

NO. 63309-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DIMITAR DERMENDZIEV,

Appellant.

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STATE OF WASHINGTON  
#1

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

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Admission of an improper opinion of guilt deprived appellant of a fair trial.

2. Appellant was denied his right to effective assistance of counsel.

3. The trial court's improper comment on the evidence denied appellant a fair trial.

4. The trial court imposed an erroneous sentence.

Issues Pertaining to Assignments of Error

1. Did testimony by appellant's wife and the mother of the complaining witnesses constitute improper opinions on guilt?

2. Was appellant denied his right to effective assistance of counsel because his trial counsel failed to object to the State's introduction of opinions on the appellant's guilt and by eliciting the same improper opinions on cross examination?

3. Was appellant denied a fair trial when the trial court, in sustaining the prosecutor's objection to defense counsel's closing argument, told the jury the State had presented sufficient evidence to satisfy its burden to prove the charge beyond a reasonable doubt?

4. Did the trial court impose an erroneous sentence on three of the four convictions by imposing a term of community placement that

exceeds the term allowed by the applicable version of the Sentencing Reform Act?

B. STATEMENT OF THE CASE

Appellant Dimitar Dermendziev and his wife Isabelle lived in Blaine, Washington with their three children, daughter M.D. (d.o.b. June 2, 1990), and two sons, A.L. (d.o.b. June 6, 1992) and A.D. (d.o.b. July 19, 1998). RP<sup>1</sup> 627, 630, 635, 638. In 2007, DSHS became involved with the family due to a number of problems, including marital problems, A.D.'s behavioral problems, and general dysfunction. RP 608-11. IN November, 2007, Dermendziev contacted DSHS and requested A.D. be removed from the family home. During a discussion of Dermendziev's request, A.D. became angry with his father and accused him of hitting and raping his children. RP 524, 591-93.

DCFS social worker Sieneke Stevenson reported A.D.'s allegation to Child Protective Services (CPS) investigator Bonnie Grovom. RP 538-39. About a week after A.D.'s accusation, Grovom interviewed A.D. A.D. told Grovom that his claims were not true and that he had been "kidding." RP 541-42.

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<sup>1</sup> There are six consecutively paginated volumes of verbatim report of proceedings collectively referenced herein as "RP."

In March 2008, Stevenson and family therapist Helen Edwards, who had worked with the Dermendziev family since 2007, met with A.D. at the juvenile detention center where he was being held on a criminal matter. RP 455-60, 472-73. During the meeting A.D. asked to speak privately with Edwards, so Stevenson left. RP 473, 601. A.D. then told Edwards his father had touched him inappropriately when he was six to eight years old. A.D. also said the same thing may have happened to his sister, M.D. RP 474. Edwards reported A.D.'s allegations to Stevenson and the accusations were relayed to Grovom. RP 604. .

On March 19, 2008, Grovom and Blaine Police Officer Deborah Hertz met with M.D. to discuss A.D.'s disclosures. RP 552, 706, 737-38. M.D. told them her father had sexually abused her when she was in elementary school. RP 553, 739. Grovom and Hertz interviewed A.D. the following day, and he maintained his claim of abuse by his father. RP 555, 559, 741.

The Whatcom County prosecutor charged Dermendziev with four counts of first-degree child molestation. CP 87-88. The first three counts alleged that "between June 2, 1996 and June 2, 1999," Dermendziev molested M.D. Count four alleged that "between June 6, 1998 to [sic] June 6, 2001," Dermendziev molested A.D. CP 85-88.

At trial, M.D. testified her father first molested when she was in second grade. RP 61-68, 159-60. M.D. recalled that after she showered her father took her into her parents' bedroom, put a towel over her head and touched her vagina with his hands, tongue and lips. RP 64-69. M.D. claimed a similar event occurred a couple of months later. RP 71-77. During both alleged incidents, M.D.'s mother was out of the house and her brother A.D. was at home watching television. RP 92.

Although M.D. claimed her father molested her about 10 times, and stopped before she entered fourth grade, the only other specific instance she could recall was in her parents' bed with both parents present. RP 93, 99, 101, 278. M.D. claimed her father touched her "privates" after she had crawled in bed between her parents one night because she was scared. RP 93.

M.D. said the first person she told was her mother, when she was in second or third grade. RP 101, 155. She could not recall how her mother reacted, but did say the molestation continued. RP 102.

