NO. 99497-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIE GARZA,

Petitioner.

Appeal from the Court of Appeals

BRIEF OPPOSING PETITION FOR REVIEW

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I. INTRODUCTION

Review of the Court of Appeals decision is not warranted. As this Court has consistently recognized, the Washington Constitution allows the trial court to provide an accurate statement of the law. That is precisely what occurred in this case. The trial court provided an accurate statement regarding RCW 9A.44.020(1), which indicates that it is not necessary that the testimony of the alleged victim of child molestation be corroborated. The trial court also took care to instruct the jury that the jury was solely responsible for determining witness credibility.

The importance of a noncorroboration instruction in sexual assault cases has been recognized by the high courts of other States, as well as sociological and legal research on the need to counteract the myths that "real" sexual assaults are witnessed and result in physical evidence. It is critical that these prevalent misconceptions not act as barriers to justice.

II. RESTATEMENT OF THE ISSUES

Is a noncorroboration instruction appropriate in a child molestation case, where the defense theme is that "common sense" indicates that child molestation cannot be proven beyond a reasonable doubt based on the unsubstantiated testimony of the child victim?

III. STATEMENT OF THE CASE

A. Garza's Granddaughter Reported that He Repeatedly Touched Her Inappropriately

Willie Garza's granddaughter, I.R., regularly spent time at his house while she was approximately 5 to 11 years old. During some of this time period, I.R.'s family lived with Garza and he babysat I.R. and her younger siblings. Throughout this time period, Garza touched and pinched I.R.'s bottom and inner thighs, and made comments about women that made I.R. uncomfortable. RP 268-69.

I.R. recalls three specific incidents that occurred when she was between the ages of 5 and 10. The first occurred in the early morning hours. Garza had I.R. in his bedroom, on his bed, while the rest of the family was asleep in another area of the house. RP 270-71. I.R.'s pants and underwear were on the floor. RP 271. Garza kissed her stomach and legs while touching the child's unclothed legs, inner thighs, and vagina. RP 270.When Garza heard a noise, he told I.R.: "Hurry up. Put your clothes on before your aunt or your mom comes and sees you." *Id*.; RP 306.

During the second incident, I.R. and Garza were alone in Garza's home. With I.R. on his lap, Garza kissed her and touched her chest underneath her shirt. RP 275. She was not wearing a bra. RP 277. The touching stopped when a neighbor knocked on the front door. *Id.*

The third incident occurred when I.R. asked to use the computer in Garza's bedroom. Garza had "pictures of girls in their bikinis and models" on his computer screen. RP 279. With I.R. on his lap, Garza again put his hands beneath the child's shirt. RP 280. I.R. was not old enough to be wearing a bra. RP 281. The touching stopped when I.R.'s little brother came into the room and asked I.R. to play with him. RP 281.

When I.R. was 10 years old, she refused to go to Garza's house any longer. She told her mother she did not want to go there because Garza kept "putting his hands on [her] in ways that he shouldn't and . . . being inappropriate." RP at 285. Her mother ended all contact between her children and Garza.

When I.R. was 12 years old, she reported to her school counselor that she was having thoughts of suicide and told the counselor about the molestation. RP 457. The school counselor informed Child Protective Services and I.R.'s parents. RP 458. The parents took I.R. to Mary Bridge Children's Hospital, where she met with a social worker for a mental health evaluation. RP 403-04. During the evaluation, I.R. told the social worker that Garza molested her. I.R. also discussed the molestation during a forensic interview at the Children's Advocacy Resource Center. This interview was observed by Detective Patricia Song. RP 433.

B. Garza Was Convicted of Two Counts of First-Degree Child Molestation

Garza was charged with three counts of first-degree child molestation based on three instances of inappropriate touching. He was accused of using a position of trust to facilitate each count. The State's case rested on the testimony of the child victim, as well as the testimony of the child's mother and father, the responding police officer and the investigating police detective, a forensic interviewer with the Child Advocacy Center, a social worker employed by Mary Bridge Children's Hospital, and a school counselor. RP 231, 327, 365, 385, 409, 424, 452.

