

No. 63309-1-I

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

STATE OF WASHINGTON, Respondent,

v.

DIMITAR DERMENDZIEV, Appellant.

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO CROSS-APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Isabelle's testimony wherein she described Dermendziev's demeanor when she confronted him with abuse allegations constitutes a manifest error of constitutional magnitude that may be raised for the first time on appeal.
2. Whether Dermendziev received constitutionally effective assistance of counsel when he attorney strategically chose not to object to an isolated response regarding demeanor of Dermendziev and inadvertently elicited opinion evidence on cross examination that could not have, in the context of the evidence presented below, had any practical prejudicial impact on the jury decision.
3. Whether the trial judge's clarification of a ruling made at Dermendziev's request during closing argument violated article IV, section 16 of the Washington Constitution where the court's comment was isolated, neutral and did not comment on the evidence before the jury.
4. Whether Dermendziev's judgment and sentence for counts I through III should be corrected to reflect the correct term of community placement (24 months) Dermendziev's faced based on the applicable version of the Sentencing Reform Act in effect at the time he committed these offenses.

B. FACTS

1. Facts

Dermendziev and his wife Isabelle lived in Blaine Washington with three children, youngest son A.I.D. (d.o.b.7/19/98), middle son, A.D. (6/6/92) and oldest daughter M.D.(6/2/90). RP 627, 630, 635, 638. At trial

M.D. testified her family lived in a three bedroom, two floor apartment in Blaine, Wa. RP 57.

When M.D. was approximately 6-8 years old, in second grade, her relationship with her father changed. RP 58. M.D. testified that one afternoon when her father was watching the children while her mother was working out of the home as a house cleaner, her dad told her brothers to watch television and told her to go upstairs to take a shower. RP 63.

M.D. remembered this was odd because her parents were typically very strict about letting any of the children watch television. RP 64. M.D. recounted that after she took her shower, her dad came into the bathroom when she was dressing and carried her to his bedroom. RP 65.

Dermendziev then laid his daughter on her back on his bed and placed a towel over her head, covering her eyes, mouth and nose. RP 66. M.D. explained Dermendziev did not talk but did take her underwear off and then used his mouth and hands to do stuff to her private area, while making noises like he was enjoying what he was doing. RP 67-9.

Afterwards, M.D. felt gross and confused. RP 70.

M.D. detailed that on another occasion her dad gave her a liquid to clean herself with that stung and burned her private parts. RP 72.

Nonetheless, Dermendziev again laid her on a bed, placed a towel on her

head and began to touch her vagina with his hands and mouth. RP 74. This time, M.D. complained to her father that it hurt but Dermendziev responded by telling her it was fine. RP 74. M.D. testified these types of encounters occurred as many as ten times when she was between the ages of 6-8 years old. RP 100.

As she got older, when DSHS was called to the Dermendziev home for various reasons, Dermendziev warned her that if she told anyone about any problems in the family her family would be torn apart. RP 103, 107. One time DSHS responded to the Dermendziev home after a report that the Dermendziev's youngest child A1.D. had been inappropriately touched by M.D. and a friend while they were playing the game of truth or dare. RP 110, 114. During this investigation M.D., who was scared and embarrassed, denied to authorities that anyone had ever touched her inappropriately. RP 115.

M.D. did eventually confide the abuse with two close school friends, Kristina and Kassandra Rathbun. RP 104, 119. This disclosure eventually was relayed to a Blaine Middle School counselor and after meeting with the counselor, M.D. asked him not to report the abuse. RP 118, 133-4. Blaine Middle School could not find any documentation to support M.D.'s claim she met with a counselor over abuse allegations. RP

799. M.D. also testified that at some point A.D. told her Dermendziev had also sexually abused him but the two never discussed details of the abuse. RP 127.