Years later, in eight grade, M.D. told her friends, the twins Kristina and Kassandra Rathbun. RP 104-05. Although she told them not to tell anyone, they apparently told another girl at school, "Megan," who revealed it to a school counselor. RP 118, 133. M.D. recalled getting called in to see the counselor and telling him/her about the alleged

molestation. M.D. implored the counselor not to report it because she did not want anything bad to happen to her father. RP 133-34

M.D. recalled that at some point she told A.D. she had been molested, probably before she told the Rathbun twins. RP 122. M.D. claimed she also told two boy friends about the molestation, one when she was 16 and one when she was 17. RP 126.

M.D. said she saw her father on the street in 2006 and stopped to talk to him. RP 130, 318. M.D. claimed her father apologized for molesting her when she was younger. RP 131, 318-19.

M.D. admitted that when she was 10 or 11 years old she was questioned by CPS and law enforcement for molesting her youngest brother, Al.D., when he was only two. RP 109-111, 285, 305-06. M.D. admitted touching Al.D.'s penis and said a neighbor girl, "Laura," kissed Al.D.'s penis. RP 114, 153. M.D. recalled telling the CPS worker that she had never been touched inappropriately. RP 115.

A.D. testified that when he was between five and seven years old, his father molested him at least twice, once in his own bed and once in his parents' bed. RP 181-82, 185, 188. A.D. said he confronted his father about it when he was eight, during an argument it in front of his mother and sister, by accusing his father of raping him. RP 189-90. A.D. claimed his mother did not react and his father ignored the accusation. RP 189-91.

A.D. recalled that at a CPS meeting in November 2007, he accused his father of raping him in response to all the bad things his father was saying about him. RP 195, 201-02. A.D. admitted recanting the accusation, however, after he was questioned further by CPS workers. RP 196, 357.

A.D. once told his friend Michael Arrington about the alleged molestation. RP 203. A.D. said he told him because Michael had been through "some pretty bad stuff" and it "felt really, really good" for him to explain to Michael why he was always so depressed. RP 204. A.D. was confident Michael never told anyone else. RP 204.

A.D. said he next told family therapist Edwards in March 2008. RP 205-06. A.D. said he told Edwards because he was being held in juvenile detention for doing stupid things and was scared he might end up spending a year in jail if he did not disclose what was causing him to misbehave. RP 211-12, 254.

Sandy Rathbun, the mother of Kristina and Kassandra Rathbun., testified her daughters came to her when they were in middle school and told her M.D. had told them her father had molested her. RP 381-82. Sandy testified that when she confronted M.D. about the alleged molestation, M.D. expressed fear about getting in trouble and that she was afraid it would break up her family. RP 387.

Kristina testified that in middle school M.D. told her she had been raped by her father earlier that week, and that he had taken her from the shower, put a towel over her head and put her on a bed. RP 394-96. Kristina claimed M.D. told her not to tell anyone because she did not want to break up her family. RP 397. Kristina also testified M.D. told Cassandra the same thing. RP 397-98. Defense counsel elicited almost identical information on cross-examination. RP 401-04. Similarly, Cassandra testified M.D. told her she was molested by her father when she was younger. RP 415-18.

A.D.'s friend Michael testified A.D. told him his father had molested him when he was younger. RP 439. Michael also said A.D. told him the same thing happened to M.D., and that A.D. said he thought M.D. had it worse than he did. RP 441-42.

Family therapist Edwards testified to the details of what A.D. had told her, including that A.D. claimed he and his sister were molested by their father. RP 466, 474-75, 477-78, 492. Edwards also testified others told her A.D. had told Michael about the sexual abuse. RP 490.

During a break in cross examination of Edwards, defense counsel expressed frustration that evidence of prior bad acts of his client had been admitted, although counsel acknowledged not objecting at the time. RP 507. Counsel then argued it was therefore appropriate for the defense to

flush out evidence that would show reasons, other than actual sexual abuse, for why M.D. and A.D. might want to have their father removed from the home. RP 510. The court granted counsel's request. Counsel elicited Edward's testimony that A.D. had told her both his mother and father used to beat him. RP 516-17.

