosecutor committed flagrant and ill-intentioned misconduct by providing a personal opinion as to Mr. Brandenburg's guilt.

> **ISSUE 1:** A prosecutor commits misconduct by minimizing or mischaracterizing the state's burden of proof to the jury. Did the prosecutor commit misconduct by telling jurors they should convict if they believed E.W. and L.B.?
>
> **ISSUE 2:** A prosecutor may not express a personal opinion as to the accused person's guilt. Did the prosecutor commit reversible misconduct by using a PowerPoint presentation to express a personal opinion on Mr. Brandenburg's guilt?

4. Mr. Brandenburg was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

5. Mr. Brandenburg's attorney provided ineffective assistance of counsel by failing to object to inadmissible evidence.

6. Mr. Brandenburg's attorney provided ineffective assistance of counsel by failing to object to hearsay bolstering the complainants' testimony.

7. Mr. Brandenburg's attorney provided ineffective assistance of counsel by failing to object to irrelevant "expert" testimony bolstering the complainants' testimony.

8. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct that prejudiced the defense and increased the likelihood of conviction.

> **ISSUE 3:** Defense counsel provides ineffective assistance by failing to object to inadmissible and prejudicial evidence absent a valid strategic reason. Did Mr. Brandenburg's attorney

provide ineffective assistance by failing to object to inadmissible testimony that strengthened the state's case and prejudiced his client?

ISSUE 4: Generally, defense counsel's failure to object to prosecutorial misconduct during closing falls below an objective standard of reasonableness. Did defense counsel provide ineffective assistance by failing to object to misconduct?

9. The trial court erred by giving Instruction No. 2.

10. The trial court's reasonable doubt instruction violated Mr. Brandenburg's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.

11. The trial court's reasonable doubt instruction violated Mr. Brandenburg's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.

12. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.

13. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 5: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Brandenburg's constitutional right to a jury trial?

14. The statute elevating first-degree child molestation to a Class A felony is unconstitutional because it was enacted in violation of Wash. Const. art. II, § 19.

15. The 1990 bill elevating first-degree child molestation to a Class A felony violated the single-subject rule.

16. The 1990 bill elevating first-degree child molestation to a Class A felony violated the subject-in-title rule.

17. The 1994 bill reenacting and amending RCW 9A.44.083 did not cure the defect in the 1990 bill, because the 1994 bill was also enacted in violation of art. II, § 19.

> **ISSUE 6:** Washington's constitution requires that bills enacted into law embrace a single subject, expressed in the title. Was Mr. Brandenburg convicted of an offense that was improperly elevated to a class A felony by means of a bill enacted in violation of art. II, § 19?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Shawn Brandenburg met his future wife Gina when their children both attended the same school in California. RP 230. Gina divorced her husband at the time, and married Mr. Brandenburg. RP 233. They lived together in Washington with Gina's five children. RP 233-235.

One of Gina's children, twelve year old E.W., had a sleepover at which her friend L.B. alleged that "someone" took off her bikini top while she slept. RP 40. She said that person then touched her breasts. RP 40, 122-123. E.W. did not believe her friend, as she remembered seeing L.B. remove her own bikini top before they went to sleep. RP 40, 65. When Gina Brandenburg heard the allegation, she didn't believe it either, since Mr. Brandenburg had been with her the entire night. RP 243, 262, 267.

Another friend of E.W.'s who was there that night said that L.B. said the next morning that she thought she saw a person or a shadow standing over her. RP 286-287. This girl said that L.B. didn't know if it was real. RP 287. She also said that L.B. didn't claim at the time that the person touched her. RP 289.

L.B. told her mother, who contacted police. Police came when E.W. was at L.B.'s house, and E.W. told police that a person touched her

when she slept. RP 42-43. She said she only saw the person once, and that the person was Mr. Brandenburg. RP 75-76.

E.W. admitted that it may have only happened in her imagination. RP 76. When asked if she was possibly dreaming the incident, E.W. responded that she didn't know. RP 99-100. Over the next two years, E.W. spoke to law enforcement three times, giving more detail each time. RP 56-57, 70-71, 84-85, 108, 219-220.

