NO. 98665-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

ROGER W. FLOOK, Jr.,

Petitioner.

PETITION FOR REVIEW

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY

The Hon. Scott D. Gallina

Marla L. Zink
LUMINATA, PLLC
212 Broadway E. #22815
Seattle, Washington 98102
(360) 726-3130

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Other Federal Decisions

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Roger W. Flook, Jr. requests the Court grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Flook*, No. 36610-3-III, 2020 WL 2128704 (May 5, 2020). A copy of the opinion is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review because the Court of Appeals decision conflates demeanor and opinion testimony, in contravention of this Court's prior decisions, including *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), and in violation of Flook's constitutional rights? RAP 13.4(b)(1), (3).

2. Whether the Court should grant review where the exclusion of evidence prejudiced Flook's constitutional right to present a defense and conflicts with two published decisions from the Court of Appeals, *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003), and *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984)? RAP 13.4(b)(1), (2), (3).

3. Whether the Court should grant review in the substantial public interest where the Court of Appeals did not consider the full motion in limine record yet ruled the trial court properly admitted Flook's prior conviction for identity theft? RAP 13.4(b)(4).

4. Whether the Court should grant review of the substantial constitutional question whether trial counsel acted ineffectively in failing to insulate Flook from the prejudicial evidence of a prior conviction. RAP 13.4(b)(3).

5. Whether the Court should grant review to determine whether the Court of Appeals misapplied constitutional privacy principles in upholding admission of the thumb drive and its contents? RAP 13.4(b)(3).

6. Whether the Court should grant review to determine whether, in the cumulative, Flook was denied a constitutionally fair trial? RAP 13.4(b)(3), (4).

C. STATEMENT OF THE CASE

1. The allegations arose 14 months after Flook and his family attended a church-organized marriage retreat.

In June 2014, Martha Montenegro and Roger Flook, Jr. went to Clarkston for a church-sponsored marriage retreat. RP 334-35, 520-21, 472-73. They planned for their children to stay with their biological father but that did not work out, so the two kids joined Montenegro and Flook overnight. RP 456, 523, 573-74. At the hotel, they had to share a king bed—the church had paid for one room and the kids joined at the last minute out of necessity; Flook asked for rollaway beds but none were available. RP 521-22, 735-36. Flook slept on one side of the bed with

Montenegro on the other and A.S. and J.S. between them. RP 473, 522-23. Montenegro had "a horrible cold" and kept coughing throughout the night; J.S., who suffers from epilepsy, had seizures for several hours. RP 523-24. At some point during the night, Montenegro got up and sat in a chair near Flook because her coughing triggered J.S.'s seizures. RP 560-63. She remained alert out of concern for J.S. and did not see Flook do anything or hear A.S. say anything. RP 563-64, 593-95 (Montenegro's "mom radar was on").

A.S. was typically happy, smart, and creative. RP 445. However, Montenegro noticed that starting in April 2014, before the marriage retreat, her grades slipped and her attitude changed. RP 525-26, 589-90. In the Spring of 2015, Flook discovered on A.S.'s electronic devices sexually explicit text messages with adults, sexting in adult internet chat rooms, pornography, and photographs of herself nude. RP 239, 256, 449-50, 453, 487-88, 490-93, 527-30, 570-72, 717-24. He showed Montenegro, and they punished A.S. by taking away her electronic devices and internet access. RP 450, 453-54, 528-30, 727-29. They also referred A.S. to counseling for her inappropriate sexual activity. RP 252-53, 453, 497, 730-31.

Counselor Konen started meeting with A.S. in April 2015. RP 238-39. A.S was upset about her media being taken away and was aware that

Flook initiated the punishment. RP 261. After more than 20 counseling sessions, A.S. made allegations that Flook touched her inappropriately during the night of the marriage counseling retreat in 2014. RP 255-56.

2. The first verdicts were reversed due to improper vouching for a witness, and the second jury acquitted Flook of the most serious charge.

The Court of Appeals reversed and remanded for a new trial after a jury convicted Flook of first degree rape of a child and child molestation as charged. *State v. Flook*, No. 34220–4–III, 199 Wn. App. 1052 (Jul. 11, 2017).[1] The court held witness Sheriff Myers improperly vouched for A.S.'s credibility and Flook's lack of veracity. *Id*. The State did not file a petition for review.

Following a second trial, the jury acquitted Flook of rape of a child and found him guilty of child molestation.[2] CP 127; RP 935. Due to

[1] A copy of the first Court of Appeals opinion is attached as Appendix A.

[2] Both trials were presided over by Judge Scott Gallina, who has since been charged with six felonies related to sexual misconduct against courthouse employees, including rape, at the courthouse and in chambers, including during breaks in court proceedings while people remained in the courtroom. Judge Gallina's sexual harassment of nine courthouse employees is alleged to have occurred over the same time period as Flook's trials. The Associated Press, Civil lawsuit filed against judge accused of sexual assault, The News Tribune (Jul. 21, 2020), https://www.thenewstribune.com/news/state/article244372082.html; Lisa Baumann, Washington state judge will fight courthouse rape charge, as investigators say 9 employees report varying degrees of sexual misconduct, Seattle Times (Apr. 11, 2019),

improper vouching and other errors during the second trial, Flook appealed. The Court of Appeals affirmed. Appendix B.

D. ARGUMENT

1. The Court should grant review of whether law enforcement, a therapist, and a civilian witness improperly opined on Flook's guilt.

Flook's first trial was reversed for improper vouching testimony by Sheriff Myers. *See* Appendix A. In this second trial, three witnesses improperly opined on Flook's guilt.

This Court has held "No witness, lay or expert, may testify to his 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) (citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967)); *accord* U.S. Const. amend. VI; Const. art. I, §§ 21, 22. Such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

First, during Sheriff Myers's testimony, when the prosecutor asked him about Flook's demeanor during an interview, he replied that "it was very obvious he didn't want to be there or answer any of the questions." RP 328. Defense counsel objected, and the court ultimately ruled that the

---

https://www.seattletimes.com/seattle-news/crime/asotin-county-judge-charged-with-rape-sex-assault-at-courthouse/.

prosecutor could ask the Sheriff about Flook's behavior. RP 328-31; *accord* RP 332-33.

The Court of Appeals upheld the ruling in conflict with this Court's cases and in violation Flook's constitutional rights. As the Court of Appeals stated when reversing Flook's first trial, "Opinions on guilt are improper whether made directly or by inference." *State* v. Flook, 199 Wn. App. 1052, 2017 WL 2955539, *7 (Jul. 11, 2017) [3] (Appendix A) (citing *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008)). The trial court was clear the Sheriff could not speculate, opine, or infer. RP 328, 331. He could testify only as to his observations. RP 331.

Here, the Sheriff testified Flook appeared uncomfortable and like he did not want to be there. Using the Court of Appeals' own words, one does not observe "appearing" uncomfortable. One does not observe "like he didn't want to be there." In fact, the inference and opinion are explicit in the Sheriff's answers:[4] "appearing" uncomfortable and "like" he didn't

[3] Under GR 14.1, the Court of Appeals' prior opinion in this case is cited as nonbinding authority to demonstrate conflict in the Court of Appeals reasoning within this same case.

[4] An officer's testimony often carries a special aura of reliability. *Kirkman*, 159 Wn.2d at 928.

want to be there." The Court should grant review to clarify this confusing distinction between demeanor and opinion testimony.

Next, A.S.'s mother was allowed to testify on redirect that she told Flook's aunt she believed A.S. RP 604. The Court of Appeals erred by failing to apply the test from this Court in determining whether a witness gave improper testimony, which required it to examine "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Montgomery*, 163 Wn.2d at 591. The Court simply ruled the State could clarify an issue left open by the defense, apparently even if it includes improper opinion testimony.

Had the Court of Appeals applied this Court's test, it would have found the testimony improper. As the mother of the alleged victim, Montenegro's opinion on A.S.'s credibility was important evidence to bolster the State's case. Second, her testimony opined on A.S.'s credibility as to the ultimate issue. Third, because this was a case "involving child sex abuse, [the] child's credibility [was] a central issue." *Kirkman*, 159 Wn.2d at 933. Fourth, Flook's general denial defense hinged on inconsistencies in A.S.'s story. Yet Montenegro tried to assure the jury there were none. Finally, as the acquittal on the most serious charge and the length and nature of the jury's deliberations show, the State's evidence

was not overwhelming. RP 917-35 (jury deliberated overnight and posed two inquiries before acquitting Flook of the most serious charge).

Third, contrary to the Court of Appeals holding, the testimony by A.S.'s counselor, Konen, was an express comment on A.S.'s credibility. 2020 WL 2128704, at *8 (reviewing issue raised in statement of additional grounds). Konen testified she concluded "what was described to me that sounded like sexual abuse" and "the sexual abuse that had occurred in the previous months." RP 248-49. In *Kirkman*, this Court held testimony that "neither corroborated nor undercut [the alleged victim's] account" was not an improper opinion on guilt or credibility. 159 Wn.2d at 929-30 (examining testimony by Dr. Stirling). Here, on the other hand, Konen did not equivocate, she stated the abuse A.S. alleged "had occurred." RP 249. The lower court's holding to the contrary conflicts with this Court's decision in *Kirkman* on an important constitutional issue. *See* RAP 13.4(b). The Court should grant review.

2. The Court should grant review of the significant right to present a defense issue.

The Sixth Amendment to the federal constitution and article I, section 22 of the Washington Constitution guarantee the meaningful opportunity to present a complete defense. U.S. const. amends. VI, XIV; Const. art. I, § 22; *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576

(2010); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). This right to present a complete defense restricts the authority to exclude from criminal trials evidence relevant to the defense. *Holmes*, 547 U.S. at 324.

The trial court excluded evidence that A.S. had played sex games with her brother, J.S., which would have impeached Montenegro's testimony on the same topic. The court also excluded evidence that A.S. and her boyfriend were experimenting with sexual activity, even though the prosecution asked A.S.'s friend C.S. about parts of this conversation on direct. RP 219-25, 584-87, 630, 759-63,

For defense evidence that is at least minimally relevant, the burden shifts to the prosecution to "show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Relevant information can be withheld only "if the State's interest outweighs the defendant's need" for the information sought. *Id*. As with the evidence deemed admissible in *Jones*, the evidence here was Flook's entire defense. *See id*. at 721.