M.D. mentioned the abuse to her mother, Isabelle, for the first time when she was in second or third grade but did not remember her mother doing or saying anything about it. RP 102. Isabelle confirmed at trial that M.D. did disclose abuse to her when she was in the second grade. RP 643. Isabelle said she was surprised but that she trusted her husband so she didn't ask M.D. any questions or take any action, instead choosing to ignore the allegation. Id. When M.D. was in middle school M.D. told Isabelle that she had told a counselor about the abuse and Isabelle responded by chastising her, asking M.D. why do you do that to our family. RP 644. When M.D. got a bit older however, Isabelle finally confronted Dermendziev with the abuse allegations and all Dermendziev said was "I'm sorry if I did." RP 645. After this confrontation, Isabelle grew concerned but when she questioned her next oldest child, A.D., he denied Dermendziev had sexually abused him. RP 646. Isabelle thereafter grew more careful with her third child, son Al.D. RP 649.

Middle child and son, A.D. testified that when he was in second grade his home was very chaotic with lots of verbal and physical abuse.

RP 178. He recalled that about this same time his father, Dermendziev began touching him inappropriately on his penis. RP 181-82, 185, 188. A.D. explained that when he cuddled in bed with his mom and dad, Dermendziev would touch his penis and masturbate him. RP 181. A.D. did not disclose this abuse until he was much older, after years of family volatility, drug use and years of running away from home. RP 210-11, 326. Though, A.D. testified that he did accuse his father of raping him during a family argument when he was about 8 years old. 189-90. Despite the confrontation, A.D. testified his mother and father ignored the accusation. Id.

A.D. disclosed to authorities for the first time that his dad had “raped him” in the middle of a meeting with DSHS, while he was in juvenile detention facing criminal charges after becoming upset when Dermendziev complained of A.D.’s behavior and drug problems. RP 195, 210-11. A.D. recanted this disclosure the next week to CPS investigator Bonnie Grovum telling her he was just “kidding” about the abuse allegations. RP 195, 538-39. In March of 2008 however, A.D. confirmed to family therapist Helen Edwards that his dad had touched him inappropriately when he was between 6-8 years old and that he thought his dad had touched his sister M.D. too. RP 474.

After A.D.'s disclosures were conveyed to the Blaine Police Department, Officer Deborah Hertz interviewed M.D. who confirmed Dermendziev had molested her when she was younger but gave no details. RP 552, 706, 737-38. When Hertz subsequently interviewed A.D., he confirmed that his father had molested him when he was 6-8 years old. RP 555, 559, 741.

After Dermendziev was no longer in the home, M.D. encountered him walking alone in Bellingham and feeling sorry for him, pulled over and offered Dermendziev a ride. RP 131. M.D. testified that during the car ride her father apologized to her and told her he knew his actions were wrong. RP 131. M.D. thought Dermendziev was referring to both the physical and sexual abuse. Id.

At trial, M.D.'s school mates, the Rathburn twins confirmed that M.D. had confided in them with details of being sexual abused by her father, including that he would place a towel over her face when he molested her. RP 381-82, 394-96. The Rathburn twin's mother explained that she took no action because M.D. was fearful of getting in trouble and that disclosing would break up the family. RP 387. A childhood friend of A.D.'s, Michael Arrington also confirmed that A.D. had confided in him when they were younger that his father had sexually abused him. RP 439.

Dimitar Dermendziev was charged with four counts of child molestation in the first degree for improper sexual contact with his older son A.D. (D.O.B. June 6th 1992) and his daughter M.A.(D.O.B. June 2nd 1990. CP 87-88. Specifically, Dermendziev was charged with three counts of molesting his daughter M.A. between June 2nd, 1996 and June 2nd, 1999. The fourth count alleged Dermendziev molested his son A.D. between June 6th 1998 and June 6th, 2001. CP 85-88. Following a jury trial Dermendziev was convicted as charged. CP 50-53.

C. ARGUMENT

- 1. Dermendziev waived his right to assert there was improper opinion testimony by failing to object below because the alleged error he asserts was isolated, elicited by Dermendziev himself and not a manifest error of constitutional magnitude that may be raised for the first time on appeal.**

Dermendziev contends his ex-wife Isabelle repeatedly testified she believed M.D. and A.D. claims that they were molested by Dermendziev. Br. of App at 14. The record belies Dermendziev's assertion. The record demonstrates Isabelle did not repeatedly opine on her children's credibility during trial and appropriately recounted her husband's demeanor when she finally confronted him with abuse allegations. See RP 647-48.