The state charged Shawn Brandenburg with molesting and raping E.W., and with molesting L.B. CP 1-2.

At trial, the state offered the testimony of Detective Ivanovich. He told the jury that abuse victims don't disclose all at once, but instead tell more and more the safer they feel. RP 158-159. The defense did not object to this testimony. RP 154-159.

The initial investigating officer, Sgt. Cassidy, testified to the details of L.B. and E.W.'s statements to him. He told the jury, without objection, that L.B. "disclosed" a sex offense. RP 212. He also said, again without objection, that E.W. told him that she woke up with her shirt off and thought Mr. Brandenburg had done it. RP 219-220.

The court instructed the jury on reasonable doubt using the standard pattern instruction. That instruction included the following

sentence: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 21.

During closing argument, the prosecutor told the jury that if they believe E.W., then they are satisfied beyond a reasonable doubt: "He's presumed innocent, unless and until you believe the little girls who sat in the chair, [E.W.] and [L.B.], and if you believe them, you're satisfied beyond a reasonable doubt." RP 333.

The prosecutor made use of a PowerPoint presentation during closing argument. Ex 15. Two of the slides asked – and answered – the question: "Did sexual contact between defendant and ([L.B.] or [E.W.]) occur?" The slides included in all caps: "YES." Ex. 15.

The jury acquitted Mr. Brandenburg of rape, but convicted him of two counts of child molestation. CP 40-42. Mr. Brandenburg had no criminal history. CP 53. He was sentenced to 80 months to life. CP 56-57. Mr. Brandenburg timely appealed. CP 73.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT PREJUDICED MR. BRANDENBURG.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's

misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A. The prosecutor mischaracterized the burden of proof in closing.

The state's argument "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor's misstatement regarding the law is "a serious irregularity having the grave potential to mislead the jury." *Id.*, at 763. This is especially true when the misstatement mischaracterizes the presumption of innocence, the burden of proof, and the reasonable doubt standard. *See, e.g., State v. Lindsay*, 180 Wn.2d 423, 434-438, 326 P.3d 125 (2014); *Glasmann*, 175 Wn.2d at 713.

Here, the prosecutor mischaracterized the burden of proof by telling jurors to convict if they "believe[d] the little girls who sat in that

chair." RP 333. In fact, the jury could believe the complainants and still have a reasonable doubt as to Mr. Brandenburg's guilt.

Furthermore, the argument implied that acquittal required the jury to disbelieve E.W. and L.B. *See State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991). This was misconduct. The argument was improper. *Id.*

B. The prosecutor improperly expressed a personal opinion as to Mr. Brandenburg's guilt.

A prosecutor must "seek conviction based only on probative evidence and sound reason." *Glasmann*, 175 Wn.2d at 704. It is improper for the state's attorney to convey a personal opinion of the accused's guilt. *Id.* at 706-07. A prosecutor who "'throw[s] the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused'" denies the defendant a fair trial. *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In deciding whether a prosecutor's remarks amount to an expression of personal opinion, the reviewing court considers the comments in the context of the entire argument. *State v. McKenzie*, 157 Wn.2d 44, 53-54, 134 P.3d 221 (2006). Prejudicial error occurs if it is "clear and unmistakable that counsel is not arguing an inference from the

evidence, but is expressing a personal opinion." *McKenzie*, 157 Wn.2d at 54 (emphasis omitted) (quoting *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59 (1983).

PowerPoint slides can create special problems for prosecutors. *Glasmann,* 175 Wn.2d at 704-711. Prosecuting attorneys who use presentation software (such as PowerPoint) run the risk that jurors will view a particular slide as an expression of personal opinion. *Id.; see also State v. Hecht*, 179 Wn. App. 497, 506, 319 P.3d 836 (2014).