The Court of Appeals analysis is legally and logically flawed. Under the Court of Appeals reasoning, prior sexual conduct is per se irrelevant to charged sexual misconduct because the alleged victim has the

right to be free from (nonconsensual) sexual contact. It reasoned, "Whether 11-year-old A.S. was an innocent waif or not, the law still protects her from sexual contact from an adult. Flook's purpose for admitting A.S.'s purported sexual misconduct was irrelevant." 2020 WL 2128704, at *4. But it is true in every sexual misconduct case that the alleged victim has the right to be free from unwanted sexual contact. Yet under *Jones* there are circumstances when prior sexual conduct remains admissible. 168 Wn.2d at 721. The Court should grant review to determine whether the evidence from Flook and C.S. are among those circumstances.

The Court further confused the rape shield statute and contradicted itself. Defense counsel made an offer of proof by asking C.S. if she remembered talking to the sheriff about A.S. telling her that A.S. and her boyfriend Alex were experimenting with sexual activity and C.S. said she did. RP 631-32. The court ruled such testimony is inadmissible under the rape shield statute where the defense has not made a motion supported by an offer of proof and the State has not opened the door to such testimony. RP 634-35.

Here the Court of Appeals contradicts itself. When the government sought to admit opinion testimony on redirect and the defense objected, the Court of Appeals decided the government was entitled to complete the picture asked about by the defense. 2020 WL 2128704, at *5. Yet when

Flook sought to question C.S. in follow up to testimony started by the government, the Court of Appeals sustained the government's objection. On direct examination, the government asked C.S. several questions regarding what she and A.S. discussed that day:

> Q And what did you guys talk about when you first met?
>
> A I do not remember. We -- when -- like when she told me about --
>
> Q Just in general.
>
> A Oh.
>
> Q When you first met up?
>
> A I think we just talked about drawing and art. . . .
>
> Q And did you guys start talking about other things?
>
> A Yes, we did.
>
> Q What did you talk about?
>
> A We talked about little crushes we had on people in our school and then it led into other things.

RP 624-25. Flook should have been allowed to complete the picture by following up on the discussion that preceded these "other things" about A.S.'s sexual experimentation that accompanied her "disclosure" to C.S. *See* RP 631-32.

Moreover, RCW 9A.44.020(4) explicitly allows evidence relating to the alleged victim's past behaviors when the State presents evidence tending to prove the nature of that behavior. Here, the State questioned C.S. regarding conversations about A.S.'s behaviors and tried to paint her

as sexually innocent. RP 624-25, 761. The rape shield statute explicitly did not apply. RCW 9A.44.020(4).

Finally, the Court of Appeals holding contradicts two Court of Appeals opinions holding the victim's other sexual activity is admissible if the prosecution opens the door as well as to impeach a witness on a central issue. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003) (rape shield statute inapplicable where State opens the door); *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984) (rape shield statute does not apply when evidence of past sexual behavior is proferred not for the purpose of showing the alleged victim had actually engaged in past sexual behavior, but rather for the limited purpose of showing witness had not been consistent "on [a] central issue in the case").

Because this area is ripe for confusion, and was indeed confused by the Court of Appeals and the trial court here, the Court should grant review.

3. The Court should review, as an issue of substantial public interest, whether under the novel circumstances occurring below highly prejudicial other misconduct evidence should have been excluded.

The Court of Appeals erred in affirming the trial court's admission of Flook's prior conviction, finding it did not violate the trial court's

ruling on Flook's motion in limine. 2020 WL 2128704 at *8-9. The Court of Appeals did not consider that the State affirmatively stated it would seek permission outside the presence of the jury before admitting any prior charged misconduct. RP 190. The Court also did not consider the scope of the trial court's ruling on pretrial motions, where it (a) explicitly excluded all prior convictions from the State's case-in-chief, (b) excluded a prior third degree rape conviction as impeachment evidence, and (c) was silent as to the admission or exclusion of other convictions to impeach Flook if he testified. CP 55-56; RP 190. With this full context from the record in mind, this Court should accept review because these facts raise an issue of substantial public interest

4. The ineffectiveness of trial counsel is a significant constitutional question meriting this Court's review.

If the State did not violate the defense motion in limine by introducing Flook's prior conviction, then counsel acted ineffectively by failing to address the prior conviction first and favorably on direct and by failing to secure an explicit ruling on the issue in advance of trial. *See* RP 776; App'ts Op. Br. at 46. Counsel was surprised when the State admitted evidence of Flook's prior conviction under ER 609, clearly having lost track of what he had argued in his motion in limine and what the court's ruling allowed. RP 802-08, 815-16, 850.

Counsel also acted ineffectively when its objection allowed the State to ask leading questions of A.S. and to introduce items of evidence the Court of Appeals found "certainly were prejudicial." *Flook*, 2020 WL 2128704, at *6; RP 484.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The Court should grant review of these important constitutional questions. RAP 13.4(b)(3).

5. The Court of Appeals misapplied constitutional privacy principles in upholding admission of the thumb drive and its contents.

Flook moved to suppress a thumb drive and its contents, which were produced by a third-party, seized, and searched without a warrant three years after the alleged incident and two years after the allegations, and which were only connected to Flook through circumstantial evidence. CP 81-86; RP 174-86, 387; U.S. const. amend. V; Const. art. I, § 7. The Court of Appeals misapplied constitutional principles in upholding the admission of the thumb drive and its contents. If the

thumb drive belonged to Flook, he did not abandon it by losing or misplacing it. *United States v. Sarkisian*, 197 F.3d 966, 987 (9th Cir. 1999) (citing cases); *State v. Kealey*, 80 Wn. App. 162, 171-73, 907 P.2d 319 (1996) ("one does not relinquish ownership in goods by losing or misplacing them" and "retains a reasonable expectation of privacy in the property"). Because Flook had not abandoned the drive, if he owned it, the purchaser of his vehicle who subsequently found it did not have authority to consent to a warrantless search and seizure. *State v. Cantrell*, 124 Wn.2d 183,187, 875 P.2d 1208 (1994). Thus law enforcement lacked authority to search and seize the thumb drive and it should have been suppressed. Review is warranted under RAP 13.4(b)(3).

6. In granting review, the Court should also consider whether cumulative error deprived Flook of a constitutionally fair trial.

The Court should also grant review to determine the important constitutional question whether any of the above errors viewed together, even if not individually, deprived Flook of a fair trial. *See* App'ts Op. Br. at 54-56; U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

E. CONCLUSION

The Court should grant review because the lower courts' rulings on opinion testimony contravene this Court's decisions, infringe on Flook's constitutional rights, and blur the line between opinion and demeanor testimony. The Court should also grant review of the important right to present a defense issue deriving from the trial court's exclusion of evidence relating to A.S.'s sexual relationships, which comport with neither logic nor legal precedent. Flook respectfully requests the Court grant review of the additional significant issues addressed above.

Respectfully submitted this 21st day of July, 2020.

Marla L. Zink, WSBA 39042
Luminata, PLLC
212 Broadway E. #22815
Seattle, WA 98102
(360) 726-3130
marla@luminatalaw.com

Attorneys for Petitioner

APPENDIX A

199 Wash.App. 1052

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 3.

STATE of Washington, Respondent,
v.
Roger William FLOOK, Appellant.

No. 34220–4–III
|
FILED JULY 11, 2017

Appeal from Asotin Superior Court, 15–1–00165–7, Honorable Scott D. Gallina, J.

Attorneys and Law Firms

Valerie Marushige, Attorney at Law, Kent, WA, for Appellant.

Benjamin Curler Nichols, Asotin County Prosecutors Office, Curtis Lane Liedkie, Attorney at Law, Asotin, WA, for Respondent.

UNPUBLISHED OPINION

Fearing, C.J.

***1** Roger Flook appeals on numerous grounds his convictions for child rape and child molestation. We agree with his contention that a law enforcement officer improperly vouched, during the officer's testimony, to the credibility of the victim and the lack of veracity of Flook. We remand for a new trial.

FACTS

On July 24, 2010, Roger William Flook married Martha Flook. Martha has two children from a prior marriage, A.S. and J.S. J.S. suffers from a seizure disorder. When startled, J.S.'s muscles grow rigid, his body curls, and he places his arms behind his head.

In 2014, Martha and Roger Flook resided in Endicott. On June 6, 2014, Martha and Roger, accompanied by A.S. and J.S., attended a marriage seminar in Clarkston. The parents failed to properly plan for the trip. A.S. and J.S. lacked pajamas and bathing suits, and J.S. lacked his seizure medication.

During the Clarkston marriage seminar, all four members of the family stayed in one room with one king-size bed at a motel. They laid in bed in the following order: Roger, A.S., J.S., Martha.

A consuming cold afflicted Martha Flook during the night of June 6. She struggled to sleep and her coughing, combined with J.S.' lack of medication, caused J.S. to suffer seizures. At an unidentified time, Martha arose from bed, sat in a chair near Roger, and remained in the chair for the remainder of the night. J.S. seized throughout the night.

A.S. began the night laying on her back. At some unidentified moment, A.S. felt something under her pants. The pressure under her clothes released, but, three to five seconds later, returned. She sensed a hand further down her pants. The hand retreated again. A.S. later identified the hand as Roger Flook's hand. Roger's hand slid inside her underwear a third time. A.S. felt the hand "touch [her] area." Report of Proceedings (RP) at 115. After the hand retreated again, A.S. rolled onto her side and positioned her arm between her legs. Roger grabbed her arm and whispered "come on." RP at 116. A.S. softly cried. When Roger asked her what was wrong, A.S. did not respond.

In August 2015, A.S. attended summer camp in Moscow, Idaho. On her last day at camp, A.S. disclosed, to C.S., a nine-year-old girl A.S. met at camp, the touching by Roger Flook in her private area. C.S. reported A.S.'s disclosure to C.S.'s mother. Aaron Sheridan, the father of both A.S. and J.S., resides in Pullman. After searching for Aaron Sheridan's location, C.S.'s mother contacted Sheridan and informed him of A.S.'s disclosure. Thereafter Sheridan informed Martha Flook of A.S.'s allegations.

