No. 335763

DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROY E. COOLEY,

Appellant

ON APPEAL FROM KITTITAS COUNTY SUPERIOR COURT
Honorable Frances P. Chemelewski

BRIEF OF APPELLANT

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I. INTRODUCTION

According to Randi Lowery, the mother of then six year-old RB, sometime during the summer of 2014, while she was bathing him, RB told her that Roy Cooley had made him put his mouth on Cooley's penis. Eventually, on August 27, 2014, the mother informed law enforcement of her son's disclosure, but she delayed making this report for a rather lengthy period of time. Exactly how long she waited before making a police report on August 27th is unclear because her testimony as to when her son made the disclosure to her was – as the prosecutor acknowledged in closing – "all over the place." Initially the mother said her son disclosed to her sometime in August. Then she said he disclosed to her sometime in July. Finally, she said she told her sister that her son had made his disclosure sometime in June. Thus the period of reporting delay was initially represented as about one week, but the delay she eventually acknowledged was roughly two months. The prosecutor's big challenge in this case was to provide a plausible explanation for this delay.

The solution to the prosecutor's problem was to present testimony from the mother that she waited until she was sure that her son was telling the truth. The mother testified that when RB first told her what Cooley had done, she asked RB if he was sure, and the child replied, "Go ask dad." (The child referred to Cooley as "dad," and also as "Dusty.").[1] The mother claimed that she then went and confronted Cooley, told him what her son had said, and

[1] See RP 114. "Dusty" was Roy Cooley's nickname. RP 131.

asked him if it was true. The mother testified that Cooley flatly denied the accusation, and so the next day she told her son that Cooley had denied it. According to the mother, her son then burst into tears. She testified that her son's reaction convinced her that the accusation was true. She testified that at that point, "knowing that what my son was saying was the truth," she reported the accusation to the police. RP 149. The prosecutor repeatedly asked her why she waited so long to report the matter to the police, and she replied that she didn't want to report it "without being sure" that the accusation was true, and when asked whether she believed him the second time she discussed the matter with her son she said that she did: "I did when I saw him crying and stuff." RP 149. When the prosecutor asked her why she did not report her son's accusation immediately, she said, "I didn't want to ruin somebody's life without being a hundred per cent sure that it had happened." RP 195.

Defense counsel never objected to any of the mother's testimony. He did not object to her testimony that she waited until she was sure; or to her testimony that she believed her son; or to her testimony that she was 100% sure that it happened once she saw her son crying.

In closing argument the prosecutor said that he believed the mother's testimony, and again defense counsel did not object. The prosecutor acknowledged that after her son disclosed to her, the mother "sat on it" [the child's disclosure]. RP 759. The prosecutor described her subsequent conduct as conducting some "fact checking," and he argued that her "fact checking" mission was completed when she assessed her son's reaction to

being told that his "dad" had denied doing what the child had said he had done: "She's looking at her son as a mother looking at his reaction." RP 760. The prosecutor told the jury that when the mother saw her son crying she was impelled by a mother's "instinct" to take action and she realized at that point that she had to report it to the police, and so at that point she did. RP 760. Defense counsel never objected to any of this, and the jury found him guilty as charged.

II. ASSIGNMENTS OF ERROR

Appellant assigns error to:

1. The admission of the testimony of Randi Lowery that she waited to report her son's allegation of molestation until she was 100% sure that her son was telling the truth.

2. The failure of Appellant's trial court counsel to object to the elicitation of testimony from the child's mother that she believed her son's accusation that he was molested by the Appellant.

3. The admission of a police officer's testimony that the decision as to "whether there is enough" to file a felony charge is made by "the Court."

4. (a) The prosecutor's closing argument statement that he believed witness Randi Lowery, and (b) the failure of Appellant's counsel to object to this statement.

5. (a) The prosecutor's questioning of the defendant asking him to admit that he could not think of any reason why the child would accuse him of this criminal act, and (b) the failure of Appellant's counsel to object to these questions.

6. (a) The prosecutor's statement in closing argument that the Appellant could have shown the investigating officer his naked body as a way of demonstrating that he could not be the person that the child described as having molested him, and (b) the failure of Appellant's counsel to object to this argument.

7. (a) The prosecutor's statement in closing that in order to go with the defense the jurors would have to believe that Lowery coached her son into making a sex abuse accusation, and (b) the failure of Appellant's counsel to object to this argument.

8. The prosecutor's elicitation of testimony regarding the tactics that criminal defense attorneys generally employ in cases where a child has accused the defendant of an offense of sexual molestation.

III. STATEMENT OF ISSUES

This appeal raises the following issues:

1. Did the admission of the mother's opinion that she believed her son's accusation that the defendant sexually molested him violate the Appellant's article I, § 21 & § 22, and/or his Sixth Amendment right to a trial by jury?

2. Did the admission of the mother's testimony that she waited until she was "100 percent sure that it happened" violate the Appellant's art. I, §21 & §22, and/or his Sixth Amendment right to trial by jury?

3. By allowing a police officer to testify that it's up to the Court to decide "whether there is enough" to bring a felony charge against a defendant, did the Court violate Wash. Const., art. 4, §16 which prohibits any judicial comment on the evidence?

4. Did any of the following acts of prosecutorial misconduct, either standing alone, or in combination with others, deprive the Appellant of his due process right to a fair trial?

   (a) vouching for the credibility of Randi Lowery, a key prosecution witness, by stating "I believe her."

   (b) questioning the defendant as to his inability to provide an explanation as to why the child would make a false accusation against him;

   (c) arguing to the jury that if the defendant really had been clean shaven, he would have taken off his clothes and shown that to the arresting officer, because that would have supported his claim of innocence;

(d) telling the jurors that in order to accept the defense theory "you have to believe" that the mother coached the child; and

(e) eliciting testimony that when defending people accused of molesting a child, criminal defense attorneys routinely argue that someone has planted a false memory in the child's mind.

5. Was the Appellant deprived of his Sixth Amendment right to effective representation of counsel by any one of the following acts, or by the cumulative effect of any two or more of them?

(a) failing to object to the mother's opinion testimony that she believed her son was telling the truth;

(b) failing to object to the mother's testimony that she waited to report the crime to police until she was 100 percent sure that it had happened;

(c) failing to object to the prosecutor's closing argument vouching for witness Randi Lowery by stating that he believed her testimony;

(d) failing to object to the prosecutor's closing argument comment that if the defendant were truly innocent he would have shown the detective that his naked body did not match the child's description of the body of the man who molested him; and

(e) failing to object to the prosecutor questioning the defendant as to whether he had any explanation as to why the child would bring a false accusation against him?

IV. STATEMENT OF THE CASE

A. The history of the relationship between Lowery and Cooley.

Before she met Roy Cooley, Randi Lowery had a three year relationship with a man named Baker; she had two sons with Baker and that relationship lasted from 2006 to 2010. RP 124, 127. When that relationship ended, Lowery and her sons lived for about six months with her parents in Ellensburg. RP 126. She then met Roy Cooley at her place of employment

and began a relationship with him. RP 128. She moved into Cooley's house in Thorp in April of 2011. RP 128-29.

The prosecutor elicited testimony from Lowery that she had a sexual relationship with Cooley, and that she and Cooley made films of their own sexual conduct. RP 132-33. Lowery testified that so far as she knew, neither of her sons ever looked at the pornographic films that she and Cooley made. RP 134.

She and her two sons lived with Cooley and Cooley's daughter Bailey for "[a]bout three years." RP 129-30. They stopped living with Cooley in June of 2014. RP 129. When the prosecutor asked her why she stopped living with Cooley she said simply, "it wasn't working for us." RP 129. On cross-examination she acknowledged that Cooley threw her out of the house. RP 154. When asked why, she initially said, "You'd have to ask him exactly why." RP 154. Eventually she acknowledged that she had been cheating on him, and she alleged that he had been cheating on her too. RP 171. Lowery said that one night in June when Cooley discovered her infidelity, he left a note on her car that said she should not come home. RP 154. She claimed that when she went home the next day he yelled at her, punched her, and pushed her through a window and out of the house. RP 155-56. But she did *not* report this incident of alleged violence to the police. RP 155. She said she did not report it because she did not want to traumatize her children. RP 184.

Lowery testified that when she moved out of Cooley's home, she went to live in her sister in Ellensburg. RP 135. She lived there for the next

six months, with her sister, her brother-in-law, their three year old son, and a male friend of Lowery's named Jerome with whom she had a brief relationship for a couple of months. RP 135-36.