Here, the prosecutor expressed a personal opinion by showing slides that answered "YES" to the question "Did sexual contact between defendant and [L.B./E.W.] occur?" Ex. 15. The two slides with this question and answer did not contain any reference to the testimony or other evidence. Ex. 15. The "YES" answers were provided in bold lettering, larger than any other characters on the slide.[1] Ex. 15.

As in *Glasmann, Hecht,* and other cases addressing similar slides, the prosecutor's visual presentation conveyed a personal opinion on the primary issue at trial. The misconduct was flagrant, ill-intentioned, and could not have been cured by an instruction. *Hecht*, 179 Wn. App. at 506. This is especially true because graphical presentations such as that used

[1] Indeed, the lettering appears larger than any of the bold characters on any of the PowerPoint slides. Ex. 15. Furthermore, the exhibit is in black and white; the record does not indicate the colors shown to the jury.

here may operate at an unconscious level, rendering curative instructions ineffective. *Glasmann,* 175 Wn.2d at 708, 709 n.4.

The slides improperly expressed a personal opinion. *Id.*

C. The prosecutor's flagrant and ill-intentioned misconduct caused incurable prejudice.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, Mr. Brandenburg was prejudiced by the prosecutor's improper arguments. Both E.W. and L.B. had credibility issues, and the testimony of others undermined their accounts. RP 230-274, 279-291. By misstating the burden of proof and expressing a personal opinion, the

prosecutor tipped the balance in favor of conviction. There is a substantial likelihood that the misconduct affected the verdicts. *Id.,* at 704.

Furthermore, the prosecutor had access to long-standing caselaw prohibiting her from mischaracterizing the law in closing argument. *See e.g. State v. Evans,* 163 Wn. App. 635, 643, 260 P.3d 934 (2011). Likewise, the rule prohibiting expression of personal opinions in PowerPoint presentations is well-established. *Glasmann*, 175 Wn.2d at 704-711; *Hecht*, 179 Wn. App. at 506.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct. *Glasmann*, 175 Wn.2d at 704-711. Mr. Brandenburg's convictions must be reversed. *Id.*

II. MR. BRANDENBURG WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

The right to counsel includes the right to the effective assistance of counsel.[2] U.S. Const. Amends. VI, XIV; *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of

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[2] Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

A. Defense counsel unreasonably failed to object to inadmissible testimony that prejudiced Mr. Brandenburg.

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

1. Defense counsel should have objected to inadmissible hearsay that bolstered the state's case.

Hearsay is generally inadmissible. ER 801, ER 802. Furthermore, repetition is not generally a valid test for veracity. *State v. Thomas*, 150 Wn.2d 821, 867, 83 P.3d 970 (2004) (citing *State v. Alexander*, 64 Wn. App. 147, 152, 822 P.2d 1250 (1992)).

Here, defense counsel unreasonably failed to object to hearsay that bolstered the complainants' testimony. Specifically, counsel should not

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have permitted Sergeant Cassidy to testify that L.B. disclosed to him a sex offense. RP 212. Counsel should also have objected when Cassidy spelled out the "concerning things" E.W. had told him about Mr. Brandenburg. RP 220-221.

These hearsay statements did not fit within any hearsay exception. Furthermore, their effect was to improperly bolster the testimony of L.B. and E.W., contrary to *Thomas*. Defense counsel should have objected, and his failure to do so denied Mr. Brandenburg the effective assistance of counsel. *Saunders*, 91 Wn. App. at 578.

2. Defense counsel should have objected to "expert" testimony regarding delayed reporting.

An expert may testify about specialized knowledge, but only if qualified to do so. ER 701. Furthermore, expert testimony bolstering a child victim's account should not be admitted into evidence unless the complainant's credibility is challenged in a manner that implicates the specific subject of the expert testimony. *See, e.g., State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Here, defense counsel should have objected when the prosecutor elicited expert testimony from Detective Ivanovich about the general behavior of children disclosing abuse. RP 158-159. Ivanovich was not

qualified to testify as an expert. Although he had some training and personal experience interviewing child victims, he did not claim to be familiar with any studies or research on the subject of child disclosures. RP 154-159. Instead, Ivanovich appeared to be generalizing from personal experience.