Whitman County Sheriff Brett Myers conducted most of the investigation into A.S.'s allegations against Roger Flook. Myers interviewed both A.S. and Flook. When Myers asked Flook if he touched A.S.'s private parts,

Flook denied any such touching. Flook explained that J.S. suffered from seizures that night and he reached across A.S. to prevent J.S. from flailing.

PROCEDURE

The State of Washington charged Roger Flook with one count of child molestation in the first degree and one count of child rape in the first degree. Before trial, Flook's attorney filed motions in limine to preclude, among other things, the State from mentioning Flook's criminal history, earlier time in prison, and use of controlled substances. The State responded that mention of Flook's earlier prison stay held relevance because Flook's release date from incarceration constituted an important event in A.S.'s life and a date from which A.S. measured other events.

***2** A third motion in limine sought to preclude:

> Any claims of conduct not directly related to the alleged incidents of June 6, 2014, including claims that the defendant talks about inappropriate things, showed internet images, including anime characters, used profanity, discussed finding a sex toy in [A.S.'] mother's drawer, that defendant spanked [A.S.] on her bottom, that defendant asked [A.S.] to sit on his lap in a car in the driveway of their home in Endicott, Washington, and the claim that the defendant has kissed [A.S.] on the neck.

Clerk's Papers (CP) at 10. Roger Flook based his third motion on ER 404. Flook argued that the conduct mentioned in the motion, assuming any occurred, happened after June 6, 2014, and thus bore no probative value as to whether he committed the charged crimes. Flook contended the only purpose for testimony of such behavior would be to tag him as a bad person. The State argued the evidence demonstrated his lust toward A.S. and thus the trial court should admit the evidence under the second sentence of ER 404(b).

The trial court granted Roger Flook's motion to exclude evidence of drug use, Flook's time in prison, and his release date from prison. The trial court denied the motion to exclude testimony of other sexually inappropriate touching of A.S. by Flook. The trial court reserved ruling on the latter motion at the conclusion of oral argument and thus rendered no comments on the merits of the motion then. The trial court later entered a written order that declared:

> Motion to Exclude Sexually Inappropriate Conduct Directed Toward [A.S.]
>
> This motion is denied. The proffered evidence, if believed, has a strong tendency to demonstrate a lustful disposition toward the alleged victim. It also tends to show motive, intent, knowledge, and absence of mistake or accident.

CP at 39 (boldface omitted).

At trial, Whitman County Sheriff Brett Myers, who conducted the investigation of A.S.'s allegations, testified extensively. In response to a question about Flook's demeanor during Myers' first interview with him, Myers testified:

> Mr. Flook, it was about three o'clock in the afternoon. Mr. Flook appeared to be very tired, possibly—possibly under the influence of a substance, rolled his eyes quite a bit, couldn't keep his eyes open sometimes, acted—it seemed like he had just been rolled out of bed almost and often times questions needed to be asked a couple of times in order to elicit an answer. Yeah—

RP at 51.

On cross-examination, defense counsel questioned Sheriff Brett Myers about inconsistencies in A.S.'s statement. Counsel also asked, "[w]ould you agree with me that girls are not always telling the truth?" RP at 60. The following colloquy then occurred:

> MYERS: Are you talking about, in what context?
>
> LEDGERWOOD [Defense Counsel]: When they make sexual abuse allegations.
>
> MYERS: In by far and away the vast majority of the cases I have done they are telling—they're not making it up.
>
> LEDGERWOOD: Are there cases where they are making it up?

MYERS: I've had one or two out of hundreds.

CP at 61.

***3** The State, on redirect examination, elicited testimony from Sheriff Brett Myers regarding the veracity of the statements of A.S. and Roger Flook. Sheriff Myers gave the following testimony on redirect:

[The State]: Mr. Ledgerwood was asking you about experience in prior cases with girls who would make these things up and you indicated the vast majority were determined to be founded. As part of your training, in both general law enforcement and sexual abuse to identify signs of deception during an interview?

MYERS: Yes.

[The State]: Can you describe that briefly to the jury?

MYERS: Well, certainly any time that you are interviewing someone, just like establishing whether a person knows the truth from the untruth, or having some sort of grandiose statement. Sometimes what you do is you ask questions several different ways to make sure that what they're saying is consistent and then you also take into consideration their body language, their demeanor, to help determine whether or not a statement on its face value is true. In this particular case, all of her body language was consistent with someone, based on my training and experience that was telling the truth. There was nothing that was overly grandiose, so what I mean by that is sometimes when people are explaining something that is almost fantastical and unbelievable, then you start having to question is that really the way it is or when people describe things that are in a way that's much more in the a way we see things happen, then you start—you look at a statement different based on answers and then again, you come back around and ask different questions and you look to see if there's consistency and then compare that consistency with other statements that other witnesses might give down the road.

[The State]: So, during the course of the interview, whether it's a victim of sex or a witness or otherwise, you're looking for possible signs of deception?

MYERS: Yes.

[The State]: And you didn't see any or did you see any with A.S.?

LEDGERWOOD: Your Honor, the question has been asked and answered. He's really asking the witness, does he believe her or not.

[The State]: No, I'm asking whether he saw—it's an appropriate question.

JUDGE: Let's not talk over the top of each other gentlemen.

LEDGERWOOD: That's the province of the jury to decide if she's telling the truth or not and the question has been asked and answered. He was asked if he saw signs of deception and he answered that.

[The State]: Your Honor, he had not answered that question. He, and it is, he is not being asked whether he believed the witness or whether the witness was credible, just that did he observe any signs of deception when interviewing A.S.

JUDGE: I'll agree with the State. Go ahead.

[The State]: Did you observe any signs of deception in your interview with A.S.?

MYERS: No I did not.

RP 69–71.

[The State]: ... Now, during your interview with Mr. Flook, did you observe any signs of deception?

MYERS: What I would consider based on my training and experience, I felt as though the answers—

[The State]: Let me, not your opinion—

MYERS: Okay—

[The State]: As to the truth or the falseness of the statements he made. Did you observe any signs or signals to you that there may be deception?

***4** MYERS: Inconsistencies from what other people had indicated would be that there were some inconsistencies with what he said.

[The State]: How about the lack of memory about the general subject matter when you initially inquired.

MYERS: So, often times when asking people questions if something as memorable as maybe going to a marriage counseling retreat when you ask that, that would be something most people would be like oh yeah, I remember going to that a year ago. It's not a guarantee, but in this particular case it's a very important fact of the case and when one of the very important facts of the case is when you ask that

question and there's not an immediate memory and in fact it's a memory that has to be jarred and then they remember that. *To me that's a sign of trying to be evasive in providing an answer, which is a sign of deceptiveness.* So, when we look for evasiveness in answering, having to repeat questions several times that are very direct and simple questions, *often times those are indications that a person is being deceptive and in the interview with Mr. Flook I did see that.*

[The State]: And contrasting that with his fairly quick memory about the sleeping arrangement and the order of people in that bed on that night, did that—did that strike you?

MYERS: Um to some degree, yes absolutely, because again not having a memory that it needed to be jarred and then on some of the other questions with very quick responses, did you ever do this, no. Did you ever do this, no. Some of the questions simply could have, to just say no would tell me that a person has a very good memory if they are just absolutely sure that didn't happen, but to not be able to remember a trip to the hotel in Clarkston would be an example of.

[The State]: So, remember or not remembering the general event but then remembering details immediately about that event?

MYERS: Like sleeping arrangement, where everybody slept.

[The State]: Or—

MYERS: Reaching over specifically not being able to remember going to the hotel, but then once being reminded being able to remember that during the night when there was a seizure that they reached over to stop the flailing of the arms. Those are, I guess sometimes you look for convenient memories or convenient losses of memory, as a deceptive answer.

[The State]: Or the—him not remembering her sitting on his lap in the vehicle but then remembering he terminated the contact by needing to go to the bathroom?

MYERS: Right.

RP at 73–75 (emphasis added).

A.S. testified about the alleged rape and molestation. She said:

A.S.: Well, I felt it touch my area and so I felt uncomfortable.

[The State]: By area what are we—what are you talking about, what do you mean by your area.

A.S.: Like—

....

[The State]: So, when you're talking about—when you're talking about are you talking about outside in the front at this point?

A.S.: Yeah.

RP at 115–16.

[The State]: From your sex ed class do you know what labia are?

A.S.: No.

[The State]: Did it go down into the area where you go potty?

A.S.: Just a tiny bit and that was yeah just like not even much, no?

[The State]: Like when you say not even much, can you explain that?

***5** A.S.: Like maybe just a tiny bit of a fingertip.

[The State]: And did that go inside the opening or just—can you explain?

A.S.: Not exactly, just—no I can't really explain it.

[The State]: Can you show me with your fingers.

A.S.: Like just like that.

[The State]: Can you demonstrate it? Hold it up, I'm sorry.

A.S.: Just like this.

[The State]: So, just inside the folds, in the—the—

A.S.: Mmm hmm.

[The State]: Split there. How about further into the, you know what your vagina is?

A.S.: No.

[The State]: Not, you mean no you don't know or no, not in that far?

A.S.: Not in that far.

RP at 117–18.

A.S. testified about other incidents when Roger Flook acted inappropriately. He showed her anime porn and talked to her about sex. She sat on his lap. Flook spanked her randomly.

Nicole Konen A.S.'s counselor, declared during trial:

[The State]: Did [A.S.] indicate to you a timeframe when this [touching] had happened?

KONEN: Right after he got out of jail.

[Defense Counsel]: I'm going to object and ask that part of the answer be stricken.

JUDGE: That will be stricken.

RP at 216.

[Defense Counsel]: And so [A.S.] tells you for the first time something that she said happened fourteen months earlier.

KONEN: Right.

[Defense Counsel]: Did you understand the date to be June of 2014.

KONEN: I did not know the date. I just knew it was sometime after and I didn't know when Roger was even in jail, so I—

[Defense Counsel]: Your Honor, I'm going to ask again that any reference to jail be stricken.

KONEN: That was the only date I had.

[Defense Counsel]: And the witness be instructed.

JUDGE: That will be stricken and you're not to make reference to any kind of jail or anything associated about that.

RP at 224.