B. The alleged bathtub disclosure at Lowery's sister's house.

Initially, Lowery testified that sometime "in August of 2014," her son came and told her that he had been molested. RP 138. This allegedly happened in the bathroom of her sister's house in Ellensburg. RP 138. Lowery said she had been getting her sons out of the bathtub when RB grabbed his own penis. RP 139. She told him, "okay, you need to keep that private, nobody wants to see that" and at that point RB responded that he wanted to tell her something but she couldn't tell anybody. RP 140. RB allegedly told her that "Daddy made me put his who-who in my mouth." RP 140. According to Lowery, her younger son was present when RB said this to her, but the younger child did not hear what RB said. RP 140, 174. Lowery said she never asked the younger son if anything had ever happened to him. RP 174. According to Lowery, RB's statement "took [her] completely by surprise." RP 143. RB did not divulge any further details at that time, and her conversation with him ended with RB telling her "to go ask Dusty [Cooley] if it happened or not." RP 143.

C. The mother's initial allegation that she confronted Roy Cooley with her son's accusation in August.

Lowery testified that after RB made this statement to her, she "waited until the next day" and then she "went out [to Cooley's house in Thorp] and asked him" if what RB said was true. RP 144. Lowery said no one was else

was present, and she "asked him if he had done that. And he was very adamant that he had not . . . ." RP 144. She said it was short conversation, and after he denied it she just left. RP 146.

(Cooley would later testify that this conversation never took place at all; that Lowery never came out to his house to tell him or ask him about RB's accusation, and that he knew absolutely nothing about any such accusation until August 27th when he was arrested. RP 536).

On cross-examination, Lowery said she did not know what day it was in August that she went out to Cooley's house to confront him. RP 156. Nor did she know how she long she waited after that before she went to the police. RP 156. Kittitas County Deputy Sheriff Whitsett said that she made her police report on August 27, 2014. RP 305.

D. The prosecutor asked Lowery why she waited before reporting her son's accusation to police and she testified that she waited until she knew "that what my son was saying was the truth." He asked if she believed her son and she said she did.

Notwithstanding RB's testimony that he was "[p]ositively, absolutely sure" that he only talked with his mom once about what Dusty did to him, Lowery said she talked to her son again on the same day that she confronted Cooley. According to Lowery, the initial disclosure, her confrontation with Cooley, and her second conversation with her son, all occurred within a 24 hour period. RP 147.

According to Lowery, she went right back to RB and told him that Dusty "had said it did not happen." RP 147. She said this second conversation also occurred at her sister's house, and that when she told him

that, "He started crying." RP 147. The prosecutor then asked her a series of questions about what she did after that second conversation with RB, and why she waited for a period of time before reporting RB's accusation to the police:

> Q. What did you do with that information?
> A. I went and told the police.
> Q. When?
> A. ***I would say a week or so after that.***
> Q. A week or so after that?
> A. Yeah. I don't really remember exactly.
> Q. Maybe more?
> A. No. I don't remember.
> Q. Okay. ***But at least a week.***
> A. ***Yeah,*** I would say.
> Q. ***Why did you wait?***
> A. ***Just trying to make sure*** that I wasn't going to mess up anybody's life.
> Q. Okay.
> A. ***Without being sure of –***
> Q. ***Without being sure of what?***
> A. Yeah. ***Without knowing*** that what I was going – I don't know. ***That knowing that what my son was saying was the truth.*** I was just trying to –
> Q. Well, at the point of the second conversation when you told [RB] what the defendant said –
> A. Uh-huh.
> Q. – ***did you believe him at that point?***
> A. ***I did. I did when I saw him crying and stuff. That's what made me*** – I didn't want to believe it.
> Q. Made you what?
> A. Made me tell the police.
> Q. ***But you still waited a week?***
> A. I did.
> Q. And during the course of that week, what were you thinking?
> A. I don't remember.

RP 148-49 (emphasis added). Lowery reported her son's accusation to Deputy Sheriff Whitsett on August 27, 2014. RP 305.

E. The stalking complaint, dismissal of the stalking charge, and testimony regarding who decides whether to file a felony charge.

On cross-examination, although she initially said she did not recall contacting law enforcement anytime in July, Lowery eventually acknowledged that on July 25th she contacted law enforcement to complain that Cooley was stalking her. RP 158-59. She testified that she didn't know whether any criminal charges were ever filed against Cooley as a result, and claimed she never received any letters about a stalking case. RP 159. She denied having any recollection of receiving a letter stating that "because of [her] lack of cooperation, [the stalking case] was being dismissed." RP 160.

Ellensburg police officer Robert Salinas testified that on July 25, 2014, Lowery made a complaint of harassment against Cooley, and that led to a charge of stalking being filed against him. RP 671, 673. Salinas said that the case was pending against Cooley for some time, but it was ultimately dismissed because Lowery "did not pursue it." RP 673. 675.

The prosecutor asked Salinas, "Who charged the defendant with the crime of stalking?" and he answered, "I did." RP 675. He then asked Salinas, whose choice it was to file misdemeanor or gross misdemeanor charges, and Salinas replied, "Myself and the Court." RP 675-76. Defense counsel made no objection to these questions.

But then the prosecutor asked about felony charges and defense counsel did object but his objection was overruled:

> Q. Okay. ***As to felonies, whose decision is it?"***
> A. ***It's going to be*** up to the –
> MR. KIRKHAM: Objection. Relevance.

THE COURT: It's all right. Go ahead.
A. – ***up to the Court whether*** enough – ***there's enough to*** – I couldn't ***charge a felony*** based on the circumstances of the crime.

RP 676 (emphasis added). Defense counsel attempted to defuse the prejudicial impact of testimony that suggested (erroneously) that judges make the decision whether to file felony charges by asking one question:

Q. You mentioned the courts filed charges. It's actually the prosecutor's office; is that correct?
A. Yes, sir.

RP 677.

On further redirect the prosecutor then proceeded to ask *more* questions on this subject, apparently to establish that in felony cases all a police officer really does is make an arrest, but the answers he got back made further reference to "the courts":

Q. ***As to felonies, who ultimately files the charge?***
A. ***Who ultimately files the charge?***
Q. ***Yeah, physically gets in and files a felony?***
A. ***The officer does.***
Q. Well, does the officer effect the arrest?
A. The officer effects the arrest.
Q. Okay. On arrest, how is the documentation generated?
A. ***It is forwarded to the courts.***
Q. Okay. ***To the courts?***
A. ***Yes.***

RP 677 (emphasis added).

The prosecutor's last question – "To the courts? – suggests that the prosecutor knew that that answer was incorrect, but Officer Salinas confirmed his "to the courts" answer. The prosecutor then asked Salinas about "a citation." RP 677. Salinas answered that an officer tries to serve a citation on a defendant, but if unable to make such service the officer then sends the paperwork "to the courts." RP 678. The prosecutor then got the officer to

agree that the situation was "different from the felony officer," because (1) in the case of a citation the officer is the one who "actually issu[es]" a citation; and (2) "whether the prosecutor dismisses it [a citation] or not, that's out of [the officer's] control." RP 678. Then the prosecutor returned to the subject of *felony* charges once again:

> Q. Okay. But as to a felony, you're not, in fact, charging the individual with a felony. You're just arresting them; is that correct?
> A. I'm arresting them ***and requesting this set of charges.***
> Q. ***Requesting?***
> A. ***Yes.***
> MR. HERION: Thank you.

RP 678 (emphasis added).

F. The civil protection order of July 30th and Lowery's testimony that her son disclosed the molestation to her before that date.

Lowery did admit that she initiated a civil protection order proceeding. RP 160. In her protection order petition, she alleged that Cooley had hit her and shoved her out of a window back in June when he threw her out of his house. RP 161. And she acknowledged that on July 30, 2014 she was granted a temporary civil protection order that prohibited Cooley from having any contact with her. RP 162.

When cross-examined about the timing of RB's sexual molestation accusation against Cooley, Lowery said that her son made his disclosure *before* she obtained the civil protection order on July 30th, and that she was "pretty sure" about that. RP 163. She went on to say that she went out and confronted Cooley about RB's accusation *before* the temporary protection order went into effect. RP 163. Thus, Lowery moved the date of her son's

disclosure back in time from sometime in August, to sometime in July, and thus lengthened the period of time that she waited before reporting the accusation to the police.

G. Lowery's acknowledgment that she told her sister about her son's sexual molestation accusation in June of 2014.

Moments later in cross-examination, Lowery said she told her sister that her son RB had disclosed sexual molestation to her in June of 2014. RP 172. She again stated that she confronted Cooley with RB's accusation the next day. RP 175. And she again stated that she had her second conversation with RB in the evening of the day that she confronted Cooley. RP 175. So because she pushed back the time of her son's disclosure to sometime in June, she also pushed back both the date of her alleged confrontation of Cooley, and the date of her second conversation with RB where she told him that his dad denied doing anything. Thus, these date changes also further lengthened the period of time between the child's disclosure and August 29th, the date on which Lowery reported the matter to the police.