CPS investigator Grovom testified on direct examination that A.D. and M.D. told her and others about being allegedly molested by their father. RP 538, 543, 545, 549-50, 553-56, 558. Grovom also said Dermendziew's wife, Isabelle, told her she had known about the molestation for years. RP 559. Defense counsel elicited similar testimony during cross-examination. RP 565, 568-69, 571.

DCFS social worker Stevenson also recounted what A.D. said, or what others said A.D. said, about being molested by his father. RP 593, 596, 604-06.

Isabelle testified that in second grade M.D. said her father was touching her "privates." RP 643. Isabelle ignored the allegation at the time. RP 644. In eighth grade M.D. again told her Dermendziew had molested her, and when Isabelle confronted her husband, he allegedly said that if he had molested his daughter, he was sorry. RP 644-45, 647.

When asked how she reacted to Dermendziew's response, Isabelle said she did not "know what to think," and agreed she was upset.

Ultimately, Isabelle concluded Dermendziev had done what he was accused of, particularly because of the way he acted when confronted. RP 647-48. Isabelle said her relationship with Dermendziev changed at that point; she no longer trusted him and she became particularly protective of her youngest son, Al.D. RP 648-49.

Isabelle also testified that after M.D. told her the second time, she asked A.D. if he had ever been molested by Dermendziev, and A.D. said no. RP 646. A few years later A.D. told her he had been raped by his father. RP 652-53. Isabelle also said M.D. told her that A.D. had told M.D. about being molested by their father. RP 654.

On cross examination defense counsel elicited more testimony from Isabelle about what M.D. and A.D. told her about being molested by their father, that they encouraged her to divorce Dermendziev, and that they were concerned Dermendziev would molest Al.D. RP 662, 670, 677. Isabelle concluded her cross-examination by stating she now believed M.D. was telling the truth. RP 696.

On redirect examination, Isabelle explained that she believed M.D. when she initially reported she was being molested, but did nothing about it because she did not want to believe it was happening. RP 699-700. Only after A.D. told her he was also being molested did she conclude Dermendziev was molesting the children. RP 701.

Officer Hertz, who had investigated the 2001 allegation against M.D. and the current allegation against Dermendziev, confirmed Grovom's trial account of what M.D. said during the March 2008 interview about being molested by her father. RP 705, 724, 737, 739. Hertz also confirmed that M.D. said her father had apologized for the abuse, that M.D. and A.D. had at some point discovered that they had both been abused, that A.D. said he had been abused more than once and that it happened when he was about eight years old. RP 739-40, 743.

The prosecutor then asked Hertz a host of questions about exactly what A.D. said in his interview with her and Grovom. RP 744-46. Hertz's direct examination concluded with the officer confirming that what Isabelle said in her interview matched what M.D. said she told her mother and that Dermendziev had apologized to M.D. RP 751.

Defense counsel asked Hertz several questions that elicited what M.D. and A.D. had said to others about what their father had allegedly done to them. RP 755-78.

Sexual assault specialist Joan Gaasland-Smith testified in general terms about the difficulty children have reporting sexual abuse, and about the most common ways they finally make disclosures, such as first telling friends, who they ask for confidentiality because they fear destroying their family or being considered abnormal. RP 814-23.

The only defense witness was Blaine Middle School assistant principle Aaron Smith. RP 797. Smith testified that he was unable to find any documentation that a counselor ever met with M.D. in middle school to discuss alleged sexual abuse. RP 799.

In her initial closing argument, the prosecutor focused on the credibility of M.D. and A.D., noting the circumstances surrounding their disclosures and the many witnesses who corroborated their accounts of abuse. RP 867-882. The prosecutor argued:

So what I'm asking you to do is look at it kind of like a puzzle. There are pieces to the puzzle that kind of fit together and see if you look at a timeline and see how those puzzle pieces fit. You know, there is kind of age [preference here] it looks like from six to eight. And then he goes on to [A.D.]. [A.D.] from six to nine in that period of time. And then why stop? [A.D.] said I don't know why. I don't know why it stopped. [A.D.] says I don't even know why it started. Why would he? He was young. He was six to eight years old. That's first graders. Little tikes. You know, the little kids. I mean, you saw them at 16 and 18. That's not what they were. They were little. I don't know. 2001 by then it had stopped. What do you think? What happened in 2001.

RP 880.

The prosecutor noted that in 2001 police came to Dermendzиеv's home to investigate allegations of inappropriate behavior by M.D. RP 880-81.