When a witness uses personal experience as a basis for "generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used…" *State v. Jones*, 71 Wn. App. 798, 818, 863 P.2d 85 (1993).

Detective Ivanovich crossed that line. Defense counsel should have objected. Mr. Brandenburg's convictions must be reversed and the case remanded for a new trial. *Saunders*, 91 Wn. App. at 578.

B. Defense counsel unreasonably failed to object to the prosecutor's misconduct.

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.

Counsel should have objected when the state improperly told jurors to convict if they "believe[d] the little girls who sat in that chair." RP 333. Likewise, counsel should have objected to the PowerPoint slides that answered "YES" (in oversized bold letters) to the question "Did sexual contact between defendant and [L.B./E.W.] occur?" Ex. 15.

At a minimum, defense counsel should have asked for a sidebar, objected, and sought a mistrial outside the presence of the jury. The prosecutor violated well-established rules that should have been obvious to defense counsel. Counsel's failure to protect his client's interest through a proper objection deprived Mr. Brandenburg of the effective assistance of counsel.

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

C. Defense counsel's errors prejudiced Mr. Brandenburg.

Mr. Brandenburg pled not guilty and denied any abuse. The defense strategy involved casting doubt on the accusations. By failing to object to inadmissible evidence, defense counsel allowed prejudicial testimony to bolster the testimony of E.W. and L.B. Furthermore, by allowing the prosecutor to commit prejudicial misconduct, defense

counsel increased the risk that jurors would decide the case for improper reasons.

There is a reasonable possibility that some jurors were influenced by the inadmissible hearsay, the irrelevant "expert" testimony, and the prosecutor's misconduct. *Kyllo*, 166 Wn.2d at 862. Accordingly, Mr. Brandenburg's convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. BRANDENBURG'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT 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 (2012). 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.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 21.

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)). 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 21.

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 language reached the jury in the form of an instruction from the court. CP 21. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied*, 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied*, 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I's position.

In *Bennett*, the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called

Castle instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.[3] *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle*, as in *Bennett*, the defendant favored the "truth of the charge" language. *Id.*, at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted the language found in the pattern instruction. *Id.*, at 656.[4] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I's decisions in *Kinzle* and *Fedorov*.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

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[3] The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.*, at 318.

[4] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.*, at 656.

Improper instruction on the reasonable doubt standard is structural error.[5] *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt 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. Brandenburg his constitutional right to a jury trial.

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

IV. MR. BRANDENBURG WAS CONVICTED UNDER STATUTES ENACTED IN VIOLATION OF ART. II, § 19.[6]

Under art. II, § 19, "No bill shall embrace more than one subject, and that shall be expressed in the title." The framers included this provision (a) to prevent "logrolling" (where a law is pushed through by attaching it to other legislation), and (b) "to notify members of the Legislature and the public of the subject matter of the measure." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 207, 11 P.3d 762 (2000) *opinion corrected,* 27 P.3d 608 (2001).

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[5] RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier,* 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'")

[6] Mr. Brandenburg did not raise this issue in the trial court. However, conviction under an unconstitutional statute is a manifest error affecting a constitutional right. His argument may thus be reviewed for the first time on appeal. RAP 2.5(a)(3).

A. The statute elevating first-degree child molestation to a Class A felony was enacted in violation of the single-subject rule.

The legislature must "be given the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits." *Washington Toll Bridge Auth. v. State*, 49 Wn.2d 520, 525, 304 P.2d 676 (1956). The relevant inquiry looks to whether "the body of the act contain[s] more than one general subject…" *Id,* at 523. Part of the analysis turns on whether each subject is necessary to implement the others. *Amalgamated Transit Union,* 142 Wn.2d at 217. A statute passed in violation of the single subject rule is unconstitutional and void. *Id.* at 216; *Toll Bridge,* 49 Wn2d at 525.