H. Lowery said she waited to report the accusation until she was "100% sure that it had happened."

Since Lowery's changing trial testimony had pushed back the date of her son's disclosure to sometime in June, on redirect the prosecutor returned to the subject of why Lowery waited until August 27th to report her son's accusation to the police. The prosecutor asked Lowery:

> Q. – did you want to report to law enforcement what your son reported to you?
> A. No.
> Q. Why not?

A. I didn't t want to ruin somebody's life ***without being a hundred percent sure that it had happened.***

RP 195 (emphasis added).

Defense counsel made no objection to this questioning, and no motion to strike this testimony. RP 195.

I. Lowery denied that she told police that she moved out of Cooley's house because Cooley molested her son. But Deputy Whitsett testified that she *did* tell him that, and that she told him that her son's disclosure of abuse happened in June.

Lowery testified that she moved out of Cooley's house on June 23, 2014. Defense counsel questioned her as follows:

Q. Have you ever told anybody that the reason you moved out was that he had molested your son?
A. No.
Q. Never?
A. No.

RP 199.

But on the next day of trial, Deputy Sheriff Whitsett testified that Lowery did tell him that she moved out of Cooley's house because her son disclosed to her that Cooley had molested him. RP 332. Whitsett said he was first contacted by Lowery on August 27th. RP 305. Lowery told him that her son had disclosed sexual abuse to her and she "told me that the disclosure happened in June of 2014." RP 341. He obtained an arrest warrant for Cooley, went to Cooley's home and arrested him on August 27th. RP 313, 318. Whitsett arranged for Lowery's son to be interviewed by a forensic child interviewer (Lisa Larrabee) on August 29th. RP 254. On cross-examination, Whitsett gave the following testimony:

Q. Okay. Now, you indicated that you had also talked to Randi [Lowery] about the disclosures. And ***when did she indicate those disclosures occurred?***

A. In my initial conversations with her on August 27th, she indicated that it was some weeks or possibly months earlier. That is, earlier than the 27th. ***She was not specific as to the date of the disclosure at that time.***

During the time that I talked with her very briefly after our interview with [RB] on the 29th, I talked with her about what we were going to do next. Sorry. I believe that Randi told me at that time that she – ***that [RB] had disclosed the matter to her in June at or possibly before the time that she moved out of Dusty's house.***

Q. So back in August the 29th, ***she told you that they occurred in June, they argued, then she moved out after she confronted him; is that correct?***

A. That was what I took away from our brief conversation on that day after [RB]'s interview, ***yes***.

RP 332 (emphasis added).

J. The forensic interview by Larrabee and the child's drawing.

Lisa Larrabee, an experienced child interviewer, interviewed the child on August 29, 2014. RP 239, 254. Larrabee noted that she "was actually only able to do the introduction, introduce [herself] and [her] role," when RB interrupted her by "asking [her] a question." RP 255. He said, "'You want to know something,' or 'Hey, you know what?'" RP 255-56. Larrabee said, "Huh," and then "[h]e said, 'Once my dad – my dad, he made me put my mouth on his who-who." The child then told Larrabee what his dad (or "Dusty") had done. RP 257.

During the interview Larrabee asked RB to draw her "a picture of what the who-who looked like" and "a picture of the room in which he said this happened." RP 282. RB then drew the two requested pictures, and at

trial they were admitted in evidence as Exhibits #3 (what the who-who looked like) and #4 (the room). CP 46, 47. Larrabee wrote words on RB's drawing so as affix labels to parts of his drawing. RP 282. Larrabee labeled a large stick figure with the words "Dad Dusty," and she labeled a part of that body with the words "hoo-hoo." CP 46. Larrabee also labeled a smaller stick figure with the RB's first name, and a part of that body as "[RB's] mouth." CP 46. The "hoo-hoo" (spelled throughout the trial transcript as a "who-who") appears to have spines, or hairs, on it. CP 46. Larrabee testified that she "was labeling things so that anyone who was looking at it would be able to know what the child intended." RP 282.

K. The child's trial testimony describing what Larrabee had labeled a "hoo-hoo" as a "cactus."

RB was 7-1/2 years old at the time of trial. RP 103. He testified that the incident happened "[w]hen I was five." RP 106.[2] RB did not know where he was living when the incident occurred, but testified that it happened "in my bedroom at night" and that he was in a top bunk and his younger brother was sleeping in the bottom bunk. RP 106. According to RB, Dusty

[2] The third amended information charged that the crime was committed at some point during the period between August 22, 2011 and June 23, 2014. CP 112. (Both Lowery and Cooley agreed that June 23rd was the day Lowery stopped living with Cooley and moved out of his house. RP 201, 322-23.) There is no fourth amended information in the Superior Court file. But on the third day of trial the prosecution moved orally for leave to amend the information to charge a slightly bigger time period, from April 1, 2011 through June 23, 2014. RP 292. Defense counsel made no objection. RP 293. It appears that no formal written motion seeking leave to make this amendment was ever made; but the to-convict jury instruction states that in order to convict the jury must find that Cooley committed the crime sometime within the larger time period beginning on April 1, 2011. CP 128 (Instruction No. 7). So the time period that was ultimately used covered three years and two months.

told him to come down a ladder from the top bunk and made RB put his mouth on his "who-who." RP 107-08. "Who-who" is the word RB used to refer to a penis. RP 110.

RB could not remember if Dusty did anything when he put his who-who in Dusty's mouth, he did not see Dusty do anything with his hands; he could not remember if Dusty peed in his mouth; and he did not know how long the incident lasted. RP 108-110. RB testified that he told his mother what Dusty had done and when asked, "How soon after did you tell your mom about it?" he replied, "when it was day." When asked where he was when he told his mother about it he replied, "In the hallway," and then specified that he was in the hallway of Dusty's house and that he was still living with Bailey (Roy Cooley's daughter) at the time he told his mother what happened. RP 117-18. Since this did not match what Randi Lowery had said about where she was living and where she and RB were when RB made his disclosure to her, defense counsel asked RB how many times he talked to his mother about Dusty putting his who-who in RB's mouth and RB indicated he only spoke to his mother about the incident one time.[3] Defense counsel returned to this subject moments later and RB confirmed that he was still living with Bailey and Dusty (the Appellant) at their house when he told his mom what Dusty did. RP 120. Asked if he was sure about that, RB answered, "Positively, absolutely." RP 120. Asked again if he remembered

[3] From the transcript it appears that RB made some kind of a nonverbal gesture to indicate one time and defense counsel confirmed that RB meant one time only by speaking the words "Just once? Okay." RP 118.

how many times he talked to his mom about it, RB answered, "Yes. Just once." RP 120. RB never testified about, or made any reference to telling his mother what Dusty did while he was taking a bath at his aunt's house.

The prosecutor showed RB the drawings he had previously made at Lisa Larrabee's request and RB identified the two drawings as ones he had made (Exhibits 3 & 4). RP 111-112. RB could not remember when he made these drawings. RP 112. He identified them from his "handwriting" (although Larrabee subsequently testified that the handwriting of the words used to label things in the drawing was hers). RP 282.[4] When RB was asked about his drawing of the incident he repeatedly referred to the "cactus" shown in the picture and he insisted that it was a real cactus. RP 112, 113.[5]

L. The expert testimony of Professor Reisberg and the prosecutor's elicitation of testimony about what defense attorneys "routinely argue" in child sex abuse cases.

Professor Daniel Reisberg, a psychology professor at Reed College, testified for the defense on the general subjects of memory mistakes, "source confusion" in children, and the best practices for interviewing children so as not to increase the risk of memory mistakes. RP 370. Reisberg distinguished

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[4] Q. Why do you recognize what you see on that piece of paper?
A. Because it's me holding the cactus and Dusty is sitting on it.
Q. Okay. You holding the cactus?
A. Yes.
Q. What is the cactus, [RB]?
A. The cactus is a prickly plant.