During defense counsel's closing argument, the following colloquy occurred:

[Defense Counsel]: . . . Now if you believe the State's version, then you believe Mr. Dermendziev is a pedophile. He is a person that prays [sic] on children to satisfy sexual desires.

[Prosecutor]: I object as to that. That's -- clearly that hasn't been the State's version. That's not the only thing that this jury can believe. It isn't cut and dried in that form counsel, she --

THE COURT: I'll sustain the objection.

[Prosecutor]: Thank you.

[Defense Counsel]: I don't quite understand what the ruling is as -- is it over the word pedophile?

THE COURT: I think it goes beyond that in that you began comments by saying if you believe the State's version then you believe, et cetera, the State had a specific burden of proof. The State has a heavy burden of proof but it has a specific burden of proof and the State's evidence has been elicited simply to satisfy that burden of proof. Not to place if you will any larger labels on them. Just to come forth with evidence to prove beyond a reasonable doubt that the alleged acts occurred. Certainly nothing less. But the State is attempting to prove nothing more either.

RP 923-24.

The jury convicted Dermendziev as charged and the court imposed concurrent sentences of 175 months on each count. CP 26, 50-53; RP 965. The court also imposed a 36-month term of community placement on each count. CP 27; but see CP 34 ("Appendix H") (provides that "for a sex offense . . . committed on or after July 1, 1990, but before June 6, 1996,"

the term of community placement shall be "for two years or up to the period of earned early release . . . [,] whichever is longer").

Dermendziev timely appeals his judgment and sentence. CP 2-19.

C. ARGUMENT

1. IMPROPER OPINION ON GUILT EVIDENCE DEPRIVED DERMENDZIEV A FAIR TRIAL.

The role of the jury is held “inviolable” under Washington’s constitution. Wash. Const. art. I, §§ 21, 22. The jury’s fact-finding role is essential to the constitutional right to trial by a jury of one’s peers. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, “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).

An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008). Opinions on the truthfulness of witnesses are also inappropriate in criminal trials. Id. “Unquestionably, to ask a witness to express an opinion as to whether or not another witness is lying does invade the province of the jury.” State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991) (citing State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985)).

In determining whether a witness had improperly opined on guilt or credibility, this Court considers the 1) the type of witness, 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. Saunders, 120 Wn. App. 800, 812-13, 86 P.3d 232 (2004) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)).

In Saunders, a police officer testified Saunders's answers to questions "weren't always truthful." 120 Wn. App. at 812. This was held to constitute improper opinion testimony because police witnesses have an "aura of reliability," the testimony dealt directly with the defendant's credibility, and the charges were very serious. Saunders, 120 Wn. App. at 813.

a. Isabelle's Claim She Believed Her Children Were Molested Constitutes Improper Opinion Testimony.

Isabelle repeatedly testified she believed M.D. and A.D. when they claimed they were molested by Dermendzhev. RP 647-48, 696. As in Saunders, the type of witness made the opinion testimony particularly prejudicial: "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).

Jerrels is remarkably similar to Dermendzhev's case. In Jerrels the prosecutor elicited testimony that the children's mother believed the children's accusations that Jerrels molested them. 83 Wn. App. at 506-07. Although Jerrels never objected, the court held that eliciting Jerrels's wife's opinion was improper and prejudicial: "Because credibility played such a crucial role, the prosecutor's improper questions were material and highly prejudicial." 83 Wn. App. at 508. This Court reversed the convictions for child rape, child molestation and assault finding the mother's opinion testimony deprived Jerrels of his constitutional right to a fair trial. 83 Wn. App. at 509.

Similarly, in State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985), this Court reversed and remanded convictions for statutory rape. As with Jerrels, credibility was a key issue. There was no physical evidence indicating the alleged victims were sexually abused and the defendant's testimony directly conflicted with that of the alleged victims. 39 Wn. App. at 657. During the State's case-in-chief, a pediatrician testified she believed the alleged victims had been molested based on her interviews with them. The pediatrician's opinion was based solely on her evaluation of the alleged victim's version of the events. Id. While this Court found an instructional error required reversal, it also held the pediatrician's opinion testimony was improperly admitted. Id.