At trial, the primary defense theory was that the unsubstantiated testimony of a child is insufficient to prove child molestation beyond a reasonable doubt. To bolster this, the defense cross-examined the State's witnesses regarding the victim's mental state, whether others who lived or had access to Garza's house saw or heard anything, whether the victim's testimony was coached, and whether there was any physical evidence to support the charges. *See, e.g.,* RP 302-04, 309-310, 359, 374-75, 405, 418-422, For example, during cross, the defense probed the victim's parent about whether they had seen or heard anything inappropriate between Garza and the victim. RP 359. During cross of the investigating detective, the defense highlighted the lack of physical evidence by asking the detective to provide a general explanation of what a "rape kit" is, to describe the State's

"ability to get children who have made allegations of sexual assault checked out medically," and to state whether there was a rape kit collected in this case. RP 435-36.

Following the testimony, the trial court instructed the jury on the elements of first-degree child molestation, informed the jury that the State was required to prove beyond a reasonable doubt that Garza had sexual contact with I.R. on three separate occasions, and explained the meaning of sexual contact. CP 110, 113, 118, 121. Over the objection of the defense, the trial court also instructed the jury that "[i]n order to convict a person of child molestation in the first degree, . . . it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility." CP 106. The trial court further informed the jury that the lawyers' statements are not evidence, that "the evidence is the testimony and exhibits," and that the jury "must disregard any remark, statement, or argument that is not supported by evidence." CP 102.

Defense counsel argued during closing argument that the State's case was based on nothing more than the testimony of a child with emotional problems. RP 556. He told the jury: "You don't check your common sense at the door. You don't check your daily experiences at the door." RP 563. "[Y]ou are the sole judges of the credibility of the witnesses. And what we have are unsubstantiated allegations . . . made by a child" with

"emotional and psychological problems." RP 565. He asked the jury: Are "unsubstantiated allegations made by someone with these types of problems, is that all it takes these days to convict someone of a serious crime like this?" *Id.* He concluded that "[s]imply put, Ladies and Gentlemen, this is a case about unsubstantiated allegations made by a troubled child . . .. the issue before you is whether or not that in and of itself is proof beyond a reasonable doubt that these crimes occurred." RP 568.

The jury convicted Garza of counts II and III of first-degree child molestation and found that Garza used his position of trust to commit the offenses. The jury was hung on count I and the State later dismissed the charge without prejudice. Garza was sentenced to a minimum sentence of 89 months with a maximum of life and community custody for life.

Garza filed a direct appeal contesting the convictions and community custody terms. *State v. Garza*, 2021 WL 351991 (Wash. Feb. 2, 2021) (unpublished). As part of his appeal, he contended that the noncorroboration instruction could have misled or confused the jury. *Id.* at *3. In a unanimous decision, the Court of Appeals held that the noncorroboration instruction did not constitute an improper comment on the evidence. *Id.* at *6-7 (citing *State v. Clayton*, 32 Wn.2d 571, 578, 202 P.2d 922 (1949), *State v. Zimmerman*, 130 Wn. App. 170, 180-81, 121 P.3d 1216 (2005)). The convictions were upheld and the trial court was directed to

strike the challenged community custody conditions. *Garza*, 2021 WL 351991 at 9. Garza filed a timely petition for review.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A. The Noncorroboration Instruction Was Plainly Permitted by the Washington Constitution and Well-Settled Case Law

The noncorroboration instruction given in this case was entirely consistent with longstanding caselaw from this Court and the Court of Appeals. It is well settled that a trial court may instruct the jury in a manner that accurately states the law, without inferring "the court's attitude toward the merits of the case" or disputed issue. *E.g.*, *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). In this case, the defense was based on an appeal to pervasive stereotypes concerning sexual assault and rape. The trial court complied with this long-standing case law by providing a statement of the law, without compromising the constitutional rights of the defendant.

The trial court's ability to state the law for the jury is grounded in the Washington Constitution, which provides that "'[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, *but shall declare the law.*'" *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting Const. art. 4, § 16) (emphasis added). An instruction that does no more than convey an accurate statement of the law is not an impermissible comment on the evidence. *E.g.*, *Christensen v. Munsen*, 123 Wn.2d 234,

249, 867 P.2d 626 (1994); *State v. Chenoweth*, 188 Wn. App. 521, 354 P.3d 12 (2015), *rev. denied*, 184 Wn.2d 1023, 361 P.3d 747 (2015).

The instruction provided in this case was without question an accurate statement of the law. RCW 9A.44.020(1) provides that "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." *See* RCW 9A.44.083 (defining child molestation in the first degree). The instruction provided in Garza's trial hewed closely to the statutory language by stating that: "[i]n order to convict a person of child molestation in the first degree, . . . it shall not be necessary that the testimony of the alleged victim be corroborated." CP 106.