[5] Q. [RB], how do you know that's a picture you drew?
A. From my handwriting and the – me holding the cactus.
Q. The cactus? [RB], is that really a cactus?
A. Yes, that's really a cactus.

between memory mistakes, also called false memories, and lies. "[M]emory mistakes are cases where the child is telling you as honestly as he or she can what they happened, but they're wrong." RP 370. Reisberg explained that it is fairly common for children to lose track of where a piece of information came from. RP 374. A child like RB can confuse a true memory – something that really happened – with something that he talked about with his mother. RP 374. If the child loses track of the source of information, he can take what someone told him, or what someone discussed with him, or something he saw on TV, and come to think of it as something that actually happened to him. RP 375. Reisberg explained that when questioning a child, a good interviewer avoids introducing new information to the child, and thus avoids the danger of source confusion. RP 378. Instead of asking, "Did he touch you?" which introduces the idea of touching, a good interviewer says, "Why don't you tell what happened?" RP 378. Reisberg discussed studies conducted with small children, where the children witnessed a real event, and then later they were exposed to a retelling of the event by reading a book that summarized what they had seen and experienced. The book contained mostly true information with false information inserted into it. RP 385. The studies found that it was very common for children to develop a false memory and to report that something happened which in fact never happened. RP 386. Depending upon the way in which false information was introduced,

researchers found that they could produce false memories in children at rates as high as 80%. RP 396.[6]

Reisberg approved of the way that Larrabee conducted her interview of RB, saying that in general the interview was pretty good. RP 505. But he explained that if the child's memory had already been impacted by someone or something else before Larrabee did her interview, then it was simply irrelevant that Larrabee conducted a good interview because the source confusion could have already occurred. RP 476. "The scientific research tells us that once those outside influences have had an impact on memory, it almost doesn't matter if the forensic interview is really, really well done. You cannot unscramble the egg." RP 425. "[I]f the child has been exposed to some prior influence before the forensic interview, then a properly conducted interview can still elicit a false statement because it's something the child entered the interview already believing." RP 476.

The prosecutor recognized that the defense was using Dr. Reisberg's testimony as scientific background information for the argument that RB had already been exposed to contaminating "outside influences" long before he was interviewed by Larrabee on August 29th. The prosecutor correctly anticipated the following defense "false memory" arguments which defense counsel later made in closing arguments:

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[6] As time passes the risk of source errors producing false memories goes "zooming" upwards. RP 402. Reisberg explained: "[There are] three separate reasons" that delay increases the risk of false memories: "You're going to lose the original episode. You have a greater chance of outside influence. And keeping track of where you got your information from gets harder and harder." RP 401.

(1) The mother, Randi Lowery, had deliberately coached her son into believing that Dusty had sexually molested him; or

(2) the mother had accidentally and unintentionally induced her son into believing that Dusty had molested him by talking to him about bad sexual touching; or

(3) someone else – some other man – had sexually molested RB and RB simply confused *who* had done this to him; or

(4) RB had seen one of the pornographic home sex videos that his mother had made with Dusty, and had confused what he saw on the video – an act of oral sex that his mother had performed – with a false memory of an act that he himself had performed.

In an attempt to discredit these arguments, the prosecutor asked this question regarding a scholarly research article written by a man named Lyons, and got an affirmative answer:

> Q. Okay. And on that note, and in all fairness, he – does he [Lyons] not also report that, on the flip side, ***defense attorneys would routinely argue that children's reports*** [of sexual abuse] ***are the product of adult influence***?
> A. ***Yes***.

RP 479 (emphasis added). Defense counsel made no objection, and no motion to strike. RP 479.

Reisberg found two things about the child's interview "troubling." RP 480-81. First, it was troubling that RB began talking about an act of oral sex before the interviewer Larrabee had asked him anything at all:

> [T]he fact that the child blurted that out, you know, 20, 30, 50 seconds into the interview was, I think, ***a fairly clear indication that the child had been, to some degree, prepped for that interview and knew exactly why he was there or knew exactly what the agenda was,*** knew exactly what he was supposed to be talking about. That's ***the sort of thing that, for me – raises some concerns*** about. Plainly – I think unmistakably, there had been prior conversations. Otherwise, how did the child know that's what he was supposed to talk about?

RP 481 (emphasis added).

Second, Reisberg found it "peculiar" that the child interrupted Larrabee to "correct" her when she asked about the child putting his mouth on Dusty's who-who, when in fact the child's "correction" was inconsistent with what the child had consistently said before. RP 505. The child interrupted to "correct" Larrabee by pointing out that the child put *his* who-who into *Dusty's* mouth, when previously he had said Dusty put *Dusty's* who-who into *his* mouth:

> I mean, as I testified earlier, it's often the case that there are small inconsistencies on details, stuff around the edge. But if the entire event is suddenly reversed, that's somewhat peculiar.

RP 505.

Finally, Reisberg suggested that Larrabee should have asked more questions when the child referred to "furs" on the who-who that he had drawn at Larrabee's request:

> They're talking about the picture, and the child says, "He had furs" – I assume that means furs on his penis.... And the child says, "He had furs because all men when they are grown up, they have furs on them." And so at that point the child is asserting that he has knowledge about men's genitals in – overall. "All men when they are grown up, they have furs on them." I really would love to know where that information came from. I mean, how does this child know about all grown-up men? How does he know about lots of men's penises. He claims he knows about lots of men's penises.
>
> That was a point that was not followed up at all by the interviewer. She, to some extent, just ignored it . . . .

RP 506-07.

M. Roy Cooley's arrest, his unrecorded statement to Detective Whitsett, and his trial testimony.

Deputy Whitsett arrested Cooley at Cooley's house on August 27, 2014. Whitsett acknowledged that Cooley was cooperative when arrested, and that Cooley asked him what he was being arrested for. RP 318-19. Whitsett told him he was under arrest for rape of a child. RP 319. Whitsett advised Cooley of his Miranda rights and Cooley said he *wanted* to talk to Whitsett because the accusation was ridiculous. RP 320. Whitsett arranged to have another officer transport Cooley to jail, and then Whitsett recontacted Cooley there. RP 318, 320. Cooley still wanted to talk to Whitsett, so Whitsett and Cooley had a conversation but Whitsett chose not to record the conversation. RP 320-21, 697-98.

When Cooley flatly denied ever molesting RB, Whitsett showed Cooley the drawing RB had made when Larrabee interviewed him, and he asked Cooley where a child would ever learn about an act like oral sex. RP 324, 328. Cooley explained that he and Lowery had made videos of their sexual activities, and that these videos were loaded onto an iPad that also had children's movies on them. RP 325-26. On one occasion Cooley caught RB looking at one of the porn videos on the iPad which also contained a children's movie that RB had been trying to find and play. RP 325. Cooley took the iPad away from RB and explained to him that when mommies and daddies love each other they share their bodies with each other. RP 326.

Cooley took the witness stand and testified at trial. He denied that Lowery had ever come out to his house to confront him with RB's accusation of sexual abuse. RP 536. No such conversation ever took place on any date

or in any month. RP 536. Cooley said the first time he ever heard anything about RB's accusation was on the day he was arrested on August 29th. RP 536.

Cooley confirmed that he had told Deputy Whitsett (as had Lowery) about the porn "home movies" that he and Lowery had made. RP 556-67. He said that he and Lowery watched them together, and that they stored the movies on their home server. RP 556. Inside his house, they could play the movies on any device, such as a cell phone or an iPad. RP 556. One time when RB was sick and in his room in bed, Lowery gave RB the iPad so that he could watch a children's movie. RP 556. Cooley was making dinner in the kitchen when he heard his own voice coming from RB's bedroom. RP 558. Cooley went to the bedroom and found RB watching one of the pornographic "home movies," took it away from him, and asked him why he was watching it. RP 558. RB said he was sorry and he was trying to watch a kid's movie, and when Cooley investigated he saw that a button called the task switcher had not switched off the movie that he and Lowery had been watching previously. RP 558.

Cooley assured RB that he was not in trouble, but that the movie was not something he was supposed to see. RP 559. He explained that it was a movie that Daddy and Mommy made because they loved each other. RP 559. RB asked Cooley, "Was she biting you?" and Cooley said no, she was not, and not to worry about it. RP 559.

Cooley said when deputy Whitsett showed him the drawing RB had made, Cooley first looked at it for only a few seconds and then gave it back to

Whitsett. RP 565. But then he asked to see it again because it bothered him that the penis seemed to have hairs on it. RP 565. He explained that for the last one and a half years of his relationship with Lowery, he shaved his public hair because she liked him to be clean shaven down there. RP 566. So after looking at the drawing the second time he told Whitsett, "This can't be me. I have been clean shaven for the last year and a half. And he [Whitsett] says, Oh, okay. RP 566.

At the end of the trial, the prosecution called Whitsett as a rebuttal witness, and Whitsett testified that Cooley never said anything to him about being clean shaven. RP 701. Whitsett acknowledged that he did not record his interview with Cooley, and that he could have. RP 702-03.[7]

N. The prosecutor's closing argument remarks reminding the jurors that when the mother was "looking at [her son's] reaction," her maternal "instinct" told her that her son was telling the truth and that it really did happen.