Roger Flook did not testify at trial. The jury found Flook guilty of child molestation in the first degree and child rape in the first degree.

LAW AND ANALYSIS

On appeal, Roger Flook argues that the trial court erred by denying his motion for mistrial following Nicole Konen's violation of the court's order in limine precluding mention of Flook's time in jail, by admitting opinion testimony from Sheriff Brett Myers, and by admitting testimony of other sexual misconduct with A.S. Because the State contends that Roger Flook's trial counsel did not object to the testimony of Brett Myers, Flook contends he suffered ineffective assistance of counsel. According to Flook, counsel also performed ineffectively by failing to request a limiting jury instruction with regard to the evidence of other sexual misconduct. Finally, Flook contends cumulative error deprived him of a fair trial.

We hold that the trial court committed error by allowing Sheriff Brett Myers to testify to the veracity of Roger Flook and A.S. and that such error was harmful. Since we do not expect a witness to violate the trial court's order in limine during a second trial, we do not address Flook's assignment of error based on Nicole Konen's violation of the order. We also need not address Flook's contention of cumulative error and ineffective assistance of counsel. Because the issue of evidence of Flook's other touching of A.S. will likely arise on a retrial, we address this third assignment of error.

Sheriff Brett Myers' Testimony

***6** Roger Flook contends the trial court erred by admitting testimony from Sheriff Brett Myers, in which Myers opined about Flook's deceptiveness and A.S.'s truthfulness. Flook argues that this testimony embraced the ultimate issue of guilt and thus reaches constitutional magnitude. The State argues that, without conceding inadmissibility of the testimony, Flook failed to preserve the issue. It contends that counsel only objected on the basis that the question had previously been asked and answered and that Myers' indistinct statements do not attain constitutional magnitude. The State does not argue that Flook's earlier questioning of Sheriff Myers about some girls fabricating stories opened the door for testimony concerning the credibility of A.S.

Testimony about A.S.

We distinguish between testimony from Sheriff Brett Myers about A.S. and the sheriff's testimony about Roger Flook. We must first determine if Flook objected to Myers' testimony about A.S.'s veracity.

ER 103 governs rulings on evidence; it reads:

> (a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

On the one hand, an objection that does not specify the particular ground on which it is based is insufficient to preserve the question for appellate review. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). On the other hand, all that is required of any objection to evidence is that the objection be sufficiently clear and definite so that the trial court will understand the reason for the objection. *Walley v. La Plata Volunteer Fire Department*, 368 S.W.3d 224, 232 (Mo. Ct. App. 2012).

Roger Flook's defense counsel objected to Sheriff Myers' testimony:

> Your Honor, the question has been asked and answered. He's really asking the witness, does he believe her or not.

RP at 71. In his next comments to the court, before Myers answered the question, counsel reiterated:

> That's the province of the jury to decide if she's telling the truth or not and the question has been asked and answered.

RP at 71. We disagree with the State's contention that the objection did not suffice. Counsel's comments notified the trial court that Flook objected to the testimony because a witness may not opine on the credibility of a witness.

Because the issue was preserved, we address directly the merits of Roger Flook's claim that the trial court erroneously allowed testimony from Sheriff Brett Myers that vouched for the credibility of A.S. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Salas v. Hi–Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Salas v. Hi–Tech Erectors*, 168 Wn.2d at 668–69. A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts. *In re Detention of Duncan*, 167 Wn.2d 398, 403, 219 P.3d 666 (2009). We conclude the trial court applied the wrong legal standard when overruling Flook's objection to Brett Myers' testimony.

No reliable test for truthfulness exists, such that a witness is not qualified to judge the truthfulness of a child's story. *United States v. Azure*, 801 F.2d 336, 341 (8th Cir. 1986); *State v. Dunn*, 125 Wn. App. 582, 594, 105 P.3d 1022 (2005). This rule is but a more specific application of the general rule that no witness may give an opinion on another witness's credibility. *State v. Neidigh*, 78 Wn. App. 71, 76–77, 895 P.2d 423 (1995); *State v. Wright*, 76 Wn. App. 811, 821–22, 888 P.2d 1214 (1995); *State v. Suarez–Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993); *State v. Walden*, 69 Wn. App. 183, 186–87, 847 P.2d 956 (1993); *State v. Smith*, 67 Wn. App. 838, 846, 841 P.2d 76 (1992); *State v. Stover*, 67 Wn. App. 228, 231, 834 P.2d 671 (1992); *State v. Casteneda–Perez*, 61 Wn. App. 354, 362–63, 810 P.2d 74 (1991); *State v. Barrow*, 60 Wn. App. 869, 875, 809 P.2d 209 (1991). Lay opinion of the truthfulness of another is not helpful within the meaning of ER 701, because the jury can assess credibility as well or better than the lay witness. *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

***7** In most sexual abuse cases, the respective credibility of the victim and the defendant is a crucial question because the testimony of each directly conflicts and the two are the only percipient witnesses. *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Therefore, declaring the victim to be telling the truth in essence opines that the defendant is guilty. Declaring the defendant to be prevaricating also in essence opines that the defendant is guilty. Opinions on guilt are improper whether made directly or by inference. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008).

Sheriff Brett Myers did not directly testify that A.S. told the truth when describing Roger Flook's touching her genitalia. Myers did not explicitly state that he believed A.S.'s allegations. Instead, Myers told the jury that all of A.S.'s body language was consistent with telling the truth. Conversely, according to Myers, A.S. gave no signs of deception.

The Washington Supreme Court has addressed whether testimony of a witness concerning the reliability of statements of another witness constitutes impermissible vouching. The Supreme Court wrote:

> In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.

State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (internal quotation marks omitted).

We address these five factors with respect to Sheriff Brett Myers' comments about A.S. Testimony from a law enforcement officer regarding the veracity of another witness may be especially prejudicial because an officer's testimony often carries a special aura of reliability. *State v. Kirkman*, 159 Wn.2d at 928. As to the second factor, Sheriff Myers essentially told the jury that A.S. told the truth. More importantly, Myers introduced his testimony by mentioning his training in deception detection and couched his opinion of A.S.'s truthful mannerism as based on his experience and training. In short, Myers qualified himself and testified as an expert on the credibility of witnesses.

We distinguish this appeal from *State v. Kirkman*, 159 Wn.2d 918 (2007), wherein the Washington Supreme Court approved the State's questions regarding the competency protocol that police officers follow with child witnesses. The court observed that the protocol functionally coincided with the oath every witness takes before testifying. In *State v. Montgomery*, 163 Wn.2d 577 (2008), the state Supreme Court reiterated an observation from *Kirkman*, that to avoid inviting witnesses to express their personal beliefs, one permissible and perhaps preferred way is for trial counsel to phrase the question "is it consistent with" instead of "do you believe." *State v. Montgomery*, 163 Wn.2d at 592. Sheriff Brett Myers' testimony follows this formula. Nevertheless, his testimony went beyond the formula.

The third *Kirkman* factor is the nature of the suit. Our appeal involves sexual touching of a child. Cases involving child sex abuse inevitably render the child's credibility a central issue. *State v. Kirkman*, 159 Wn.2d at 933. In most sexual abuse cases, the respective credibility of the victim and the defendant is a crucial question because the testimony of each directly conflicts and the two are the only percipient witnesses. *State v. Alexander*, 64 Wn. App. at 154 (1992); *State v. Fitzgerald*, 39 Wn. App. at 657 (1985).

***8** The fourth *Kirkman* factor is the nature of the defense. Roger Flook's defense was a general denial. The defense hinged on emphasizing inconsistencies in A.S.'s testimony and Flook's innocent explanation. Roger Flook did not testify at trial. Nevertheless, the State presented testimony from Sheriff Brett Myers that Flook, during a police interview, denied any touching of A.S.'s private area. Thus, the State indirectly told the jury of Flook's defense.

The fifth and last *Kirkman* factor is other evidence. The State lacked physical evidence and corroborating eyewitness testimony. The State's evidence included A.S.'s testimony and Sheriff Myers' testimony about A.S. and Flook.

All five *Kirkman* factors favor Roger Flook. Therefore, we hold the trial court applied the wrong legal standard when permitting the testimony and thereby abused its discretion. We later discuss the harm of the impermissible vouching.

Testimony about Roger Flook

We agree with the State that Roger Flook did not object below to Sheriff Brett Myers' testimony concerning Flook's behavior during Myers' interview of Flook. Therefore, unless Flook meets the stringent requirements of RAP 2.5, this court will not review this assignment of error.

RAP 2.5(a) formalizes a fundamental principle of appellate review. The first sentence of RAP 2.5 reads:

> **(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court.

No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L.Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L.Ed. 834 (1944). Sound reasoning lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. *State v. Weber*, 159 Wn.2d 252, 271–72, 149 P.3d 646 (2006); *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The theory of preservation by timely objection also addresses several other concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. *State v. Strine*, 176 Wn.2d at 749–50; *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1998).

Countervailing policies support allowing an argument to be raised for the first time on appeal. For this reason, RAP 2.5(a) contains a number of exceptions. RAP 2.5(a) allows an appellant to raise for the first time "manifest error affecting a constitutional right," an exception on which criminal appellants commonly rely. Constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *State v. Scott*, 110 Wn.2d at 686–87. Prohibiting all constitutional errors from being raised for the first time on appeal would result in unjust imprisonment. 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5 author's cmt. 6, at 218 (8th ed. 2014). On the other hand, "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts." *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992).

***9** Washington courts and even decisions internally have announced differing formulations for "manifest error." First, a manifest error is one "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d at 688. Second, perhaps perverting the term "manifest," some decisions emphasize prejudice, not obviousness. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); *State v. Scott*, 110 Wn.2d at 688; *State v. Lynn*, 67 Wn. App. at 346. A third and important formulation for purposes of this appeal is the facts necessary to adjudicate the claimed error must be in the record on appeal. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

For the same reasons that we conclude that Sheriff Brett Myers' testimony concerning A.S.'s credibility constituted impermissible witness vouching, we conclude that Myers' testimony concerning his interview of Roger Flook to constitute proscribed witness vouching. Although Sheriff Myers did not directly declare Flook to be a liar, Myers characterized Flook as deceptive and evasive. Myers accused Flook of possessing a convenient memory and a convenient loss of memory. The purpose of Myers' testimony was to destroy Flook's credibility and defense of a general denial. Myers promoted his testimony as based on his experience and training as a law enforcement officer. The attack on Flook's veracity focused on the heart of the prosecution. To repeat, the State lacked physical evidence and corroborating testimony from a percipient witness.