Longstanding case law indicates that a statement of the law regarding uncorroborated testimony is permissible when there is no comment or inference made by the trial court regarding the facts. *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). A comment on the facts exists only if the court's attitude is "'reasonably inferable from the nature or manner of the court's statements.'" *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999) (quoting *State v. Carothers*, 84 Wn.2d 256, 267, 525 P.2d 731 (1974)). Conversely, a "[a] jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law." *State v. Johnson*, 152 Wn.

App. 924, 935, 219 P.3d 958 (2009) (citing *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986)); *State v. Zimmerman*, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005). Here, as in *Clayton*, the trial court properly stated the law without further comment.

In addition to taking care to not comment or provide any inference regarding the evidence, the trial court took the proactive step of instructing the jury that it is the sole judge of credibility. CP 106. Division I of the Court of Appeals has suggested that "[w]ithout this specific inclusion, the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim's credibility." *Johnson*, 106 Wn. App. at 936-37. In Garza's case, the trial court removed any possible inference that the judge was commenting on the evidence by affirmatively stating that "the jury is to decide all questions of witness credibility" and that the jury "must disregard any remark, statement, or argument that is not supported by evidence." CP 102, 106; *see also* CP 102, Jury Instr. 1 (directing jurors that they "are the sole judges of the credibility of each witness" and "the sole judges of the value or weight to be given to the testimony of each witness," and that the state constitution "prohibits a trial judge from making a comment on the evidence.").

Given this consistent body of case law, Garza attempts to manufacture a conflict by citing cases in which the trial court directly

commented—or was asked to directly comment—on the evidence. *See* Pet. at 9. For example, in *Laudermilk v. Carpenter*, 78 Wn.2d 92, 457 P.2d 1004 (1969), the plaintiff in a negligence case involving a young child who was allowed to start a trash fire asked for jury instructions that comment on the evidence, such as: "[a]s a matter of common knowledge, fire is considered to be an inherently dangerous activity" and that "young children . . . are without discretion or judgement . . . further, that they are creatures of impulse and impetuosity, having no habits of deliberation and forethought, and are likely to be drawn by childish curiosity into places of danger." *Id.* at 99-100. The Court held that the trial court properly declined to provide these instructions, "which might subject the trial judge to the charge of commenting on the evidence." *Id.* at 100. Unlike the overtly biased, factual commentary requested in *Laudermilk*, the instruction given in Garza's trial was a neutral statement of the law.

Garza's remaining claims of conflicting case law are equally specious. *See* Pet. at 9. He makes a passing citation to *In re Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999), which held that a jury instruction violated article IV, section 16 because it was a statement of legislative intent—rather than a statement of substantive law. *Id.* at 145-46. But in Garza's case, the instruction mirrored the text of RCW 9A.44.020(1). The remaining citations are also inapposite. In *State v. Faucett*, 22 Wn. App.

869, 875, 593 P.2d 559 (1979), the trial court openly commented on the weight of testimony by instructing the jury that it must "be slow to believe that any witness has testified falsely," thereby reducing the likelihood that the jury would find a reasonable doubt. Similarly, in *Kirkland v. O'Connor*, 40 Wn. App. 521, 523-524, 698 P.2d 1128 (1985), a jury instruction that "prohibited the jury from considering a lack of evidence about a material element" of an intoxication charge was determined to be a comment on the evidence. Finally, in *State v. Mellis*, 2 Wn. App. 859, 861-62, 470 P.2d 558 (1970), the Court of Appeals held that the trial court properly refused a request to comment on the credibility of an alleged rape victim's testimony by instructing the jury that "consent . . . may be inferred if there has been no outcry and no serious resistance."

In sum, Garza's constitutional argument fails. It is well settled that an accurate statement of the law, without any comment regarding the facts, is constitutionally permissible. In essence, the petition requests that the Court accept this case to overturn over 70 years of case law, recognizing that the Washington Constitution allows the trial court to state the law. The petition should therefore be denied.