Here, as in Jerrels and Fitzgerald, credibility was the key issue because there were no witnesses to the alleged abuse except M.D. and A.D. Isabelle's testimony that she believed her children when they claimed Dermendziev molested them was improper because it was based solely on her opinion of their veracity rather than on knowledge of any actual acts of molestation.

Isabelle's improper testimony was highly prejudicial as it supported a jury finding that M.D. and A.D. were credible, despite serious questions as to their credibility arising from their repeated denials of abuse. RP 115, 196, 357, 542, 646. Without Isabelle's improper opinion testimony, the jury's determination of M.D.'s and A.D.'s credibility likely would have been different.

Application of the other Demery factors also shows Isabelle's testimony was improper. In Saunders, the impermissible opinions unfairly undermined the defendant's alibi; here, they tipped the other end of the scale by vouching for the complaining witnesses. As in Saunders, the charges here are very serious. First-degree child molestation is a class A felony and Dermendziev has been sentenced to more than 14 years in prison. RCW 9A.44.083(2); CP 26. Dermendziev's defense was that the alleged molestations never happened. The defense was supported by the lack of physical evidence. Instead, the state's case consisted almost

entirely of witnesses repeating the children's alleged statements to others. In other words, the childrens' words were essentially the only direct evidence against Dermendziev. Under these circumstances, the mother's vouching was particularly damaging. As in Saunders, the Demery factors show the testimony was an impermissible opinion on credibility and thus on guilt. This Court should therefore reverse Dermendziev's convictions.

b. Permitting Isabelle to Give Opinions on Her Children's Truthfulness Was Manifest Constitutional Error.

Improper opinion testimony may be manifest constitutional error that can be raised for the first time on appeal. Saunders, 120 Wn. App. at 811, 813 (citing Demery, 144 Wn.2d at 759); RAP 2.5(a). Notably, in Saunders, as here, there was no objection. Nevertheless, the Saunders court held the officer's statement "was improper opinion testimony, and that the admission of this evidence was constitutional error." Saunders, 120 Wn. App. at 813. The same result is required here.

Manifest constitutional error occurs when the error causes actual prejudice or has "practical and identifiable consequences." Montgomery, 163 Wn.2d at 595. This case is distinguishable from Montgomery, where the court found no practical consequences or actual prejudice because the jury is presumed to follow the instructions and there was no indication the

jury was unfairly influenced. 163 Wn.2d at 595-96. The court noted it would not hesitate to find manifest constitutional error if there were indications the opinions influenced the jury's verdict. 163 Wn.2d at 596 n.9.

Here, Isabell's opinion testimony had practical and identifiable consequences. Jurors are encouraged in the instructions to consider the closing arguments. CP 58 (Instruction 1). Unlike in Montgomery, the prosecutor relied on the opinion testimony in closing argument. See RP 943 (prosecutor notes Isabelle knew what Dermendziev had done). The prosecutor's exploitation of the improper admission of opinion testimony likely influenced the jury. This Court should find there was manifest constitutional error.

Constitutional error is presumed prejudicial, and the State bears the burden of proving it harmless. Saunders, 120 Wn. App. at 813 (citing State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The State cannot meet its burden here.. Unlike in Saunders, the untainted evidence can hardly be described as "overwhelming." Saunders, 120 Wn. App. at 813. Rather, the State's case consists solely of the words of children, one of whom initially disclosed the purported abuse in a fit of anger. Absent a finding the children were credibility, the State's case would not survive. As such, this case is more like Jerrels where, despite the lack of objection,

the court found the error reversible because the only evidence was severely tainted by the improper opinion testimony. This court should reverse Dermendziew's convictions.

c. Defense Counsel's Failure to Object to Isabelle's Opinion Evidence Also Warrants Reversal.

Even if this Court finds this argument may not be raised for the first time on appeal, reversal is nevertheless required because trial counsel's failure to object was ineffective assistance.

The state and federal constitutions guarantee the accused reasonably effective representation by counsel. U.S. Const. amend. 6; Const. Art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Deficient performance by counsel that prejudices the accused violates this right and thus denies the accused a fair trial. See Strickland, 466 U.S. at 687.

The first prong of the Strickland test requires a showing that defense counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound trial strategy for counsel's actions. Strickland, 466 U.S. at 689.