In closing argument the prosecutor discussed at some length the reason why Lowery delayed before telling the police about her son's accusation, which he allegedly made in the bathroom of her sister's house. First, the prosecutor admitted that she should have called the police sooner. RP 756. But he reminded the jurors that Lowery simply waited until she was

[7] He said he made a tactical decision not to record the interview because he was afraid that would make Cooley reluctant to talk to him. RP 702. But at the same time he acknowledged that when he was arrested in his home and given Miranda warnings, Cooley said he *wanted* to talk to Whitsett, and when Whitsett met him forty-five minutes later at the jail he again said he wanted to talk to him, and he did. RP 318-321. In fact, during closing argument the prosecutor stressed the fact that Cooley "asked [Whitsett] to come down to the jail" because "[h]e wanted to talk to him." RP 765.

sure that her son was telling the truth; and he further reminded them that what cinched it for her was seeing her son cry when she told him that Cooley had denied the child's accusation:

> I would submit to you, going to Randi's credibility, she could have called the police. And recall that line of questioning about that, she could have called the police and she didn't.

RP 756 (emphasis added).

> Randi even tells you, as she told Deputy Whitsett, You know, I sat on it. . . . This is interfamily. Things are going on, and she is reeling. And I really don't think that's even in dispute from what I heard from the testimony, but ***she sits on it. She is – call it fact checking. She's looking at her son as a mother looking at his reaction***. Confronts the defendant, gives him the opportunity. ***Goes back to her son. And there's that scene. He's just crying.*** There's no words exchanged. I told him – I told Daddy. He says no. And all that scene is, is ***he's just crying. And she, as a mother – instinct***. Facts in evidence – she doesn't have evidence. ***It's just a mother looking to her child. And she's like, No. It's – you've got to tell somebody, [RB].*** You've got to tell somebody, which he does.

RP 759-760 (emphasis added). Defense counsel made no objection to any of this argument. RP 759-760.

O. Other statements made by the prosecutor in closing argument.

1. To accept the defense "you have to believe" that the mother coached her son.

The prosecutor told the jurors argued that in order to "go on the defense theory" that Cooley was not guilty, they "have to believe" that Randi had framed Cooley by telling her son what he should say when interviewed and instructing him to be sure to get right into the subject of the act of oral sex at the very start of the interview:

> [W]hen we get to what is reasonable within the context in hearing the testimony from Randi and everybody that the mother is down there in the car – they're driving down and she's like, All right. So there's this interview. You'll be down there. Get out the first phrase, and you're going to have to provide details [RB], and here's how it went down. You were up on the bunk. He calls you down from the ladder. He's there. He's grabbing your shoulders. Ka-wham?
>
> ***If we go on the defense theory part one of its Randi, that's what you have to believe.***

RP 750 (emphasis added).

2. Vouching for Randi Lowery.

Lowery's trial testimony was that RB told her about the abuse after she had moved out of Cooley's home and into her sister's house, and that the disclosure occurred in the bathroom when he was getting out of the bathtub; but RB's own testimony was that he told his mother what happened on the day that followed the night when the molestation occurred, and that when he told his mother he was still living with Cooley and Cooley's daughter, and that he was in a hallway when he told his mother. The prosecutor ignored RB's own testimony, summarized Lowery's testimony that the disclosure occurred in her sister's bathroom, and then bluntly stated that he believed Lowery:

> In context with what's happening in the bathroom – according to Randi Lowery, she's in there. She's bathing him. She doesn't know the date herself exactly. And Ryan [sic] grabs his testicles and she sees him, He's kind of grabbing it, and she's like, Hey, you know, those are yours. We don't do that. ***I believe her testimony*** – you know. That's just for you.

RP 751 (emphasis added). Defense counsel made no objection and did not move to strike. RP 751.

3. Faulting the defendant for not providing evidence of his innocence by disrobing before the deputy.

Cooley had testified that he told Whitsett he couldn't be the man whose hairy penis was depicted in RB's drawing because during the time that he lived with Lowery and RB he was clean shaven. RP 566. In closing the prosecutor argued that the jury should not believe this testimony because Cooley made no effort to prove to Whitsett that he was clean shaven by disrobing:

> If, in fact, at that point – if, in fact, unless he had grown back the public hair, he's still shaved, great opportunity, literally, to prove (inaudible) pull down your pants and you show the officer. ***Would that have been good evidence? You're damn right that would have been good evidence.*** Not to say – argue that, well; you know, Randi was the one that required it and he's [sic] been out of the house now since the end of June.

RP 765 (emphasis added). Defense counsel made no objection to the prosecutor's comment that Cooley failed to produce such "good evidence" to support his claim of innocence.

P. Defense counsel's closing argument.

In closing defense counsel explained that he did not have any answers to why RB had accused Cooley of making him engage in this sexual act. RP 769. But he did argue that RB had developed a false memory of an event that never occurred. RP 771. One possibility was that Randi Lowery decided to frame Cooley by planting a false memory in her son's mind. Another possibility was that Lowery had accidentally and unintentionally created a false memory of such an incident, by raising the subject of improper sexual touching and by asking RB leading questions about whether Cooley, or

anyone else, had ever subjected him to sexual acts. RP 773. Or possibly the child had taken what he had seen in the homemade porn movie and incorporated it into a false memory of something that happened to him. RP 773. Or maybe some other man, a man who was not clean-shaven, had subjected RB to sexual abuse, and RB misremembered who it was who did this to him. RP 775-76.

Defense counsel argued that it was quite strange for a mother whose son had disclosed sexual abuse by an adult to wait two months before making a police report about it. RP 774. But he had no come back argument with which to respond to the prosecutor's argument that the mother simply waited until she was 100 percent sure that her son was telling the truth and that the crime was really committed just as he said.

V. ARGUMENT

A. ADMISSION OF THE MOTHER'S OPINIONS THAT HER SON WAS TELLING THE TRUTH AND THAT IT REALLY HAPPENED VIOLATED THE RIGHT TO A JURY TRIAL.

1. No witness is permitted to give his opinion that another witness is telling the truth, or that the defendant is guilty.

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it 'invad[es] the exclusive province of the [jury].'" *State v. Demery,* 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). No witness may give an opinion as to the guilt of a defendant, whether by direct

statement or inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).[8]

Similarly, "no witness may give an opinion on another witness' credibility." *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). *See, e.g., State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (conviction reversed because prosecution witness testified that the child did not exhibit any signs of lying).

> ***An expert may not offer an opinion on an ultimate issue of fact when it is based solely on the expert's perception of the witness' truthfulness. [Citation]. That is precisely what Bennett did in this case. By stating that he believed that M was not lying, Bennett effectively stated that Alexander was guilty as charged.*** An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility.

Alexander, 64 Wn. App. at 154 (bold italics added).[9]

2. The admission of the mother's opinions constituted manifest constitutional error which was not harmless.

Trial counsel failed to object to Lowery's testimony that she believed her son, that she waited to report the accusation until she was sure that it was

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[8] In *Black* the Supreme Court held that it was error to allow expert to testify that alleged victim suffered from "rape trauma syndrome" since that testimony necessarily "carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. [Citation]. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape." *Id.* at 349. *Accord State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

[9] *Accord State v. Dunn*, 125 Wn. App. 582, 592-93, 105 P.3d 1022 (2005) (testimony of physician's assistant that based on his interview of the child he believed sexual abuse was probable was constitutional error and was presumed to be prejudicial); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (convictions reversed because pediatrician testified that based on her interviews with two children she believed they had been molested; improper for witness to give opinion on the ultimate issue of guilt based upon the witness' determination of a witness' veracity).

the truth, and that she was 100% sure that it (the sexual abuse) had happened. Despite the fact that there was no objection, the admission of improper witness may be raised for the first time on appeal if the admission of the evidence constituted "manifest constitutional error."

It is well settled that "opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014). *Accord State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). But in order to constitute "manifest" constitutional error, the opinion testimony must *explicitly* comment on a witness' veracity or upon the defendant's guilt.

In *Kirkman* a physician testified that the child ("A.D.") gave "a clear and consistent history of sexual touching." *Id.* at 929. The Court noted that this testimony did *not* comment on the child's veracity:

> "Dr. Stirling's statement that A.D.'s account was 'clear and consistent' does not constitute an opinion on her credibility. A witness or victim may "clearly and consistently" provide an account that is false.

Kirkman, at 930. Since Dr. Stirling did not offer any opinion on the subject of whether the child was credible, the Court held that his opinion did not meet the definition of a manifest constitutional error: "'Manifest error' requires a ***nearly explicit statement*** by the witness that the witness believed the accusing victim." *Kirkman*, at 936 (emphasis added).

While Dr. Stirling's opinion testimony did not meet the *Kirkman* "nearly explicit" standard, the opinions of Randi Lowery admitted in this case obviously *do* meet that test. Testimony that she "did believe" her son was an explicit opinion that he was telling the truth. RP 148. Testimony that she waited to report the accusation until she was "100% sure that it had happened" (RP 195) was an explicit opinion that the defendant was guilty (*and* that her son was telling the truth). Thus, the constitutional error in this case is manifest and can be raised for the first time on appeal.