For example, in *Toll Bridge,* the Supreme Court invalidated an act because it embraced two subjects: "(1) To provide legislation, permanent in character, empowering a state agency to establish and operate all toll roads, and (2) to provide for the construction of a specific toll road linking Tacoma, Seattle, and Everett." *Toll Bridge,* 49 Wn.2d at 523. Similarly, in *Amalgamated Transit Union,* the court found that I-695 embraced two different purposes: "to specifically set license tab fees at $30 and to provide a continuing method of approving all future tax increases." *Amalgamated Transit Union,* 142 Wn.2d at 217.

RCW 9A.44.083 criminalizes child molestation in the first degree. In 1990, the legislature elevated the offense from a Class B felony to a Class A felony. Laws of 1990, ch. 3, § 902.

The title of the 1990 bill is "AN ACT Relating to criminal offenders;"[7] however, the 1990 bill addressed a variety of unrelated general topics. It violated the single-subject rule.[8]

For example, in addition to sections relating to "criminal offenders," the bill added provisions to RCW 71.05 (relating to mental illness),[9] created the statutory scheme for certifying sex offender treatment providers,[10] created RCW 71.09 (the statutory scheme for the civil

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[7] The entire title of the bill reads: "AN ACT Relating to criminal offenders; amending RCW 13.40.205, 10.77.163, 10.77.165, 10.77.210, 71.05.325, 71.05.390, 71.05.420, 71.05.440, 71.05.670, 9.94A.155, 13.50.050, 9.95.140, 10.97.030, 10.97.050, 70.48.100, 43.43.765, 9.92.151, 9.94A.150, 70.48.210, 13.40.020, 13.40.160, 13.40.110, 13.40.210, 43.43.745, 7.68.060, 7.68.070, 7.68.080, 7.68.085, 9.94A.390, 13.40.150, 9.94A.350, 9.94A.120, 9.94A.360, 9.95.009, 9A.44.050, 9A.44.083, 9A.44.076, and 9A.88.010; reenacting and amending RCW 9.94A.030, 9.94A.310, 9.94A.320, 9.94A.400, 18.130.040, 43.43.830, 43.43.832, 43.43.834, and 43.43.838; adding a new section to chapter 4.24 RCW; adding new sections to chapter 9.94A RCW; adding a new section to chapter 9.95 RCW; adding a new section to chapter 74.13 RCW; adding new sections to chapter 9A.44 RCW; adding a new section to chapter 10.01 RCW; adding new sections to chapter 10.77 RCW; adding new sections to chapter 13.40 RCW; adding a new section to chapter 43.43 RCW; adding a new section to chapter 46.20 RCW; adding a new section to chapter 70.48 RCW; adding new sections to chapter 71.05 RCW; adding a new section to chapter 71.06 RCW; adding new sections to chapter 72.09 RCW; adding a new chapter to Title 18 RCW; adding a new chapter to Title 71 RCW; adding a new section to chapter 43.06 RCW; adding a new chapter to Title 43 RCW; adding a new section to chapter 26.44 RCW; creating new sections; prescribing penalties; providing effective dates; and declaring an emergency." Laws of 1990, ch. 3.

[8] It also violated the subject-in-title rule, as discussed below.

[9] Laws of 1990, ch. 3, § 109, 120.

[10] Laws of 1990, ch. 3, § 801-11.

commitment of sexually violent predators),[11] and addressed treatment and supervision of parents found to have abused children. Laws of 1990, ch. 3, § 1301.[12]

The 1990 bill is an example of logrolling. The legislature was not "given the opportunity to consider legislative subjects in separate bills, so that each subject may stand or fall upon its own merits or demerits." *Toll Bridge*. 49 Wn.2d at 525. The body of the act contained "more than one general subject." *Id*, at 523. Furthermore, many of the various subjects were unnecessary to implement the others. *Amalgamated Transit Union,* 142 Wn.2d at 217.