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). While the decision of whether to object may qualify as a legitimate trial tactic in situations where prejudice is slight, such failure constitutes ineffective assistance where proper objection is not lodged against testimony central to the State's case. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

The second prong of the Strickland test requires a showing that counsel's deficient performance was prejudicial. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. Thomas, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. Strickland, 466 U.S. at 693; Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694; Thomas, 109 Wn.2d at 226.

Here, there was no conceivable strategic basis for counsel's failure to object when the prosecutor elicited Isabelle's improper opinion on guilt. As previously noted, "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Jerrels, 83 Wn. App. at 508. Furthermore, to elicit the similar

testimony on cross was inexplicable. RP 696. There is no reasonable strategic basis for counsel's failure to object to admission of Isabelle's opinion of Dermendzиеv's guilt. As such, counsel's performance was deficient.

Counsel's deficient performance prejudiced Dermendzиеv because the credibility of M.D. and A.D. was central to the State's case. The only direct evidence tending toward guilt came from the mouths of M.D. and A.D. The remaining evidence served only to corroborate their claims. Once Isabelle offered her assessment of credibility, guilty verdicts were all but certain. Jerrels, 83 Wn. App. at 508. This Court should reverse Dermendzиеv's convictions because he was denied his right to effective assistance of counsel.

2. THE TRIAL COURT'S COMMENTS DURING DEFENSE COUNSEL'S CLOSING ARGUMENT REQUIRE REVERSAL.

Article 4, § 16 of the Washington Constitution provides,

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The purpose of this constitutional prohibition is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition is strictly applied. Seattle v.

Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court's opinion violates the prohibition whether express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

This violation may be raised for the first time on appeal. The failure to object or to move for mistrial does not preclude review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); Lampshire, 74 Wn.2d at 893.

Dermendziew's counsel argued in closing that if the jury believed the prosecution's evidence, it was necessarily finding Dermendziew was a pedophile because it would mean he derived sexual gratification from molesting young children. RP 923; CP 71 (Instruction 13, which defined "sexual contact" as touching done for the purposes of "gratifying sexual desires"). In the context of the prosecution's evidence and jury instructions, counsel's inference was reasonable rather than a prohibited remark on evidence not presented at trial. Moreover, the argument was appropriate in light of the prosecutor's comment that Dermendziew seemed to have a preference for young children. RP 880 ("You know, there is kind of age [preference here] it looks like from six to eight.").

The trial court's ruling sustaining the prosecutor's objection was itself error. But more significantly, the court then stated:

The State has a heavy burden of proof but it has a specific burden of proof and the State's evidence has been elicited simply to satisfy that burden of proof. Not to place if you will any larger labels on them. Just to come forth with evidence to prove beyond a reasonable doubt that the alleged acts occurred. Certainly nothing less. But the State is attempting to prove nothing more either.

RP 924 (emphasis added).

This statement signaled to the jury that the trial judge believed the State presented sufficient evidence to prove Dermendziev guilty beyond reasonable doubt. The court's remarks negated that portion of Instruction 3 that stated "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 61 (emphasis added). The court's comment improperly relieved the State of this burden of production.

The improper comment is similar to the one discussed in Seattle v. Arensmeyer. The Arensmeyer court deemed the trial court's interruption of counsel during closing argument -- to say counsel was mistaken as to the evidence -- an unconstitutional comment on the evidence. 6 Wn. App. at 120. This Court found that while the trial court was duty-bound to restrict counsel's argument to the facts in evidence, "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Id. Thus, when the

trial court interrupted, it commented on the evidence by revealing to the jury what it believed the evidence to mean. Id.

Similar to Arensmeyer, the trial court wrongly interfered with a valid defense argument. More importantly, however, the trial court also signaled to the jury that it believed the State had met its burden of production to overcome any reasonable doubt that might be based on a lack of evidence

A judicial comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show no prejudice resulted. Levy, 156 Wn.2d at 723-25. [R]eversal is required even where the evidence is undisputed or overwhelming unless it is apparent the remark could not have influenced the jury. State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974). This is true even where the judge instructs the jury to disregard the comments. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

In Becker, the Supreme Court reversed because the improper comment affected an important and disputed issue at trial. Becker, 132 Wn.2d at 65. In Levy, however, the improper comment was deemed

harmless because it went to an undisputable matter (i.e., whether the structure in question was a "building"). Levy, 156 Wn.2d at 726.