Dermendziev's allegations of error are simply not supported by the record and do not amount to a manifest error of constitutional magnitude.

Dermendzief did elicit opinion evidence on cross examination when he asked Isabelle if there was ever a time she did not believe M.D.'s abuse allegations. See RP 647-48, 696. But because Dermendzief failed to object, move to strike and actually elicited this isolated opinion testimony on cross examination in a failed effort to impeach Isabelle, Dermendzief waived his right to assert this error on appeal.

Parties are generally required to appeal only on the specific grounds objected to at trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S.1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Objecting below gives the trial court the opportunity to prevent or cure the error. State v. Kirkman, 159 Wn.2d 918, 923, 155 P.3d 125 (2007). Failure to object at the time of the testimony implies no error occurred in the first place. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991), *aff'd sub nom.*, McGinnis v. Blodgett, 67 F.3d 307 (1995). Failure to challenge the admissibility of proffered evidence essentially amounts to waiver of any legal objection to its being considered by the jury. State v. Guloy, 104 Wn.2d at 422.

Only where a defendant alleges a manifest error that affects a constitutional right may an issue be raised on appeal for the first time. RAP 2.5. To determine if an error is manifest, however, this Court is

required to determine whether the alleged error presents (1) a constitutional issue; (2) whether the error is manifest; having “practical and identifiable consequences,” (3) consider the merits of the constitutional issue; and (4) whether the error is harmless. State v. Lynn, 67 Wn.App.339, 345, 835 P.2d 251 (1992); State v. Madison, 53 Wn.App. 754, 760, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).

A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” State v. Lynn, 67 Wn.App. at 345 (1992). It is the defendant’s burden to demonstrate how the error actually affected his right to a fair trial such that the alleged constitutional error would fall within the narrow exception of RAP 2.5(a). Dermendziew cannot from the record below meet this burden because the alleged opinion evidence was isolated and in context to remaining evidence, could not have had any practical affect on the jury verdict.

Generally, witnesses may not testify in the form of opinion as to the guilt or veracity of another witness. State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001). Such an opinion violates a defendant’s right to a fair trial by an impartial jury and the right to have the jury make an independent evaluation of the facts. State v. Carlin, 40 Wn.App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by*, City of Seattle v.

Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993). In determining whether statements are in fact impermissible opinion testimony, courts generally consider the circumstances of the case, including the type of witnesses involved, the specific nature of the testimony, the nature of the charges, and nature of the defense and other evidence before the trier of fact. Seattle v. Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993), *citing*, State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

On direct examination Isabelle testified that when she finally confronted Dermendziev with abuse allegations, Dermendziev denied any wrongdoing but said he was sorry “if he did.” Isabelle was then asked about Dermendziev’s demeanor during this confrontation and Isabelle explained Dermendziev acted like he had done something because he was quiet and looking down. Isabelle’s testimony did not directly opine on Dermendziev’s guilt but instead described Dermendziev’s demeanor during a critical moment; when his wife finally asked him about the abuse their children had disclosed. A witness may properly describe the manner and demeanor of a witness at the time he is making statements and that description may include inferences. State v. Madison, 53 Wn. App. at 760. The prosecutor did not therefore improperly introduce opinion testimony.

Later, on cross examination however, Dermendziev asked Isabelle:

Q: Was there ever a time after you had learned, after M.D. had said my dad touched me was there ever a time that you did not believe her?

Isabelle then responded:

A: I believe her.

RP 696.

Although Isabelle's testimony on cross examination appears to be a near explicit statement by Isabelle that she believed her daughter, this testimony was isolated and contradicted by Isabelle herself who despite her statement, had failed to act or even discuss abuse allegations with her children when M.D. twice disclosed abuse to her when she was growing up. Isabelle's lack of response to M.D.'s allegations and to questions raised when DSHS contacted the Dermendziev about M.D. improperly touching the youngest, Al.D, were important in establishing that the children's disclosures were not credible and that the Dermendziev children had fabricated sexual abuse allegations. Because this statement was isolated, elicited by Dermendziev himself inadvertently and could not have, in context of this case had any practical or identifiable consequences of the trial, this limited testimony should not be considered manifest.