An appellant must not only identify a manifest constitutional error, he must also show actual prejudice. *Id.* at 935. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* Again, in this case that showing is easily made. "As in most sexual abuse cases, credibility was a crucial issue . . . because the testimony of [the child] and [the defendant] directly conflicted." *Alexander*, 64 Wn. App. at 154. Thus the testimony that the child's own mother believed the child – indeed became 100% sure – that her son was telling the truth, had a devastatingly prejudicial effect. The opinion testimony encouraged the jury to let the mother decide the critical issue of who was telling the truth by deferring to her opinion. If the mother's assessment of who was telling the truth was accurate then the defendant was guilty. Indeed, it is hard to imagine a more prejudicial improper opinion.

"[O]pinions on guilt are improper whether direct or by inference, but it is very troubling that the testimony in this case was quite direct and used explicit personal expressions of belief such as 'I felt very strongly that ...'

and 'we believe.'" *Montgomery*, at 594. In the present case, Lowery's improper opinions regarding her son's accusation were even more explicit than those condemned in *Montgomery*. The prosecutor *explicitly* asked her "did you believe him?" and she replied, "I did." RP 149. She testified that she waited until she was "a hundred percent sure that it happened" before she reported the matter to police. RP 195. The opinion "went to the core issue." *Montgomery*, at 594. It's hard to imagine a more prejudicial opinion than one where the witness says she is 100% sure that the defendant is guilty. In this case, as in *Alexander*,[10] there was an egregious violation of *both* the rule against opinions on guilt and the rule against opinions that another witness was telling the truth.

Because improper opinions on guilt invade the jury's province and thereby violate the constitutional right to jury trial, appellate courts apply the constitutional harmless error rule. *Quaale*, 182 Wn.2d at 202; *Hudson*, 150 Wn. App. at 656. The State is required to prove that such an error was harmless beyond a reasonable doubt under the *Chapman* standard by showing that they did not contribute to the jury's verdict. No such showing can be made here. The prosecutor made sure that the jurors did not forget about the mother's opinion testimony by recapitulating her testimony in closing argument. He not only reminded the jurors of the testimony, he characterized the opinion as one based upon "a mother['s] instinct." RP 759-760. He

[10] "By stating that he believed M was not lying, Bennett effectively testified that Alexander was guilty as charged." *Alexander*, 64 Wn. App. at 154. In the present case, witness Lowery did the same thing, only far more explicitly, since she said she was "a hundred percent sure that it" – the rape of her son – "had happened." RP 195.

called it a form of maternal "fact checking" based upon "A mother looking at [her son's] reaction . . . It's just a mother looking to her child" and observing his reaction to being told that the defendant had denied the child's accusation. RP 759-760.

Many people are likely to believe that no one knows better than a parent when his or her child is lying or telling the truth. The prosecutor's emphasis on such alleged parental expertise was devastatingly prejudicial. The State cannot prove beyond a reasonable doubt that this evidence did not contribute to the verdict.

B. THE TRIAL ATTORNEY'S FAILURE TO OBJECT TO LOWERY'S OPINIONS DEPRIVED COOLEY OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

1. The failure to object was deficient conduct. It was well established that such opinions were flagrantly improper and prejudicial to the defense.

The general proposition that that "[a] witness may not testify as to his opinion as to the guilt of a defendant," was firmly established many decades ago.[11] Moreover, this general rule has previously been applied to the specific factual setting of a mother testifying as to her opinion that her child was telling the truth about an incident of sexual molestation. In *State v. Sutherby,* 138 Wn. App. 609, 158 P.3d 91 (2007),[12] "E.K.'s mother offered her opinion

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[11] *See, e.g., State v. Haga*, 8 Wn. App. 481, 492, 507 P.2d 159 (1973), citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967) (question that "literally asked witness to express his opinion on whether or not the appellant was guilty of the crime charged" was "obviously" improper).

[12] The Washington Supreme Court granted review, noting that the Court of Appeals had failed to address the issue of whether Sutherby's trial counsel was ineffective in failing to make a motion for severance. *State v. Sutherby,* 165 Wn.2d 870, 875, 204 P.3d 916

(Footnote continued next page)

on her daughter's credibility by telling the jury that E.K. makes a half-smile when she lies, but did not make a half smile when she accused Sutherby of rape." 138 Wn. App. at 617. Unlike the mother in this case, who explicitly testified that she believed her son was telling the truth, in *Sutherby* the mother's opinion was not *explicitly* stated. Nevertheless the appellate court recognized that "in essence, E.K.'s mother . . . told the jury that E.K. told the truth when she related the incriminating events to her . . ." The Court held that the mother's testimony was "wholly improper" and was not harmless *Id.* at 617-18. "The error . . . deprived Sutherby of his right to have the jury determine E.K.'s credibility based on its knowledge and experience without regard to the mother's practice of judging E.K.'s veracity by the child's smile."

Similarly, in *Alexander* the Court held it was improper to allow a counselor to express his opinion that a child who said she had been sexually abused was telling the truth. In *Black*, the Court held it was error to admit testimony that the alleged victim suffered from "rape trauma syndrome" because that "carrie[d] with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped." *Black,* at 349.[13]

(2009). The Supreme Court noted that Court of Appeals had reversed Sutherby's conviction on child rape and child molestation charges holding that it was reversible error to allow the mother's testimony. *Id.* The Supreme Court affirmed the decision to reverse Sutherby's convictions, ruling that Sutherby's trial counsel was also ineffective when he failed to move for a severance, and finding it unnecessary to also address the issue regarding the mother's opinion regarding her daughter's veracity. *Id.* at 888.

[13] *Accord State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009) (held reversible error to allow a sexual assault nurse examiner to testify that in her opinion the alleged victim's injuries were caused by nonconsensual sex, because that was the same thing as giving an opinion that the defendant was guilty of the charged rape).

Given the existence of all of these cases which clearly established the inadmissibility of such opinions, no competent criminal defense attorney would stand by silently and simply allow such prejudicial evidence to come before the jury without objecting. Trial counsel's failure to object conduct "fell below an objective standard of reasonableness" and thus clearly constituted deficient conduct for purposes of the test of *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

2. There is a reasonable probability that the outcome of the trial would have been different if the mother's opinions had been precluded.

The prejudice prong of *Strickland* is also easily satisfied. There clearly is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This is particularly evident because the trial prosecutor placed great emphasis on the mother's opinion in his closing argument. RP 759-760.

C. THE ADMISSION OF TESTIMONY THAT THE COURTS MUST APPROVE THE FILING OF FELONY CHARGES VIOLATED THE CONSTITUTIONAL PROHIBITION AGAINST JUDICIAL COMMENT ON THE EVIDENCE.

Cooley's counsel objected when the prosecutor asked Officer Salinas, "***As to felonies***, whose decision is it [to file such charges]?" RP 676. It is hard to imagine why anyone could have thought that this testimony was relevant. Salinas was the officer who took Lowery's complaint that Cooley had been stalking her. Stalking is a gross misdemeanor. There was no particular relevance to the fact that Salinas was the one who filed a citation for that offense in a limited jurisdiction court. The stalking complaint was

only relevant because Lowery's failure to show up in court caused that charge to be dismissed. The prosecutor seemed to be trying to elicit facts that would enable him to argue that the stalking charge was really Officer Salinas' idea, not Lowery's idea, and that's why she didn't bother to show up in court when it was time to try that charge. But even assuming that there was some minimal relevance to the question of who filed that gross misdemeanor stalking charge, there was no relevance at all to the issue of who makes the decision of "whether there is enough" to file a ***felony*** charge.

The only felony at issue was the charge of **Rape of a Child 1°** that Cooley was being tried for at that very moment. While no one said in open court – Rape of a Child 1 is a felony – the jurors can hardly have been in any doubt about that. So a question about who has the authority to file a felony charge could only have been interpreted by the jurors as a question asking who made the decision "whether there [was] enough" to file this Rape of a Child charge – the felony offense that was being tried to them at that moment. And the answer Officer Salinas gave was that "***It's going to be*** up to the – [Relevance objection overruled] – ***up to the Court whether*** enough – ***there's enough to*** – I couldn't ***charge a felony*** based on the circumstances of the crime." RP 676 (emphasis added).