Here, the improper comment went to the central feature of Dermendzиеv's defense, which was that the prosecution failed to submit sufficient evidence to support the allegation beyond a reasonable doubt.<sup>2</sup> As such, there can be no assurance that, absent the improper judicial comment, jurors would have convicted Dermendzиеv. This Court should therefore reverse.

3. THE TERM OF COMMUNITY CUSTODY FOR THREE OF THE FOUR COUNTS EXCEEDS THE STATUTORY MAXIMUM.

Courts must correct an erroneous sentence upon discovery. In re Personal Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). Here, the term of post-release supervision imposed against Dermendzиеv on counts one, two and three (those involving M.D.), exceeds that authorized by statute and must be corrected.

The appropriate length of Dermendzиеv's post-release supervision for counts one, two and three is governed by the version of the Sentencing

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<sup>2</sup> See e.g., RP 889 (defense counsel argues prosecution has failed to meet its burden of proof); RP 890 (defense counsel notes no physical evidence corroborating allegations); RP 897-907 (defense counsel notes M.D. failed to give details of the alleged abuse until trial); RP 924 (defense counsel notes there is no evidence Al.D. was ever molested); RP 926 (defense counsel concludes by arguing prosecution failed to meet its burden of proof).

Reform Act (SRA) in effect no earlier than June 2, 1996, and no later than June 2, 1999, the period in which he allegedly committed these offenses.<sup>3</sup> RCW 9.94A.345<sup>4</sup>; State v. Delgado, 148 Wn. 2d 723, 726, 63 P.3d 792 (2003); State v. Jones, 118 Wn. App. 199, 203, 76 P.3d 258 (2003); CP 87-88 (charging period for counts one, two and three were "between June 2, 1996 and June 2, 1999"). Complicating the analysis, however, is an amendment to the SRA during this period, which changed the length of post-release supervision. Between June 2, 1996 and June 5, 1996, the applicable version of the SRA provided:

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense . . . committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. . . .

RCW 9.94A.120(9) (1995) (emphasis added).

After June 5, 1996, however, the applicable version of the SRA provided:

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<sup>3</sup> This argument does not apply to count four because the charging period for that offense is from June 6, 1998 to June 6, 2001. CP 88.

<sup>4</sup> RCW 9.94A.345 provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."

(a) When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. . . .

RCW 9.94A.120(10) (1996) (emphasis added).

Thus, if the 1995 version of RCW 9.94A.120 applies, the trial court was authorized to impose only a two-year term of community placement. If the 1996 version applies, however, the court was authorized to impose only a three-year term of community custody. Here, the trial court appears to have applied the post-June 5, 1996 version because it imposed a 36-month term on all four counts. CP 27. This was error.

Although the SRA specifically provides that punishment must be imposed based on the law as it was at the time the offense was committed, it does not specifically address what version of the law should apply when the charging period for an offense spans a period of significant changes to the act, and when it is impossible to determine the time period relied on by the jury to convict. Under such circumstances, "[u]se of the increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties would violate the ex post facto clause of both the United States and Washington Constitutions." State v. Parker, 132 Wn.2d 182, 191, 937 P.2d 575 (1997). Moreover, under these

circumstances, the rule of lenity requires applying the version of the act most favorable to the defendant. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249-50, 955 P.2d 798 (1998); In re Personal Restraint of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994). This Court should therefore apply the 1995 version of the SRA and remand for imposition of two-year community custody terms for counts one through three

D. CONCLUSION

The trial court admitted improper opinion testimony and improperly commented on the evidence. Either or both of these errors warrant reversal of Dermendzиеv's convictions and remand for a new trial. If this Court disagrees, the trial court's erroneous sentence should be remanded to correct the community custody term.

DATED this 21st day of September, 2009.

Respectfully submitted,

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No. 63309-1-I

Certificate of Service by Mail

On September 22, 2009, I deposited in the mails of the United States of America,  
A properly stamped and addressed envelope directed to:

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Bellingham WA 98225-4048

Dimitar Dermendziev, 327687  
Washington Corrections Center  
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Shelton, WA 98584

Containing a copy of the opening brief, re Dimitar Dermendziev  
Cause No. 63309-1-I, in the Court of Appeals, Division I, for the state of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the  
foregoing is true and correct.



John Sloane  
Office Manager  
Nielsen, Broman & Koch  
Done in Seattle, Washington

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