We also determine the error to be manifest constitutional error. In so holding, we employ the test that manifest constitutional error involves a constitutional error that had practical and identifiable consequences in the trial of the case. *State v. Lynn*, 67 Wn. App. at 345.

Lay witness testimony about the victim's or defendant's

credibility implicates the accused's guilt or innocence and thus implicates the accused's right to a fair trial and impartial jury under article I, section 21 of the Washington State Constitution and the Sixth Amendment to the United States Constitution. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009). The admission of testimony vouching for a witness is constitutional 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 at 199 (2014); *State v. Kirkman*, 159 Wn.2d at 927 (2007); *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199 (1994). Vouching testimony is also manifest error because the erroneous evidence actually affects an accused's right to a fair trial. *State v. Johnson*, 152 Wn. App. at 934.

Upon a showing by the appellant of constitutional error, the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). Manifest constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. *State v. Guloy*, 104 Wn.2d at 426 (1985); *State v. Jones*, 71 Wn. App. 798, 813, 863 P.2d 85 (1993). Any error that infringes on a constitutional right is presumed prejudicial. *State v. Dunn*, 125 Wn. App. at 593 (2005).

Four Washington decisions compel reversal of Roger Flook's guilty conviction. In *State v. Sutherby*, 138 Wn. App. 609, 158 P.3d 91 (2007), *aff'd on other grounds*, 165 Wn.2d 870, 204 P.3d 916 (2009), a jury convicted Randy Sutherby of child rape and child molestation, among other charges. This court reversed because the trial court allowed the victim's mother to testify that her daughter was telling the truth. The mother stated she could determine if her daughter lied because of a half-smile that appeared on the child's face on prevarication.

***10** A second important decision is *State v. Alexander*, 64 Wn. App. 147 (1992). The prosecution questioned the victim's counselor, David Bennett, about whether the victim gave any indication that she was lying about the abuse. Bennett testified he did not believe the victim lied. This court reversed the conviction of Robert Alexander for child rape. By declaring the victim to be speaking the truth, Bennett essentially opined on the guilt of Alexander. An expert's opinion as to the defendant's guilt invades the jury's exclusive function to weigh the evidence and determine credibility. Without analysis, this court also concluded that the error, combined with other error, was not harmless beyond a reasonable doubt.

Another important decision is *State v. Dunn*, 125 Wn. App. 582 (2005). This court reversed another conviction for rape of a child on the ground of inadmissible testimony. Physician's assistant, James Kramer, testified that, despite an absence of any physical evidence of rape, he concluded that sexual abuse occurred because of the detailed story told him by the victim. The impermissible testimony was prejudicial because the only evidence of sexual abuse was the child's own testimony and hearsay statements to others. The evidence was sufficient to convict Larry Dunn of rape, but still not harmless. The trial became a credibility contest between the alleged victim and the accused.

A final compelling decision is *State v. Johnson*, 152 Wn. App. 924 (2009). The State charged Gerald Johnson with child molestation. His trial counsel failed to object to impermissible opinion testimony. The jury heard testimony that Johnson's wife believed the story of the victim. The court held the testimony to be reversible and manifest constitutional error. The testimony invaded Johnson's right under article I, section 2 of the Washington Constitution for a fair trial before an impartial jury.

The State astutely observes that only explicit or almost explicit statements by a witness rise to the level of constitutional error reviewable for the first time on appeal. *State v. Kirkman*, 159 Wn.2d at 937 (2007). The State contends that Sheriff Brett Myers did not engage in explicit vouching. Roger Flook argues that Myers' testimony is sufficiently explicit to rise to the level of constitutional error. We agree with Flook. Sheriff Myers' testimony inevitably told the jury that Flook, in Myers' view, prevaricated.

State v. Barr, 123 Wn. App. 373, 98 P.3d 518 (2004) enlightens our opinion. Derrick Barr met A.J. at a bar, where both imbibed. The two departed the bar. According to A.J., Barr then pushed her into the back of a car and forced her to have anal, oral, and vaginal sex with him. When released, A.J. ran naked from the waist down while screaming and sobbing. A.J. suffered abrasions, bruising, and a bite mark. According to Barr, A.J. seduced him. At trial, Officer Brett Koss testified about interviewing Barr while employing the Reid Investigative Technique, which entailed the use of verbal and nonverbal clues to determine an interviewee's deceptiveness. On direct examination, Koss testified to signals of deception:

> What I have been taught [by] some of these schools is people feel guilty and that they realize there is [sic] consequences and lots of times they'll verbalize those fears. So it was obvious to me he was afraid he was going to go to prison for this.

> ....
>
> ... [T]hat's one of the big flags like that and like utterances about the thing going to prison, those are big flags when you see those things start to bunch together. You get an idea somebody is being deceptive.
>
> ....
>
> ... Again, it didn't seem genuine to me. It didn't seem like if he was really feeling these emotions and that worked up he would be hitting the table and stuff. He wouldn't have these ups and downs so quickly.

***11** *State v. Barr*, 123 Wn. App. at 378–79 (alteration in original) (italics omitted).

In analyzing Officer Brett Koss's testimony, this court observed:

> The State maintains that the testimony here was not improper because the officer did not testify that Mr. Barr was being deceptive, but, rather, the officer's testimony consisted of observations of Mr. Barr's behavior indicating that there were signs that Mr. Barr was being deceptive. This is a distinction without a difference. The officer's testimony was clearly designed to give the officer's opinion as to whether Mr. Barr had committed the offense. ...
>
> ....
>
> In short, the officer's testimony invaded the province of the jury by impermissibly commenting on Mr. Barr's guilt.

State v. Barr, 123 Wn. App. at 382–83.

The untainted evidence against Roger Flook does not overwhelm. Therefore, the constitutional error likely impacted the trial. To repeat a second time, the State, through no fault of its own, lacked physical evidence and corroborating eyewitness testimony. The trial pitted the veracity of A.S. and Roger Flook. The respected testimony of a county sheriff as to the veracity of the two would likely influence the jury.

Flook's Prior Acts

Roger Flook seeks reversal of his convictions because the trial court purportedly, without any analysis on the record, erroneously admitted evidence of other bad acts under ER 404(b) and the error harmed him. The State responds that the record suffices to establish that the trial court conducted the appropriate analysis. Because this issue may arise on a retrial, we address whether the trial court employed the needed analysis. Because we reverse on other grounds, we do not address whether any error was harmless.

Washington's familiar ER 404(b) reads, in relevant part:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

A trial court's interpretation of ER 404(b) is a question of law that this court reviews de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). ER 404(b) prohibits evidence of past misdeeds solely to prove a defendant's criminal propensity. *State v. Nelson*, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006). Evidence of prior bad acts is presumed inadmissible, and any doubts as to admissibility are resolved in favor of exclusion. *State v. DeVincentis*, 150 Wn.2d at 17; *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The question asked here is whether Roger Flook's showing of Internet images to A.S., use of profanity, telling A.S. that he found a sex toy in A.S.'s mother's drawer, spanking A.S. on her bottom, asking A.S. to sit on his lap in a car in the driveway of their home, and kissing A.S. on the neck was relevant to prove something other than propensity.

Before the trial court admits evidence of prior misconduct under ER 404(b), the court must (1) find by a preponderance of the evidence that the prior misconduct occurred, (2) identify the purpose for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *State v. DeVincentis*, 150 Wn.2d at 17. The trial court must conduct the above analysis on the record. *State v. Asaeli*, 150 Wn. App. 543, 576 n.34, 208 P.3d 1136

(2009). The requirement for on the record balancing facilitates appellate review and ensures that the judge gives thoughtful consideration to the issue. *State v. Pirtle*, 127 Wn.2d 628, 651, 904 P.2d 245 (1995).

***12** The record on appeal shows the trial court identified the purpose of the evidence to be demonstrating a lustful disposition toward A.S., motive, intent, knowledge, and absence of mistake or accident. We might assume that the trial court considered the evidence relevant to whether Roger Flook touched A.S.'s private area on June 6, 2014. Nevertheless, the trial court, on the record, did not find the evidence to likely be true and did not weigh the prejudice of the testimony with the probative value of the evidence. We direct the trial court, before any retrial, to address all four ER 404(b) elements before determining whether to permit the evidence at trial.

STATEMENT OF ADDITIONAL GROUNDS

Roger Flook raises two issues in his statement of additional grounds: (1) did the trial court err by not dismissing both charged counts when the elements of each count were not met, and (2) did the State deny Roger Flook his constitutional right to a fair trial. This court requested additional briefing from the parties, as allowed under RAP 10.10(f), by answering the following questions:

> (1) Does statement of additional ground 1 raise a sufficiency of the evidence claim or is it limited to an appeal of the motion to dismiss for failure to make a prima facie case made following the State's case in chief?
>
> (2) Is there sufficient evidence to support Flook's conviction for child rape in the first degree?

In Roger Flook's supplemental brief, he argues the statement of additional ground challenges the sufficiency of the evidence to convict of both crimes. The State asks this court to consider Flook's statement of additional grounds as a challenge to the denial of a midtrial motion to dismiss. We give Flook the benefit of the doubt and review whether sufficient evidence supports the convictions. Since we hold that sufficient evidence supports the convictions, the State suffers no prejudice. Despite reversing the conviction and remanding for a new trial on other grounds, we address the sufficiency of evidence because an absence of sufficiency would require dismissal of the charges with prejudice.

Roger Flook contends insufficient evidence establishes penetration of A.S.'s vagina for purposes of the child rape charge. Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980). Both direct and indirect evidence may support the jury's verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This court draws all reasonable inferences in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977). Only the trier of fact weighs the evidence and judges the credibility of witnesses. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The controlling statute, RCW 9A.44.073, declares:

> A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

Another Washington statute defines "sexual intercourse" as:

> (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) [a]lso means any penetration of the vagina or anus however slight, by an object[.]