B. A Noncorroboration Instruction Is an Important Means of Insuring that Prevalent "Rape Myths" Do Not Bias Jurors in Sexual Assault Trials

Garza's reliance on a comment to a pattern jury instruction (WPIC) is insufficient to raise an issue warranting this Court's review. *See* Pet. at 7 (citing 11 Wash. Practice: Wash. Pattern Jury Instructions: Criminal 45.02 cmt. (4th ed. 2016)). The comment recognizes that "[s]ince 1913 the law of Washington has followed the common law rule that no corroboration is necessary" in a rape case, but suggests that "[t]he matter of corroboration is really a matter of sufficiency of the evidence." WPIC 45.02. The comment is at best a secondary source of information, not a conflicting authority meriting review under RAP 13.4(b).

It is also important to note that the comment to the WPIC is devoid of context. It does not comment on whether a noncorroboration instruction is ever necessary to counteract "rape myths"—institutionalized falsehoods regarding victims of sexual assault. Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 Tulsa L. Rev. 1 (2017) (hereinafter "*Fighting Rape Culture"*). Between a quarter and a third of Americans believe such myths. *Id.* at 4. In Garza's case, the record indicates that the defense relied in large part on fanning these misconceptions, particularly the myth that there are always witnesses to sexual assault. In reality, over 78 percent of rape cases lack a third-party witness and sexual abuse of

children is sometimes committed "with adults in close proximity who are unable to detect the abuse due to deception by the offender." *Id.* at n. 27 (citing Joseph Peterson et al., *The Role and Impact of Forensic Evidence in the Criminal Justice Process*, 62, 92, 109 (2010)). Although every State has addressed this longstanding bias by removing the corroboration requirement, the myth lives on. *See, e.g.,* RCW 9A.44.020; Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 Akron L. Rev. 981, 986-87 (2008).

In closing argument, the defense further employed the myth that "real" sexual assaults are witnessed by emphasizing that the child victim's testimony was "unsubstantiated" by other witnesses and asked the jury: "Are unsubstantiated allegations made by someone with these types of problems, is that all it takes these days to convict someone of a serious crime like this?" *E.g.*, 565, 568. The defense reinforced the argument that unsubstantiated claims of sexual abuse cannot be trusted by making use of a second myth: that credible claims of sexual assault are also supported by corroborating *physical* evidence. *Fighting Rape Culture* at 5. During cross examination of the investigating detective, the defense asked the investigating detective about rape kits, the "ability to get children who have made allegations of sexual assault checked out medically," and the absence of a rape kit in this case. RP 435-36. But contrary to the prevalent myth that

sexual assaults result in physical injuries, research shows that "the number of sexual assaults that result in any form of injuries is as low as ten percent." *Fighting Rape Culture* at 5. Physical evidence is particularly uncommon in child molestation cases, because "most of these crimes involve fondling or oral sex rather than forcible penetration." *Id.*

Like Washington, other States also have held that a noncorroboration instruction that merely states the law does not constitute an improper comment on the evidence. Because jurors in sexual assault cases "mistakenly assume that they cannot base their decision on the victim's testimony even if it establishes every material element of the crime," the Nevada Supreme Court held that it is appropriate for the trial court to provide a noncorroboration instruction. *Gaxiola v. State*, 119 P.3d 1225, 1233 (Nev. 2005). As the California Supreme Court explained, "[a]lthough the historical imbalance between victim and accused in sexual assault prosecutions has been partially redressed in recent years there remains a continuing vitality in instructing juries that there is no legal requirement of corroboration." *People v. Gammage*, 828 P.2d 682, 687 (Cal. 1992) (citation omitted). The reasonable doubt standard puts a "heavy burden of persuasion on a complaining witness whose testimony is uncorroborated" and while a noncorroboration instruction does not lessen that standard, it "protects the rights of both the defendant and the

complaining witness." *Id.* at 701 (citation omitted). *See also, e.g., Horne v. State*, 586 S.E.2d 13, 16 (Ga. 2003); *People v. Smith*, 385 N.W.2d 654, 657 (Mich. Ct. App. 1986).

As Washington's case law confirms, our state constitution also permits a noncorroboration instruction, particularly when it is paired with an instruction that the jury alone is responsible for determining witness credibility. Thus, there is no issue presented by the petition that necessitates this Court's review.

V. CONCLUSION

The petition for review should be denied. The Court of Appeals decision upholding the noncorroboration instruction is consistent article 4, section 16 of the Washington Constitution and Washington case law interpreting that provision.

RESPECTFULLY SUBMITTED this 30th day of March, 2021.

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PIERCE COUNTY PROSECUTING ATTORNEY

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