The 1990 bill violated the single-subject rule. *Toll Bridge*, 49 Wn.2d at 525. Accordingly, it is void under art. II, § 19.[13] *Amalgamated Transit Union,* 142 Wn.2d at 216; *Toll Bridge,* 49 Wn.2d at 525. The legislature's attempt to elevate first-degree child molestation from a Class B felony to a Class A felony was without effect. *Id.*

[11] Laws of 1990, ch. 3, §§ 1001-13.

[12] Other subjects addressed included the Juvenile Justice Act, the crime victims' compensation program, background check procedures for certain employees and volunteers, funding and grant criteria for community organizations providing services to crime victims. Laws of 1990, ch. 3, §§ 102, 301, 501-504, 1101-1104, 1201-1210.

[13] The statute has not been cured by subsequent enactment, as discussed below.

Mr. Brandenburg's sentence must be vacated. His case must be remanded for a new sentencing hearing under the provisions in effect prior to the 1990 amendment.

B. The statute elevating first-degree child molestation to a Class A felony was enacted in violation of the subject-in-title rule.

The title of a bill may be general or restrictive. *Amalgamated Transit Union,* 142 Wn.2d at 207-208. A statute enacted under a general title is invalid unless there is "rational unity between the general subject and the incidental subjects." *Id.* at 209. Examples of general titles include "An Act relating to violence prevention," "An Act relating to tort actions." *Id.* at 208 (providing examples).

As noted above, the 1990 bill elevating first-degree child molestation from a Class B to a Class A felony was titled "AN ACT Relating to criminal offenders..." Laws of 1990, ch. 3. The bill embraced numerous subjects that do not fall within this general title.[14]

The bill is invalid because there is no "rational unity" between the general subject expressed in the title ("criminal offenders") and the many

[14] For purposes of the subject-in-title rule, courts consider only the substantive language describing the bill. A title's "mere reference to a section… does not state a subject." *Patrice v. Murphy*, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (internal quotation marks and citations omitted). Numerical reference following words such as "amending," "adding new sections to," or "repealing" does not change the analysis. *Id.; see also Fray v. Spokane Cnty.*, 134 Wn.2d 637, 651-555, 952 P.2d 601 (1998). Bare numeric references do not give adequate notice: "To say that mere reference to a numbered section embodies the idea of a

disparate subjects addressed in the bill. *Amalgamated Transit Union,* 142 Wn.2d at 207-208. The bill purports to address "criminal offenders" but also amends and enacts myriad statutes relating to juvenile justice,[15] civil commitment, treatment providers, employee background checks, funding for community organizations, and help for crime victims.[16] Laws of 1990, ch. 3, §§ 103, 109, 120, 301, 501-04, 801-11, 1001-13, 1101-04.

First-degree child molestation was elevated to a Class A felony by a bill that violates the subject-in-title rule. The amendment is unconstitutional. *Amalgamated Transit Union,* 142 Wn.2d at 210. Mr. Brandenburg's sentence must be vacated. His case must be remanded for a new sentencing hearing under the provisions in effect prior to the 1990 amendment.

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theme, proposition, or discourse … is not sustained by the ordinary understanding of those terms." *State v. Superior Court of King Cnty.*, 28 Wash. 317, 325, 68 P. 957 (1902).

[15] Juvenile offenders are not "criminal offenders." Under RCW 13.04.240, "[a]n order of court adjudging a child a juvenile offender… under the provisions of this chapter shall in no case be deemed a conviction of crime." This provision has been cited by the Supreme Court as one of the reasons juvenile offenders need not be afforded jury trials. *State v. Schaaf*, 109 Wn.2d 1, 8 n. 17, 743 P.2d 240 (1987).

[16] Although most of these dissimilar topics are numerically referenced by citation to the relevant RCW sections, these references do not cure the title's constitutional deficiency. *Patrice*, 136 Wn.2d at 853. The mere listing of numerical sections does not state a subject of the bill. *Id.*

C. The 1994 amendments to RCW 9A.44.083 did not cure the problems with the 1990 bill.

A statute passed in violation of art. II, §19 is cured by subsequent amendment or reenactment "pursuant to properly titled legislation." *See Morin v. Harrell*, 161 Wn.2d 226, 228, 164 P.3d 495 (2007). Although RCW 9A.44.083 was amended in 1994, the 1994 bill was not "properly titled legislation." *Id.* It did not cure the errors in the 1990 bill.