State v. Kirkman, 159 Wn.2d at 931. Particularly since the court instructed

and the attorneys reminded jurors they are the sole judges of credibility and of what weight to be given to the witnesses. CP 56-80. Jurors are presumed to follow the law. State v. Kirkman, 159 P.2d at 929.

Contrary to Dermendziev's argument, Isabelle's testimony is less concerning than the testimony in State v. Saunders, 120 Wn.App. 800, 86 P.3d 232 (2004) and State v. Jerrells, 83 Wn.App. 503, 925 P.2d 209 (1996). In Jerrells, the defendant's wife opined directly and repeatedly that she believed her children, who testified their stepfather had sexually abused them, were telling the truth. Here, unlike Jerrells, Isabelle did not directly opine repeatedly on her daughter or Dermendziev's credibility and her alleged improper testimony was not repeated or relied on in closing. Additionally, the prosecutor's question was not designed to elicit improper testimony.

In Saunders, a detective told jurors that Saunders' answers to questions "weren't always truthful." The Saunders court reversed finding the officer's testimony was improper and particularly influential because officers typically enjoy a "special aura of reliability." *See, State v. Saunders*, 120 Wn.App. at 812. Unlike Saunders, Isabelle was not a particularly influential witness in the context of this case and did not enjoy a special "aura of reliability" because despite being a mother and despite

her isolated statement that she supported her daughter, the facts of the case reflect she in fact did not react to M.D.'s abuse disclosures in a manner that would lead anyone to think she was concerned. Isabelle's testimony was important only in so far as she helped to establish a time line of events in her children's lives, give context to the situation the children were living in at the time of the abuse, to corroborate when and what A.D. and M.D. disclosed with respect to the sexual abuse allegations and to properly describe Dermendziev's demeanor when she finally confronted him with abuse allegations.

Under these circumstances, Isabelle's limited testimony did not undermine the fairness of Dermendziev's trial and does not warrant reversal of his convictions, where here Dermendziev failed to request a curative instruction, move to strike the alleged concerning testimony and in fact inadvertently elicited Isabelle's comment that she believed her daughter. "Appellate courts are and should be reluctant to conclude that questioning, to which no objection was made at trial, automatically gives rise to 'manifest constitutional error' reviewable for the first time on appeal." State v. Madison, 53 Wn.App. at 762.

2. **Dermendziev's trial attorney reasonably chose not to object to the isolated question at issue because it was not designed to elicit improper opinion evidence. Furthermore, Dermendziev's inadvertent eliciting of an improper opinion on cross examination did not prejudice Dermendziev's right to a fair trial.**

Next, Dermendziev asserts his trial attorney was constitutionally ineffective because he failed to object to Isabelle's alleged opinion evidence on direct testimony and inadvertently elicited an opinion from Isabelle on cross examination. Br. of App. at 19. Isabelle's testimony was not improper on direct examination because Isabelle was properly describing her husband's demeanor when she confronted him about M.D.'s abuse allegations. The opinion Dermendziev elicited inadvertently on cross examination could not have had any practical effect on the trial because it was isolated and in context, not particularly helpful or damaging to either the state or Dermendziev. Therefore Dermendziev's ineffective assistance of counsel claim should be rejected.

To demonstrate ineffective assistance of counsel, Dermendziev must demonstrate that his trial attorney's representation was deficient, and that he was prejudiced by the deficient representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 1052, 80 L.Ed. 2d 674 (1984), State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Unless a

defendant makes both showings, it cannot be said that the conviction resulted in an unreliable result warranting reversal. Strickland, 466 U.S. at 694. This Court need not address both prongs of the Strickland test if Dermendzief fails to make a showing under either prong. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Appellate review of trial counsel's performance is highly deferential and it is Dermendzief's burden to overcome this strong presumption based on the record below. In re Personal Restraint of Stenson, 142 Wn.2d 710, 742, 16 P.3d 1 (2001). Review of a challenge to effective assistance of counsel on appeal is de novo. State v. White, 80 Wn.App. 406, 907 P.2d 1310, *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1995).