RCW 9A.44.010(1). "Vagina" means "all of the components of the female sexual organ and not just '[t]he passage leading from the opening of the vulva to the cervix of the uterus. ...' " *State v. Montgomery*, 95 Wn. App. 192, 200, 974 P.2d 904 (1999) (alterations in original) (quoting *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE*, 1970 (3d ed. 1992)). The *Montgomery* court determined that "vagina" includes the "labia minora." 95 Wn. App. at 201. The labia minora are the two thin inner folds of skin enclosed by the labia majora. *State v. Montgomery*, 95 Wn. App. at 201. The State must prove that the defendant penetrated, at a minimum, the lips of the sexual organs. *State v. Bishop*, 63 Wn. App. 15, 19, 816 P.2d 738 (1991).

***13** *State v. Delgado*, 109 Wn. App. 61, 33 P.3d 753

(2001), *rev'd on other grounds* 148 Wn.2d 733, 63 P.3d 792 (2003), informs our decision. Dumas Delgado took an eight-year-old girl inside his home and put his hand down her pants, inside her underwear, and rubbed her vagina. The child later told an interviewer and defense investigator that Delgado touched her " 'up in the inside part of [her] private,' " " 'in the folds' " of her external genitalia, but his finger did not go into the " 'hole' " that goes up inside her body. *State v. Delgado*, 109 Wn. App. at 63–64. The court found this evidence sufficient to establish penetration. *State v. Delgado*, 109 Wn. App. at 65–66.

A.S. testified that Roger Flook penetrated the folds of her genitalia. This testimony supported the jury's conviction for first degree rape.

Roger Flook also contends that insufficient evidence establishes the crime of sexual molestation. He argues that the evidence does not support a finding that the alleged contact was "sexual contact" within the definition of RCW 9A.44.010 and RCW 9A.44.083.

Under RCW 9A.44.083(1):

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.010(2) defines "sexual contact" as

> any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

While in the criminal context direct evidence of sexual gratification is not required; the evidence must support an inference of sexual gratification. *State v. Powell*, 62 Wn. App. 914, 917–18, 816 P.2d 86 (1991); *State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171 (2005), *aff'd*, 158 Wn.2d 630, 146 P.3d 1183 (2006).

In *State v. Powell*, 62 Wn. App. 914, this court found the evidence insufficient to support an inference that the defendant's touching of a child was for sexual gratification. Harry Powell touched a female child on three occasions:

> [W]hile she was seated on his lap, [he] hugged her around the chest. As he assisted her off his lap he placed his hand on her "front" and bottom on her underpanties under her skirt. On another occasion, while [the child] was alone with [the defendant] in his truck waiting for her cousin, he touched both her thighs. On both occasions, he only touched her on the outside of her clothing.... She was unable to describe how he touched her.

State v. Powell, 62 Wn. App. at 916. In finding insufficient evidence, the court emphasized the fact that the touches were fleeting and "equivocal" and thus susceptible of innocent explanation. *State v. Powell*, 62 Wn. App. at 917–18. We explained that the defendant touched the child's bottom while lifting her off his lap; that the child did not remember how the defendant touched her "in the front part"; that when she told him to stop he said, "Oops" and stopped. The child was clothed on each occasion, the touches were outside the clothes, and Powell uttered no threats, bribes, or requests not to tell. The court declared that the State must present additional evidence of sexual gratification when the touching occurs through clothing or when the touching is of intimate parts of the body other than the primary erogenous area.

State v. Price, 127 Wn. App. 193 (2005) presents the opposite outcome. This court found sufficient evidence to support an inference of sexual gratification when the defendant rubbed a child's vagina long enough to cause redness and swelling still visible when the child's mother picked her up from day care. In so holding, the court explained that no additional evidence was required because the sexual contact was not fleeting or susceptible of innocent explanation.

***14** In this appeal, the testimony indicated that Roger

Flook touched A.S.'s primary erogenous zone multiple times under her clothing. When she rolled away, he said "come on." There is no innocent explanation for a grown man to put his hands down an eleven-year-old girl's pants while in bed with her. Sufficient evidence supports "sexual contact."

Roger Flook next contends that the prosecuting attorney breached his constitutional duty when he failed to investigate false and contradictory testimony. Flook emphasizes multiple witnesses provided conflicting statements. He characterizes these contradictions as false testimony. We consider this argument to raise a due process contention.

Under the United States Constitution, the Sixth and Fourteenth Amendments guarantee persons accused of a crime the right to a fair trial. *State v. Davis*, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). The Washington Constitution provides a similar safeguard. WASH. CONST. art. I, §§ 3, 22.

The due process clause of the Fourteenth Amendment to the United States Constitution imposes on prosecutors a duty not to introduce perjured testimony or use evidence known to be false to convict a defendant. *State v. Finnegan*, 6 Wn. App. 612, 616, 495 P.2d 674 (1972). This duty requires the prosecutor to correct State witnesses who testify falsely. *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L.Ed. 2d 1217 (1959); *State v. Finnegan*, 6 Wn. App. at 616. To succeed on his claim that the prosecutor used false evidence to convict him, Flook must show that (1) the testimony or evidence was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) that the false testimony was material. *United States v. Zuno–Arce*, 339 F.3d 886, 889 (9th Cir. 2003).

Though Roger Flook identifies some contradictions in testimony of various witnesses, he provides no support for his contention that the State knowingly presented false testimony. Contradiction is normal when witnesses view events from different vantage points. Contradiction does not equate to lies. Contradiction does not mean perjury.

CONCLUSION

We reverse Roger Flook's convictions for child rape and child molestation. We remand for a new trial consistent with this opinion, rather than dismissal.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Siddoway, J.

Lawrence–Berrey, J.

All Citations

Not Reported in Pac. Rptr., 199 Wash.App. 1052, 2017 WL 2955539

End of Document

APPENDIX B

2020 WL 2128704
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

UNPUBLISHED OPINION
Court of Appeals of Washington, Division 3.

STATE OF WASHINGTON, Respondent,
v.
ROGER W. FLOOK, Appellant.

No. 36610-3-III
|
MAY 5, 2020

Opinion

Lawrence-Berrey, J.

***1** LAWRENCE-BERREY, J. — Roger Flook appeals after a jury found him guilty of first degree child molestation. He raises several arguments. We remand to modify two community custody conditions, but otherwise affirm.

FACTS

Roger Flook and Martha Montenegro were husband and wife, married in 2010. Ms. Montenegro had two children from a previous marriage, A.S. and J.S., her daughter and son respectively. A.S. was 11 years old in June 2014. J.S. was one year younger.

On June 6, 2014, Flook and Ms. Montenegro took A.S. and J.S. to Clarkston, Washington, for a church marriage retreat. The four stayed in a hotel room with one large bed. The four slept side by side, with Ms. Montenegro and Flook sleeping on the outsides, and J.S. next to Ms. Montenegro and A.S. next to Flook.

In the middle of the night, A.S. awakened when Flook put his hand on her upper thigh. Flook removed his hand and replaced it on A.S.'s hip area. Flook continued to remove his hand and replace it on A.S.'s body, moving it under her pants and eventually under her underwear, touching her vaginal area. A.S. turned away from Flook and put her arm between her legs at which point Flook grabbed her arm and whispered "come on." Report of Proceedings (RP) at 478.

A.S. eventually described the incident to a friend, C.S. Eventually, the incident was reported to Child Protective Services (CPS).

On August 24, 2015, the Whitman County Sheriff's Office received a report from CPS that detailed A.S. being sexually assaulted by Flook. Sheriff Brett Myers was assigned to investigate and arranged to jointly interview A.S. with CPS. During the interview, A.S. described to Sheriff Myers how Flook had touched her.

Sheriff Myers then interviewed Ms. Montenegro. She confirmed some details of A.S.'s story, including the sleeping arrangements in one bed and who slept next to whom. Ms. Montenegro left the interview and returned with Flook the same day. During the interview, Flook seemed to struggle to remember the incident, as well as a number of other incidents described by A.S. of Flook touching her inappropriately. Sheriff Myers later testified that Flook's demeanor was that of someone who did not want to be there and was uncomfortable being interviewed.

The State charged Flook with one count of first degree rape of a child and one count of first degree child molestation. Following his arrest, Ms. Montenegro sold Flook's truck to Richard Chittenden, an acquaintance. Two to three months later, Mr. Chittenden discovered a universal serial bus (USB) thumb drive that had been hidden under the truck's dashboard.

Mr. Chittenden discovered a cache of pornographic videos stored on the device. Most of the videos were adult pornography, but two of the files were encoded differently. Mr. Chittenden opened the videos and found they were voyeuristic, homemade videos of a young girl bathing. Mr. Chittenden contacted Ms. Montenegro and played the videos for her and, at her request, sent the thumb drive to Sheriff Myers.

After receiving and reviewing the videos, Sheriff Myers obtained and executed a search warrant for the house where the videos were taken. By this time, Ms. Montenegro and the children had moved out of the house and the house was unoccupied. Sheriff Myers went into the bathroom and confirmed the bathroom tile matched that shown in the video. He also noticed a hole in the

bathroom ceiling that matched the angle of where the video was shot. Ms. Montenegro later testified only Flook had access to the attic above the ceiling, and he went up there a handful of times while they lived together. She further testified J.S. did not have the ability to climb into the attic.

Procedure and trial

***2** Before trial, Flook filed a motion to exclude evidence of his prior convictions. The State responded it would not introduce Flook's prior identity theft and possession of stolen property convictions in its case-in-chief, but reserved the right to do so pursuant to ER 609 if Flook testified. The trial court granted Flook's motion.

A.S.'s testimony at issue on appeal

During A.S.'s direct examination, the State asked her to describe times Flook had touched her in a way that made her feel uncomfortable. Defense counsel objected to the narrative form of the question, and the trial court sustained the objection. The State then asked A.S. a series of leading questions, asking about each incident individually. Defense counsel objected to the leading questions, but the trial court overruled the objection.

During A.S.'s cross-examination, defense counsel began to ask A.S. about details in the CPS report. The trial court interrupted, stating it would not allow A.S. to read the report without entering the report into evidence. The State responded that it would not object as long as the entire report was entered. Defense counsel did not request to admit the report. The same issue arose again through a different witness. Again, the State was willing to have the entire report admitted, but defense counsel did not request to admit the report.