Perhaps realizing that he had just injected reversible error into the case, the prosecutor seems to have tried to undo the error by asking Salinas who "effects" the arrest in a felony, but the prejudicial impact was not alleviated by Salinas' answer that an officer makes the arrest and then he forwards the paperwork "***to the courts***." RP 677 (emphasis added). One

page later the prosecutor gave it one more go; he tried to get the officer to say that he – the officer – was not the one who was actually making the charging decision in a felony case. This time the officer answered, "I'm arresting them and ***requesting*** this set of charges?" RP 678 (emphasis added). The prosecutor sought and obtained a repetition of this answer: "Q. Requesting? A. Yes." RP 678. In sum, the jury heard Officer Salinas say that for felonies he makes the arrest, then he sends the paperwork "to the Court" and he "requests" certain charges, but it is "up to the Court whether there is enough" to bring the "requested" charge.

This testimony, admitted over defense counsel's objection, violated Wash. Const., art. 4, §16, because it told the jury that some judge had approved an officer's request for a felony charge in the Rape of a Child 1° case. Moreover, the jury had been told that some judge had determined "there was enough" to charge Cooley with that crime.

"The purpose of art. 4, §16 of the Washington constitution 'is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.'" *State v. Lampshire,* 74 Wn.2d 888, 892, 447 P.2d 727 (1968). In this case, the testimony of Officer Salinas, deliberately elicited by the prosecutor, conveyed to the jury the personal opinion of the Court that the evidence collected by law enforcement warranted the filing of a felony charge against Cooley. Therefore, the constitutional prohibition against judicial comment on the evidence was violated.

When such a violation is established, "the burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears from the record that no prejudice could have resulted" from it. *Id.* at 892; *State v. Bogner,* 62 Wn.2d 247, 252, 382 P.2d 254 (1963). The State cannot possibly meet that very high standard in this case. Indeed, the prejudice in this case is even worse than it usually is, since the trial judge overruled the defense objection in the presence of the jury. Thus the jury learned that (1) defense counsel did not want them to hear this testimony; and (2) the trial judge believed that they *should* hear this testimony. The jury learned that some unnamed judge – perhaps the very same trial judge – had already decided that "there was enough" to file a felony charge of child rape against Cooley. This only served to heighten the prejudicial impact of the testimony.[14]

Even if the evidence is undisputed or overwhelming, judicial comment violates art. 4, § 14. *Bogner*, at 252. In this case the evidence was hotly disputed and the State's case was far from overwhelming. Here, as in *Lampshire*, "the damage was done when the remark was made . . ." As in *Lampshire* and *Bogner,* the defendant's conviction must be reversed.

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[14]This type of error is manifest constitutional error which can be raised for the first time on appeal. *State* v. *Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). In the present case, there *was* a timely objection made in the trial court. And if the objection had been sustained, it would have cut off the line of questioning that led to the judicial comment on the evidence and the error would never have occurred.

D. FLAGRANT PROSECUTORIAL MISCONDUCT: VOUCHING FOR THE CREDIBILITY OF THE MOTHER BY STATING: "I BELIEVE HER."

"It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).[15] The rule that a prosecutor may not vouch for the credibility of a witness is not a new rule. Virtually every prosecutor, and every criminal defense attorney knows, or at least should know, of this rule.

In *Sargent* the prosecutor said in closing, "I believe Jerry Lee Brown. I believe him when he tells us . . ." *Id.* at 343. In this case the prosecutor said in closing, "I believe her testimony." RP 751. The Sargent Court described Jerry Lee Brown as a "key state witness." *Id.* at 342. In the present case Randi Lowery was also "a key state witness." In *Sargent* the Court noted that the prosecution's case was not overwhelming. *Id.* at 345. The same is true in this case. There is no physical evidence to corroborate the child's testimony; it's just the child's word against the defendant's word. Although the child initially drew a drawing of the alleged act of sexual abuse with a stick figure man seemingly exposing what was said to be a penis, the child later said that the drawing showed a real cactus. There was no objection made by defense counsel to the vouching in the *Sargent* case. Similarly, there was no objection to the prosecutor's vouching in this case.

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[15] *Accord State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Lindsay*,180 Wn.2d at 132-33; *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985).

The *Sargent* Court noted that a failure to object waives such an error unless the prosecutor's improper comment is "deemed flagrant and ill-intentioned and the resulting prejudice so enduring that jury admonitions could not neutralize its effect." *Id.* at 345. The Court went on to hold that the prosecutor's vouching remarks "could not have been cured with an appropriate instruction, and the remarks were so prejudicial as to deprive Sargent of a fair trial." *Id.* at 345. "[T]he prosecutor's remarks directly place[d] the integrity of the prosecution on the side of Brown's credibility and are improper. *Id.* at 344. The same is true here. Once the jury heard the prosecutor say that he believed Randi Lowery, no instruction to the jury to just ignore that remark could have cured the prejudice. The jury heard that the prosecutor had evaluated the mother's credibility and had found her credible. Even if the judge had instructed them to forget this endorsement, they could not have done so. Here, as in *Sargent*, reversal is called for, notwithstanding the lack of an objection.

E. THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE DEFENDANT.

"Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill-intentioned misconduct." *In re Glassman*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). *Accord State v. Fleming,* 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). In this case the prosecution twice engaged in misconduct by shifting the burden of proof to the defendant.

1. The prosecutor improperly challenged Cooley to come up with an explanation as to why the child would make a false accusation against him. This same tactic was condemned as flagrant misconduct in *State v. Boehning.*

First, during his cross-examination of Cooley, the prosecutor repeatedly challenged Cooley to explain why the child would make a false accusation against him and Cooley could only answer that he had no explanation for this. This exact same tactic was condemned in *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005). *Boehning* was also a child sex abuse case. The facts of *Boehning* are extremely similar to the facts of this case.

Boehning and Cooley both testified at their trials. Boehning denied sexually molesting H.R. and Cooley denied molesting RB. *Id.* at 516-17. During cross-examination, the prosecutor asked Boehning whether H.R. would have a reason to be "upset" with him, and Boehning answered, "I have no reason why she's mad at me." *Id.* at 524. The prosecutor pursued this line of questioning as follows:

> Q. ***Did you tell the detective that you could think of no reason for [H.R.] to make this up?***
> A. I don't remember telling that to the detective.
> Q. You don't.
> A. No, I don't, sir.
> Q. ***But you just said in open court that you can think of no reason why [H.R.] would be made at you; isn't that right?***
> A. ***That's right.***

Boehning, 127 Wn. App. at 524. Similarly, in this case the prosecutor asked Cooley on cross-examination:

> Q. ***And you told Deputy Whitsett you had no idea where this allegation came from, right?***

A. ***Correct.***
Q. ***That's just what you told him, no idea?***
A. ***No idea.***
Q. Okay.
A. He asked me why [RB] would, you know, accuse me of this, and I said I have absolutely no idea.

RP 637 (emphasis added).

Q. . . . ***So you provide a statement to Deputy Whitsett, right?***
A. Correct.
Q. Okay. ***And at that point you tell him you have no idea how this happened, is that right?***
A. ***I have no idea why I'm being accused of this, correct.***

RP 639 (emphasis added).

The questioning of the two defendants in the two cases is virtually identical. Boehning's attorney did not object to the question "you could think of no reason" to give to the detective. Boehning, at 517. Cooley's attorney did not object to the question "you told Deputy Whitsett . . . you have no idea why this happened."

In *Boehning* the Court of Appeals reversed the conviction finding flagrant prosecutorial misconduct because the prosecutor's questioning shifted the burden of production to the defendant by faulting him for not coming forward with an explanation as to why the child would make a false accusation. "In so doing the prosecutor improperly argued that Boehning, not the State, carried the burden of production to present evidence regarding H.R.'s credibility." *Id.* at 523. The prosecutor's misconduct during closing argument "coupled with his improper questioning of Boehning, was so flagrant and prejudicial as to deny Boehning a fair trial. Accordingly, we reverse . . . ." *Id.* at 525. The same result is called for in this case.

2. The prosecutor faulted Cooley for not presenting evidence to corroborate his claim of innocence.

Cooley testified that he couldn't possibly be the man depicted in the child's drawing of the act of sex abuse because the man in the drawing had a penis covered with hair (which the child described as fur), and yet Cooley said his public area was clean-shaven during the time that he lived with the child and the child's mother. RP 566. In closing the prosecutor argued that if that were really true, then when he was questioned by Deputy Whitsett he would have dropped his pants and shown Whitsett that he was clean shaven. He argued that this was a "great opportunity, literally, ***to prove*** (inaudible) pull down your pants and you show the officer. Would that have been ***good evidence***? You're damn right that would have been good evidence." RP 765 (emphasis added).