To establish his trial attorney's representation was deficient, Dermendzief must show that his trial counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. State v. Thomas, 109 Wn.2d at 229-230. If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance of counsel. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *review denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2w 112 (1992).

To establish prejudice under the second prong of the Strickland test, Dermendziev must demonstrate that his trial counsel's deficient performance deprived him of a fair trial. Strickler v. Greene, 527 U.S. 263, 119 S.Ct 1936, 144 L.Ed 2d 286 (1999). That is, Dermendziev must show there is a reasonable probability, but for his counsel's errors, the result of the proceeding would have been different had the error not occurred. Strickland 466 U.S. at 694, State v. McFarland, 127 Wn.2d at 334-35.

The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will failure to object constitute ineffective assistance of counsel such to warrant reversal. State v. Madison, 53 Wn.App. at 763. It is Dermendziev's burden therefore, to demonstrate based on the record below, the absence of legitimate strategic or tactical reasons supporting the challenged conduct, that an objection to such evidence would likely be sustained and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. at 578.

The record reveals Dermendziev reasonably likely did not object to Isabelle's initial testimony (see RP 647-48) because the question was not designed to elicit opinion evidence and Isabelle was appropriately

describing Dermendzиеv's manner and demeanor when she confronted him with abuse allegations. On cross examination, Dermendzиеv's attorney's question was also not designed to elicit direct opinion evidence but was an attempt to impeach the reliability of the abuse allegations by demonstrating Isabelle found no merit in M.D.'s abuse allegations when M.D. repeatedly told Isabelle Dermendzиеv was abusing her.

Because Isabelle's testimony was limited, isolated and not strategically damaging and central to Dermendzиеv's defense given her inconsistent response to abuse allegations over time, any failure to object or move to strike Isabelle's at times confusing and contradictory responses was strategic and could not have had a prejudicial affect on Dermendzиеv's right to a fair trial. Dermendzиеv's ineffective assistance of counsel claim should be rejected.

3. The trial court's response to Dermendzиеv's request for clarification of a ruling after an objection during closing argument did not deprive Dermendzиеv of a fair trial.

Dermendzиеv contends for the first time on appeal that the trial court's statement in response to Dermendzиеv's request for clarification of a ruling on an objection during closing violated article IV, §16 of the Washington state constitution and deprived him of a fair trial. The record reveals that the trial court's explanation was invited and, when taken in

context, was not an improper comment on the evidence and could not have improperly affected the verdict.

Article IV, §16 states that “[j]udges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law.” A court’s statement constitutes a comment of the evidence“ if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). In determining whether a trial judge’s conduct or remarks amount to a comment on the evidence, reviewing courts evaluate the facts and circumstances of each case. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

Once the reviewing court determines the trial judge’s remark constitutes a comment on the evidence, the burden is on the State to show that a defendant was not prejudiced based on the record below. State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006). In assessing prejudice, the test is whether there is “overwhelming untainted evidence” to support the conviction. State v. Lane, 125 Wn.2d at 839.

Not all judicial comments are problematic. Only those statements that relay the opinion or “feeling of the trial court as to the truth value of the testimony of [a] witness” are classified as comments on the evidence.

State v. Trickel, 16 Wn.App. 18, 25, 553 P.2d 139 (1976). “Adverting to or assumption of an admitted or undisputed peripheral fact does not constitute constitutionally inhibited comment. State v. Hansen, 46 Wn.App. 292, 638 P.2d 108 (1986), *quoting* State v. Louie, 68 Wn.2d 304, 314, 413 P.2d 7 (1966). Similarly, an explanation of an evidentiary ruling on an objection is not a prohibited judicial comment. State v. Dykstra, 127 Wn.App. 1, 8, 110 P.3d 758 (2005), *review denied*, 156 Wn.2d 1004 (2006).

One circumstance reviewing courts consider in evaluating such claims is whether the alleged comment on the evidence was isolated or cumulative. State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). In Eisner the court explained,

A trial judge should not enter into the ‘fray of combat’ nor assume the role of counsel...An isolated instance of such conduct may be deemed harmless error, however, if it cannot be said to violate constitutional provision of judicial comment...In such instances, potential error may be cured by an instruction, if requested. On the other hand, the cumulative effect of repeated interjections by the court may constitute reversible error.