Ms. Montenegro's testimony at issue on appeal

1. J.S. and A.S.

Defense counsel cross-examined Ms. Montenegro. In one line of questioning, defense counsel asked whether Ms. Montenegro once caught J.S. and A.S. playing sex games together. She responded, "Absolutely not true." RP at 585.

2. Alex and A.S.

In another line of questioning, defense counsel asked whether Ms. Montenegro once saw A.S. and a boy named Alex "doing inappropriate sexual things to one another at the park." RP at 587. She responded, "Never." RP at 587.

3. Discussion with Mr. Flook's aunt

In still another line of questioning, defense counsel implied that Ms. Montenegro had told Mr. Flook's aunt she did not believe A.S.'s allegations. On redirect, the State asked Ms. Montenegro what she told Mr. Flook's aunt about A.S.'s allegations. She replied, "I told her ... about what happened that night that I believed A.S." RP at 604. Defense counsel did not object to the question or Ms. Montenegro's answer.

C.S.'s testimony at issue on appeal

Defense counsel later cross-examined C.S., A.S.'s friend. Defense counsel asked whether A.S. ever talked to her about "sexual contact she was having with her boyfriend, Alex." RP at 630. The State objected. The trial court excused the jury, heard argument, and ruled the testimony was inadmissible under the rape shield statute.

Mr. Flook's testimony at issue on appeal

1. Prior conviction involving dishonesty

Flook elected to testify. On direct, Flook testified about a

time when Ms. Montenegro and he went to Australia for a vacation.

During cross-examination, the State asked, "You were being investigated for identity theft at that time, correct?" RP at 801. Defense counsel objected and made an oral motion for mistrial, arguing the court had ruled Flook's prior convictions were inadmissible. The State responded that the question about Flook's identity theft conviction was appropriate under ER 609 because, by testifying, Flook put his credibility at issue. The trial court overruled defense counsel's objection and denied the motion for mistrial.

2. Prior inconsistent statement of Ms. Montenegro

***3** On direct, defense counsel asked Flook about an incident involving A.S. and J.S. The State objected. The State noted Ms. Montenegro had denied that her two children were playing sex games.

Defense counsel responded:

> [T]he State is trying to portray A.S. as an innocent waif, we have—the jury should have an opportunity to hear all of the evidence.

RP at 761.

Defense counsel made an offer of proof. Counsel offered that Flook would testify that he heard Ms. Montenegro and A.S. screaming and yelling in the bathroom. Ms. Montenegro then came out upset and said she caught A.S. and J.S. experimenting sexually and she physically disciplined A.S.

The State reiterated its objection based on the rape shield statute and added additional objections—hearsay and ER 404. Defense counsel did not respond to these additional objections. The court disallowed the testimony.

Jury verdict, conviction, and punishment

The jury found Flook guilty of first degree child molestation and not guilty of first degree child rape. The trial court entered a judgment of conviction and sentenced Flook to 186 months to life incarceration and also imposed a series of community custody conditions, including

> 17. [He] [s]hall report to his supervising officer prior to entering into any romantic relationship with any person who has minor aged children.
>
> 18. He shall report his criminal history to any person, with minor aged children, with whom he is going to have a romantic relationship.

Clerk's Papers (CP) at 177.

Flook timely appealed his conviction.

ANALYSIS

A. EXCLUSION OF EVIDENCE PURPORTEDLY CRITICAL TO DEFENSE

Flook contends the trial court violated his federal and state constitutional rights by excluding evidence vital to his defense theory. There are two exclusions Flook discusses. The first exclusion involves his testimony of what Ms. Montenegro told him about J.S. and A.S. The second exclusion involves C.S.'s possible testimony that Alex and A.S. had engaged in sexual contact.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee an accused the right to present a defense. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We review claims that a trial court violated such rights de novo. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Duarte Vela*, 200 Wn. App. 306, 317, 402 P.3d 281 (2017).

In *Jones*, our Supreme Court wrote:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the

> rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id*....
>
> These rights are not absolute, of course. Evidence that a defendant seeks to introduce "must be of at least minimal relevance." [*State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)]. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence. *State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006).

***4** *Jones*, 168 Wn.2d at 720.

Defense counsel explained the purpose of his client's testimony was to dispel the notion that A.S. was an innocent waif. We infer defense counsel's purpose was similar when he tried to elicit testimony from C.S. that A.S. had told C.S. that she and Alex had engaged in sexual contact. The trial court excluded both proffers based on RCW 9A.44.020(2), the rape shield statute, which provides in relevant part:

> Evidence of the victim's past sexual behavior including but not limited to the victim's ... general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility ....

Whether 11-year-old A.S. was an innocent waif or not, the law still protects her from sexual contact from an adult. Flook's purpose for admitting A.S.'s purported sexual misconduct was irrelevant. We conclude the trial court did not err by excluding the evidence.[1]

[1] On appeal, Flook argues his purpose for admitting the conduct between J.S. and A.S. was to establish J.S. sexually desired his sister and was the person who videotaped his sister in the bathtub. We reject this argument for two reasons. First, this was not the argument put forth by defense counsel when the State objected to Flook's testimony. Second, it is absurd to suggest a 10-year-old boy videotaped his naked sister, using a video camera—there was no evidence he owned—from an overhead attic he could not access and then hid the recording in a truck he did not drive.

B. PURPORTED OPINIONS ON DEFENDANT'S GUILT

Flook contends the trial court erred in allowing Ms. Montenegro and Sheriff Myers to give improper opinion testimony during trial. We disagree.

The Sixth Amendment of the United States Constitution and article I, sections 21 and 22 of the Washington Constitution guarantee a defendant the right to a trial by jury. "No witness, lay or expert, may testify to his 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). Such testimony is unfairly prejudicial to the defendant because it invades the province of the jury. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

When determining whether a witness gave improper opinion testimony, this court looks to several factors including, " '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.' " *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

1. What Ms. Montenegro told Flook's aunt

Flook first argues Ms. Montenegro gave improper testimony when she testified that she told Flook's aunt she believed A.S. Flook did not object to this testimony at trial.

Ordinarily, we will not review a claim of error not raised at the trial court. RAP 2.5(a). One oft-noted exception permits us to review a claim of manifest error affecting a constitutional right. RAP 2.5(a)(3). Although improper opinion evidence affects the constitutional right to a jury trial, not all unpreserved claims of improper opinion testimony are reviewable:

> ***5** Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly

> explicit statement by the witness that the witness believed the accusing victim. ...

Kirkman, 159 Wn.2d at 936.

Here, Ms. Montenegro did not testify she believed A.S. Instead, she testified she told Flook's aunt she believed A.S. Even if this testimony was sufficiently explicit to be reviewable, we do not believe there was any error.

The State did not elicit Ms. Montenegro's opinion on direct examination. Rather, the State elicited it on redirect examination, only after Flook's cross-examination left the jury with the impression Ms. Montenegro had told Flook's aunt she did not believe A.S.

When a party raises a material issue, they do so under the assumption the rules will permit cross-examination or redirect examination into the same matter. *State v. Crow*, 8 Wn. App. 2d 480, 505, 438 P.3d 541, *review denied*, 193 Wn.2d 1038, 449 P.3d 664 (2019). This allows a party to clarify an issue that would otherwise be left in the air for the finder of fact and keeps a party from taking advantage of half-truths. *Id.*

Flook asked questions that implied Ms. Montenegro had told Flook's aunt she did not believe A.S. We consider this " 'other evidence before the trier of fact.' " *Montgomery*, 163 Wn.2d at 591 (quoting *Demery*, 144 Wn.2d at 759). This evidence permitted the State to ask on redirect what Ms. Montenegro actually told Flook's aunt. There was neither constitutional nor evidentiary error.

2. Sheriff Myers's statement of Flook's demeanor

Flook contends Sheriff Myers gave improper opinion testimony when he said Flook appeared uncomfortable being interviewed, like he did not want to be there.

This is not improper opinion testimony. A witness is allowed to testify about their observations of a person, including their demeanor. In *State v. Aguirre*, 168 Wn.2d 350, 356, 229 P.3d 669 (2010), a police sergeant with extensive experience interviewing victims of sexual assault interviewed the purported victim. She testified about the general demeanor of sexual assault victims and the demeanor of the alleged victim she interviewed. *Id.* The Supreme Court concluded the trial court did not err by allowing the police sergeant to testify about the victim's demeanor. *Id.* at 360.

We contrast testimony about a person's demeanor with testimony that the defendant was not credible or was untruthful. In *State v. Hager*, 171 Wn.2d 151, 154, 248 P.3d 512 (2011), defense counsel brought a motion in limine to prohibit detectives from testifying Hager's answers were evasive. Counsel argued the detectives could testify Hager avoided eye contact and appeared to be on methamphetamine. *Id.* at 155. Counsel argued, " 'You can state the demeanor. You can't say because of that I think he was deceptive or evasive.' " *Id.* The trial court agreed. During trial, one detective testified about the defendant's demeanor—he was jittery, avoided eye contact, and appeared to be under the influence of methamphetamine. A second detective, however, testified the defendant's demeanor was " 'evasive.' " *Id.* The defendant moved for a mistrial, but the trial court denied it. The Supreme Court concluded the second detective's description of the defendant as " 'evasive' " was improper opinion evidence. *Id.* at 158-59. One does not observe "evasiveness." Describing someone as "evasive" strongly implies the person was untruthful. Here, Sheriff Myers properly testified about Flook's demeanor, not whether he believed Flook or whether his answers were evasive.

C. PURPORTED INEFFECTIVE ASSISTANCE OF COUNSEL

***6** Flook contends his counsel was deficient because (1) he did not ask Flook about his convictions for identity theft on direct, (2) he did not move to admit the CPS reports and failed to substantiate its contents, and (3) he allowed the State to ask leading questions during a portion of A.S.'s direct examination. We disagree.

Washington courts have adopted a two-part test to determine whether defense counsel gives ineffective assistance. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008). This *Strickland*[2] test requires a defendant show (1) his counsel was deficient, represented by the counsel's performance falling below the objective standard of reasonable professional norms, and (2) the deficiency was prejudicial. *Id.* To show prejudice, the defendant must show that, had counsel's performance not been deficient, there is a reasonable likelihood the outcome would have been different. *Id.*

[2] *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984).