It was grossly improper for the prosecutor to argue that the defendant should have "proved" his innocence, or that he should have presented "good evidence" to back up his claim of innocence. "A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

F. PROSECUTORS MAY NOT ARGUE THAT IN ORDER TO ACQUIT JURORS "HAVE TO" FIND THAT A PROSECUTION WITNESS IS LYING.

"It is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying." *Catseneda-Perez*, 61 Wn. App. at 362. *Accord State v. Suarez-Bravo,* 72 Wn. App. 359, 864 P.2d 426

(1994) (same, conviction reversed even though there was no objection). The same principle applies to testifying mothers. "Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." *Glassman*, at 713. In this case the prosecution told the jurors that in order to go with the defense theory of the case "you have to believe" that the mother coached her son into making a false accusation. RP 750. This is an insidious misstatement of the law and compels reversal.

G. EVIDENCE OF WHAT OTHER DEFENSE ATTORNEYS "ROUTINELY" DO IN CHILD ABUSE CASES VIOLATED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In his examination of Professor Reisberg the prosecutor asked the witness to confirm that another scholar has noted that criminal defense attorneys "routinely argue that children's reports [of sexual abuse] are the product of adult influence." RP 479. What other criminal defense attorneys "routinely" do or do not argue in other child sex cases had no relevance to this case. It had no tendency to make any fact of consequence any more or less probable in this case. It was objectionable under ER 401 and ER 403. And yet Cooley's attorney made no objection.

The testimony elicited was extremely prejudicial, for it conveyed to the jury that criminal defense attorneys are unscrupulous people who "routinely" try to bamboozle juries into believing that innocent children who claim to have been sexually assaulted by someone are actually the victims of "outside influence" from some adult who has created a false memory in the child's mind. The word "routinely" serves to paint a stereotype of the great

majority of criminal defense attorneys, and thus the prosecutor succeeded in getting the witness to agree that in general defense attorneys do not care about the truth, and are willing to slander innocent child victims of molestation in order to get their clients acquitted.

It is well established that this type of attack on criminal defense counsel is improper. "[A] prosecutor must not impugn the role or integrity of defense counsel." *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014).[16] In the present case, the prosecutor managed to impugn the integrity of all defense attorneys faced with the task of defending people accused of committing sex crimes against children. He put evidence before the jury that attacking the credibility of the child was a "standard" defense tactic. As several courts have noted, what other defense attorneys have done in other cases is both irrelevant and highly prejudicial. *See, e.g., State v. Young*, 76 Conn. App. 392, 404, 819 A.2d 884 (2003).[17]

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[16] *Accord State v. Warren,* 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008) (prosecutor argued in closing that defense counsel's argument was a "classic example of" defense attorney practice of "completely twisting" the facts to their own benefit and hoping you are not smart enough to figure out what they are doing"); *State v. Negrete,* 72 Wn. App. 62, 67, 863 P.2d 137 (1993) (prosecutor accused defense counsel of "being paid to twist the words of the witnesses"). It is improper to refer to defense counsel's argument as "a crock." *Lindsay*, at 433; or as something involving "sleight of hand" *State v. Thorgerson,* 172 Wn.2d 438, 452, 258 P.3d 43 (2011). *See Bruno v. Rushen*, 721 F.2d 1193, 1194-95 (9th Cir. 1983) (improper for prosecutor to argue "that all defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth").

[17] "It is improper for a prosecutor to tell a jury, explicitly or implicitly, that defense counsel is employing standard tactics used in all trials, because such an argument relies on facts not in evidence, and has no bearing on the issue before the jury, namely, the guilt or innocence of the defendant."

Ordinarily the failure to object to prosecutorial misconduct waives any error if the misconduct could have been cured if a timely objection had been made. But in this situation, a timely objection could not have cured the error.[18] At the same time, the prejudice flowing from this type of improper suggestion that defense attorneys routinely attack child witnesses is extreme. It is very likely that such misconduct influenced the jury. Accordingly, the conviction below should be reversed because of prosecutorial misconduct which deprived Cooley of his Sixth Amendment right to effective assistance of counsel.[19]

H. NO INSTRUCTION COULD HAVE CURED SUCH PERVASIVE PROSECUTORIAL MISCONDUCT.

To prevail on a claim of prosecutorial misconduct where there was no objection to the prosecutor's improper argument requires a showing that the misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *Lindsay*, at 430. However, in cases where the prosecutor makes a series of clearly improper statements or arguments, an appellate court can conclude that the misconduct was "so pervasive that it

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[18]The mere speaking of the question to the witness on the stand – "Doesn't he [the author of the scholarly article] report that defense attorneys routinely" make this argument – succeeded in putting before the jury evidence of what criminal defense attorneys routinely do in child sex abuse cases. Even if (1) there had been an immediate objection and (2) the judge had sustained it before the witness had answered it, and (3) had instructed the jurors to disregard the question; the jurors would still have heard a scholarly third party say that defense counsel "routinely" attack the credibility of the child in this type of case.

[19]"Defense counsel can be rendered ineffective by his own actions or omissions or by the conduct of the prosecutor in making harassing or unfair comments (not disapproved by the trial court) which prevent the defense counsel from vigorously battling on his client's behalf." *Bardonner v. State*, 587 N.E.2d 1353, 1360 (Ind. 1992).

could not have been dispelled by a curative instruction." *Glassman,* 175 Wn.2d at 707. In such a case, "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant" that the conclusion becomes inescapable that "no instruction or series of instructions can erase their combined prejudicial effect." *Id. See, e.g.*, *Lindsay*, at 443-44; *Glassman*, at 707; *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

This is such a case. The prosecutor in this case:

(1) elicited the mother's opinion that she was 100% sure her son was telling the truth and that the sex abuse really happened;
(2) vouched for the mother by stating that he believed her;
(3) attacked the defense attorney for doing what all defense attorneys routinely do in child sex abuse cases: they try to argue that someone has planted a false memory of sex abuse in the child's mind;
(4) shifted the burden of proof to the defendant by faulting him for failing to offer physical evidence of his innocence; and
(5) suggested that to acquit the jurors had to believe that Lowery coached her son.

Every one of these improper acts went to the heart of the disputed issue – who should the jury believe? The accused or the child? Here, as in *Glassman, Lindsay*, and *Walker,* the conviction below must be reversed.

I. THE FAILURE TO OBJECT TO THE MANY INSTANCES OF PROSECUTORIAL MISCONDUCT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

As noted above, Cooley's trial counsel made no objections to any of the prosecutor's improper closing argument remarks. These failures to object must be viewed as deficient conduct in all instances save perhaps one. The case law which established the impropriety of the prosecutor's remarks was abundantly clear. For decades it has been impermissible to vouch for a witness; to shift the burden of proof; to suggest that a jury has to find that

someone is lying in order to acquit; and to attack the defendant's attorney.[20] There is no sane reason to fail to object when the prosecutor seeks to vouch for the credibility of a key witness in a case. Vouching increases the prosecution's odds of getting a conviction by placing the prestige, integrity and reputation of the prosecutor behind the witness. The failure to object to such improper comment is always deficient conduct. The same is true of the failure to object to prosecutorial comment that shifts the burden of proof. There is no conceivable rational strategic reason for not objecting to these comments.

This was a close case, with no physical evidence to support the State's case. There was a long and suspicious delay before the alleged crime was reported. The witness for whom the prosecutor vouched had ample opportunity to deliberately plant a false accusation in the mind of her child. Trial counsel's failure to object to these instances of prosecutorial misconduct meets both prongs of the *Strickland* test and constituted ineffective assistance of counsel.

J. APPELLANT'S CONVICTION SHOULD BE REVERSED UNDER CUMULATIVE ERROR DOCTRINE.

Appellant submits that standing alone, each instance of prosecutorial misconduct, and each act of deficient conduct by defense counsel, warrants a

[20] With respect to the last category of misconduct, arguably Cooley's trial attorney might have made a strategic decision not to object to the prosecutor's attempt to impugn the integrity of all criminal defense attorneys, thinking that the prosecutor's tactic was likely to backfire. But with regard to the other three categories of misconduct, there is no objectively reasonable basis for deciding not to object.

reversal and remand for a new trial. But even if this Court disagrees, reversal is required where the cumulative prejudicial effect of two or more errors has deprived a criminal defendant of a fair trial. As in the cases cited in the footnote below,[21] the combined prejudicial effect of the errors in this case necessitate a reversal.

VI. CONCLUSION

For these reasons, Appellant Cooley asks this Court to reverse his conviction to remand with directions to hold a new trial.

Respectfully submitted this 24th day of February, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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[21] *See, e.g., State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors plus prosecutorial misconduct); *Alexander,* 64 Wn. App. at 148 (improper witness opinion as to veracity of child and prosecutorial misconduct)

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email and first-class United States mail, postage prepaid, to the following:

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DATED this 24th day of February, 2016.

Deborah A. Groth

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