Id at 462-63.

In Eisner, for example the trial court repeatedly interjected questions to a child witness essentially producing the testimony that supported finding the defendant guilty. Here, the trial court made one

statement in response to Dermendziev's request and in doing so, did not enter the fray of combat.

During closing argument Dermendziev improperly argued "Now, if you believe the State's version, then you believe that Mr. Dermendziev is a pedophile. He is a person that preys on children to satisfy sexual desires." RP 923. The State objected, stating the defense was misrepresenting the State's case. Id. The trial court then sustained the objection but Dermendziev's attorney requested clarification. Id. In response to Dermendziev's inquiry the court explained:

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 has 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 924. Dermendziev's attorney then explained to the court and the jury he wasn't trying to suggest the State's burden was more than instructed by the court, only that the evidence presented was subject to more than one interpretation but that regardless he would move on. Dermendziev's attorney then continued with his closing argument without further objection. RP 924.

Contrary to Dermendziev's argument, the trial court's explanation to Dermendziev's attorney on the objection was appropriate, did not reflect the court's opinion regarding substantive testimony and served only to remind the parties that the State's burden of proof was not more nor less than stated in the instructions. Furthermore, the statement was isolated and did not draw a request from Dermendziev during or after closing statements for a curative instruction. Under these circumstances, the trial court's explanation is not problematic and does not implicate Dermendziev's right to a fair trial such that would require his conviction be reversed.

Nonetheless, Dermendziev insists the court's comment in this case is similar to that in State v. Arensmeyer, 6 Wn.App. 116, 120, 491 P.2d 1305 (1971). In Arensmeyer however, the trial court interrupted the defendant's closing arguments to say counsel was mistaken as to the evidence pertaining to the police officer's experience. The appellate court reversed because although the trial court was duty bound to restrict counsel's argument to the facts, the "court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Id at 120. An attempt to implicate the

court's logic onto counsel may implicate a defendant's sixth amendment right to counsel.

Contrary to Arensmeyer case, the trial court in this case did not interrupt closing arguments to compel counsel to only draw an inference the court believed was logical but was appropriately, neutrally responding to a concern, by the court, that the burden of proof was being misconstrued. The trial court is responsible for ensuring the attorney's arguments are not only confined to the facts but also confined to the law as set forth in the jury instructions as to avoid confusion or. State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000). Given the context of the court's limited statement in this case, Dermendziev's claim should be rejected.

4. The term of community custody for counts I, II, and III should be amended to reflect the appropriate term of community custody of 24 months.

Next, Dermendziev requests his judgment and sentence be amended to reflect the term of community custody that was applicable when his crimes were committed. Br. of App. at 26. Specifically, Dermendziev requests the term of community custody for counts I, II and III be amended from 36 to 24 months pursuant to former RCW 9.94A.120(9).

When a court sentences a defendant for a sex offense committed between July 1st, 1990 and June 6th, 1996, former RCW 9.94A.120(9)(b) requires the court impose “community placement for two years or up to the period of earned early release whichever is longer.” Here, Dermendziev was found guilty of three counts of child molestation that occurred between June 2nd 1996 and June 2nd 1999. The judgment and sentence lists the date of offense is June 2nd 1996. It appears however, the court imposed 36 months community supervision based on the statute that went into effect June 5th 1996.

The State concedes error and does not object to this matter being remanded to correct the term of community custody ordered in the judgment and sentence in counts I through III.

D. CONCLUSION

The State respectfully requests that this court affirm Dermendziev’s conviction for four counts of child molestation in the first degree and to remand this matter to the trial court to correct the judgment and sentence in counts I, II and III to reflect the correct community placement provision of twenty-four months as to these counts.

Respectfully submitted this 9th day of December, 2009.

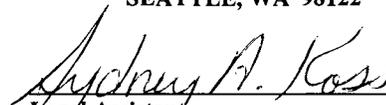


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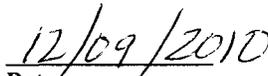
CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to this Court, and appellant's counsel, Christopher Gibson, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. MADISON STREET
SEATTLE, WA 98122



Legal Assistant



Date