Flook first contends his counsel was deficient for not asking him on direct examination about his prior convictions, which allowed the State to bring up the convictions on cross-examination. Even if defense counsel should have questioned Flook about his prior convictions, we do not see how this resulted in sufficient prejudice to change the outcome of the trial. The video evidence was damning. Flook had no credible explanation as to who else had access to the attic to shoot the video of A.S. bathing and who else would hide the evidence in his truck. The minimal prejudice resulting from his prior convictions not being drawn out on direct did not change the outcome of the trial.

Flook next contends his counsel was deficient because he did not move to admit the CPS report as evidence. Flook argues the CPS report would have greatly helped his defense. The State argues the CPS report would have been damning for Flook. Because the CPS report never was offered as an exhibit, we cannot tell whether Flook or the State is correct. For this reason, we do not review arguments which lack evidentiary support in the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Flook finally contends his counsel was deficient for objecting to the State asking A.S. a question that called for a narrative response. The trial court agreed with defense counsel and sustained the objection. The State then asked leading questions. Defense counsel again objected. The trial court overruled the objection.

The leading questions disclosed prior incidents of Flook: (1) showing A.S. some pornographic cartoons (cartoon characters having sex), (2) once asking A.S. to sit on his lap, (3) telling A.S. that her mother had sex toys, and (4) telling A.S. that he had his own porn site.

The third and fourth items certainly were prejudicial. But defense counsel's initial objection was legally correct and did not necessarily result in prejudice. Without the objection, A.S. may well have recalled the two more serious items. Also, without the objection, the trial court had authority to permit the State to ask leading questions to help jog a young witness's memory. *State v. Canida*, 4 Wn. App. 275, 279, 480 P.2d 800 (1971).

D. TWO UNCONSTITUTIONALLY VAGUE COMMUNITY CUSTODY CONDITIONS

Flook contends two of community custody conditions are unconstitutionally vague. The State rightly concedes this issue.

***7** When a trial court suspends the sentence of a sex offender and releases the offender into community custody, it must also impose certain conditions and may, at its discretion, impose additional conditions related to the crime. RCW 9.94B.070; RCW 9.94B.050; RCW 9.94A.703. Overbroad and vague community custody conditions may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

This court reviewed another case where the term "romantic relationship" was used in a community custody standard. *State v. Casimiro*, 8 Wn. App. 2d 245, 251, 438 P.3d 137, *review denied*, 193 Wn.2d 1029, 445 P.3d 561 (2019). This court held the term "romantic" was unconstitutionally vague and recommended, on remand, the trial court substitute the phrase "dating relationship." *Id.* We see no reason to diverge from *Casimiro* here and direct the trial court on remand to substitute the phrase "dating relationship" in the two community custody standards.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

In accordance with RAP 10.10, Flook raises four additional grounds for review.

SAG I: PURPORTED TRIAL COURT ERROR IN NOT EXCLUDING THUMB DRIVE

Flook contends the trial court erred by denying his CrR 3.6 motion to exclude the thumb drive. He argues the thumb drive was searched without a warrant and there is a chain of custody issue. However, the court denied the motion on both procedural and substantive grounds, and Flook does not address the procedural ground.

Flook filed his CrR 3.6 motion to suppress on Thursday, December 6, 2018. Trial commenced on Monday, December 10, 2018. The trial court denied the motion, in part, because it was not timely filed. In deciding it was

not timely filed, the court found "[t]he motion is based upon factual assertions known to the defense for more than a year and the Defendant failed to move for suppression until mere days before trial." CP at 162. The court additionally found the late filing forced the State to forego trial preparations, delayed trial, and inconvenienced the jury.

Evidentiary rulings related to trial procedure are reviewed for an abuse of discretion. *State v. McLaughlin*, 74 Wn.2d 301, 303, 444 P.2d 699 (1968). A motion to suppress must be timely. *State v. Burnley*, 80 Wn. App. 571, 572, 910 P.2d 1294 (1996). A defendant seeking to suppress evidence must move for suppression within a reasonable time before the case is called for trial. *State v. Robbins*, 37 Wn.2d 431, 432, 224 P.2d 345 (1950). In *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966), the court held exclusion of improperly obtained evidence is a privilege that can be waived if a defendant fails to seasonably object. The trial court did not abuse its discretion by finding Flook's motion to suppress was untimely.

Additionally, there was no requirement for the State to establish a "chain of title" to admit the thumb drive. ER 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, the State claimed the thumb drive belonged to Flook. There was sufficient evidence to support the State's claim. First, the video was made by a person with access to both the attic in the house where Flook formerly lived and the truck that Flook formerly drove. This likely limits the owner of the thumb drive to four people: Flook, Ms. Montenegro, or the two children. Ms. Montenegro testified she did not take the video of her own daughter bathing. There would be no reason for A.S. to film herself bathing. And young J.S. was unable to access the attic. We conclude the State sufficiently authenticated the thumb drive as belonging to Flook.

SAG II: ADDITIONAL IMPROPER OPINION TESTIMONY

***8** Flook contends another witness, Nicole Konen, a child counselor called as an expert witness for the State, gave improper opinion testimony. We disagree.

Flook argues Ms. Konen's testimony in this case was a clear and explicit statement of her opinion that A.S. was telling the truth about her assault and, thus, Flook was lying. Flook tries to distinguish this case from *Kirkman* where a counselor's testimony that an assault had happened was held to not be opinion testimony. 159 Wn.2d at 930-31. Nevertheless, the statement made by Ms. Konen during her testimony is not dissimilar from the testimony in *Kirkman*.

First, Flook in his SAG brief misquotes Ms. Konen, writing, "Counselor Konen made an explicit or at least an almost explicit statement on whether A.S. was telling the truth by opining 'what she shared with me led me to believe the sexual abuse had occurred, based on her training and experience, she was telling the truth.' " SAG at 9. However, this is not what Ms. Konen said during trial, instead stating, "What she shared with me led me to believe that the excessive preoccupation with sex, the sexting, the behaviors that were identified at the beginning of our therapeutic relationship were related and an impact from the sexual abuse that had occurred in the previous months." RP at 249.

Beyond this statement, Ms. Konen also made statements that, during her interview with A.S., she came to believe A.S. had been sexually abused, which meant Ms. Konen had to report there had been a sexual abuse. Finally, Ms. Konen stated the sexual abuse had caused A.S. to have trouble in school and in her life.

None of these statements were an expression of A.S.'s credibility or Flook's guilt. They are much like the statements made by the physician in *Kirkman*, who said the victim's story of sexual touching was consistent with someone who had been abused. 159 Wn.2d at 929. In both cases, the witness was testifying to signs that some abuse had occurred, not to the specific credibility of the victim's accusations.

Because Ms. Konen's statements were general about abuse having had occurred and did not touch on whether A.S.'s account of the abuse was what had happened, we conclude Ms. Konen's statements were not improper opinion testimony.

SAG III: VIOLATION OF MOTION IN LIMINE

Flook argues the trial court erred in not granting his motion for mistrial because the State violated a motion in limine when it brought up Flook's previous identity theft convictions. We disagree.

The motion to exclude evidence of the prior convictions read,

> The defense moves to exclude all evidence of Mr. Flook's conduct in relation to his prior convictions. This conduct is not relevant to prove that he is guilty of the crimes charged in this case. Further, evidence of any prior conduct, in relation to his convictions, is highly prejudicial and should be excluded from trial. *If Mr. Flook choses to testify, evidence of his 2002 ROC* [*rape of a child*] *conviction should not be admissible pursuant to ER 609*.

CP at 55-56 (emphasis added). The original motion requests barring the State from admitting evidence of Flook's conduct in its case-in-chief and to bar the State from using the 2002 conviction as impeachment evidence if Flook testified.

***9** In its reply brief, the State wrote, "[w]ith regard to the Defendant's convictions for Identity Theft and Possession of Stolen Property in 2012, the State would not seek to introduce these in its case-in-chief, but should properly be allowed to do so, in the event that the Defendant testifies pursuant to ER 609." CP at 73. The trial court granted the motion without commenting on the specifics.

The question the State asked Flook during cross-examination did not relate to Flook's 2002 rape of child conviction, but related instead to his 2012 identity theft conviction. This is not a violation of the motion in limine.

SAG IV: WITNESS NOT SWORN IN

Flook contends C.S. was not properly sworn in under ER 603 and this error requires reversal. However, this error was not properly preserved in the trial court below and is not an error of constitutional magnitude allowing for review. *See State v. Avila*, 78 Wn. App. 731, 738, 899 P.2d 11 (1995); RAP 2.5(a)(3).

Affirmed in part; remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Pennell, C.J.

Fearing, J:

All Citations

Not Reported in Pac. Rptr., 2020 WL 2128704

End of Document

THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent. v. ROGER FLOOK, Jr., Petitioner.	)))))))))	No. 98665-7 CERTIFICATE OF SERVICE OF COUNSEL

Certificate of Service of Counsel

I, Marla Zink, state that on the below indicated date, I caused to be filed in the Supreme Court the preceding document and caused it to be served on the following in the manner indicated below:

Benjamin Curler Nichols	bnichols@co.asotin.wa.us
Curtis Lane Liedkie	cliedkie@co.asotin.wa.us

SIGNED and DATED this 21st day of July, 2020 in Seattle, WA:

s/ Marla L. Zink
Marla L. Zink, WSBA 39042
Luminata, PLLC
212 Broadway E. #22815
Seattle, WA 98102
(360) 726-3130
marla@luminatalaw.com

LUMINATA, PLLC

July 21, 2020 - 3:10 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	98665-7
Appellate Court Case Title:	State of Washington v. Roger W. Flook Jr.
Superior Court Case Number:	15-1-00165-7

The following documents have been uploaded:

- 986657_Other_20200721150113SC769345_2729.pdf
  This File Contains:
  Other - Petition for Review
  The Original File Name was PFR for FILING Flook.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- cliedkie@co.asotin.wa.us

Comments:

Sender Name: Marla Zink - Email: marla@luminatalaw.com
Address:
212 BROADWAY E. # 22815
SEATTLE, WA, 98102
Phone: 360-726-3130

Note: The Filing Id is 20200721150113SC769345