The amending statute was titled "AN ACT Relating to crimes."[17] Laws of 1994, ch. 271. The bill did include some provisions relating to "crimes" (such as sections regarding murder, witness intimidation and tampering, child molestation, bail jumping, and stalking). Laws of 1994, ch. 271 §§1, 101, 201-205, 301-307, 701, 801-803. Other provisions related more tangentially to crime, but still bore some degree of rational unity. *See* Laws of 1994, ch. 271 §§ 501, 601-602, 901.

However, the bill also regulated two other issues, unrelated to each other or to the bill's title. First, the bill addressed the siting of correctional facilities. Laws of 1994, ch. 271 §1001. The provision required the Department of Corrections to establish a process for public participation in

[17] The full title is: "AN ACT Relating to crimes; amending RCW 9A.28.020, 9A.72.090, 9A.72.100, 9A.72.110, 9A.72.120, 9A.44.010, 9A.44.083, 9A.44.086, 9A.44.089, 9A.44.093, 9A.44.096, 43.43.754, 43.43.680, 9.94A.140, 9.94A.142, 9A.46.110, 13.40.020, and 9.94A.220; reenacting and amending RCW 9A.46.060; adding a new section to chapter 72.65 RCW; creating new sections; repealing RCW 10.19.130; prescribing penalties; and providing an effective date."

establishing or relocating community-based facilities. It also spelled out certain obligations regarding notification and public hearings. Laws of 1994, ch. 271 §1001. This provision did not relate to "crimes." Nor was it necessary to implement any of the bill's other provisions. There was no "rational unity" between §1001 and the other sections of the bill. *Amalgamated Transit Union,* 142 Wn.2d at 209.

Second, the legislature amended RCW 43.43.754 to require certain adjudicated juveniles to provide blood samples for DNA identification. Laws of 1994, ch. 271 §§401-402. Because juvenile offenders "shall in no case be deemed [convicted] of crime,"[18] this provision did not "[r]elat[e] to crimes." Laws of 1994 ch. 271. Nor was it necessary to implement any of the other provisions. *Amalgamated Transit Union,* 142 Wn.2d at 217. The subject of this provision was not expressed in the title, and there was no "rational unity" between it and the other provisions of the bill. *Id.,* at 209.

Like the 1990 bill, the 1994 bill involved logrolling, and its title failed to provide legislators and the public notice of the subjects included within the bill. *Id.,* at 207. The 1994 bill thus did not cure the defects in the 1990 legislation.

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[18] RCW 13.04.240.

The amendment elevating first-degree child molestation to a Class A felony had no effect. *Amalgamated Transit Union,* 142 Wn.2d at 216-217. Mr. Brandenburg's sentence must be vacated and the case remanded for a new sentencing hearing under the provisions in effect prior to the 1990 act.

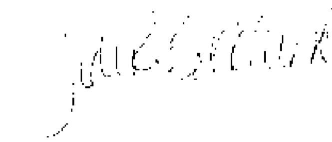
CONCLUSION

For the foregoing reasons, Mr. Brandenburg's convictions must be reversed. The case must be remanded for a new trial.

In the alternative, if the convictions are not reversed, his sentence must be vacated and the case remanded for resentencing under the provisions in effect prior to 1990.

Respectfully submitted on February 23, 2016,

BACKLUND AND MISTRY



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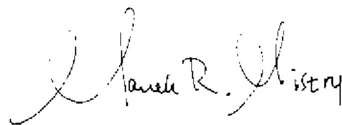

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Shawn Brandenburg, DOC #384778
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1830 Eagle Crest Way
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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:

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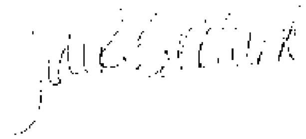
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 February 23, 2016.



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