

No. 48011-5  
Lewis County Superior Court No. 11-1-00790-6

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

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In re the Personal Restraint of:

TODD DALE PHELPS,

Petitioner.

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REPLY BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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**I.**  
**REPLY ARGUMENT**

In this brief, Phelps replies to only some of the State's arguments. This does not mean that Phelps agrees with the State's arguments on the issues he does not address. Rather, Phelps believes that no reply is required because the State's arguments are not persuasive.

A. THE PROSECUTOR USED THE CONCEPT OF GROOMING AS "PROFILE" EVIDENCE. THIS IS CLEARLY IMPERMISSIBLE UNDER *STATE V. BRAHAM*.<sup>1</sup>

The State's Response Brief (BOR) minimizes the prosecutor's use of the psychological term and concept of "grooming" throughout the trial. The prosecutor used "grooming" repeatedly and in the same context it would have been used had the State sought to introduce the psychological concept through an expert witness.

The State argues that evidence of grooming is not "per se" inadmissible. *Braham* held that testimony about grooming was inadmissible profile testimony that merely identifies a person as a member of a group likely to commit a crime. It has never been overruled. And other cases have reached the same conclusion about similar testimony. *See* PRP at pages 13-14.

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<sup>1</sup> *State v. Braham*, 67 Wn. App. 930, 841 P.2d 785 (1992).

There is no distinction between the use of the concept of grooming in *Braham* and the prosecutor's actions in this case. Here, the prosecutor argued that the process of "grooming" included "trying to get someone to trust you," "being nice," engaging in physical contact, meeting with a child's parents to deflect their concerns, texting, talking about other sexual relationships, and isolating the child. According to the prosecutor, because Phelps did all those things, i.e., fit the profile of a child rapist, he was therefore guilty.

And even though the prosecutor used the concept in the same way that an expert might have, there was no foundation for his personal list of the behaviors that he asserted were grooming. He clearly asked the jury to make the inference that anyone who engaged in such behaviors was a child rapist.

The State argues that even if the prosecutor's actions were misconduct, that misconduct was harmless because the rest of the evidence was "overwhelming." One might ask: If the evidence was so overwhelming, why did the trial prosecutor resort to profile evidence to convince the jury that Phelps was guilty?

Prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012). As Phelps pointed out in his Petition,

in this case there was delayed reporting, conflicting statements and little or no forensic evidence. The misconduct was so pervasive it could not have been cured by an instruction. There is a substantial likelihood that the misconduct could very well have tipped the jury's decision.

B. *STATE V. AKINS*<sup>2</sup> IS DIRECTLY ON POINT

The State argues that *Akins* is not point because 1) Kansas requires expert testimony on grooming and 2) the prosecutor in *Akins* argued "facts not in evidence." Neither of these two points distinguishes *Akins* from the law in Washington at the time this case was tried.

While Washington has never explicitly held that the concept of grooming is not within the common understanding of the jurors, it is clear from cases concerning similar psychological profiles that it is a concept that can only be supported by expert psychological testimony. *See, e.g., State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984) (testimony on battered woman syndrome admissible to explain why battered woman would not leave her mate, not inform police or friends, and fear increased aggression; testimony would be helpful to a jury in understanding these phenomena which were not within common understanding of lay persons);

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<sup>2</sup> *State v. Akins*, 298 Kan. 592, 315 P.3d 868 (2014).

*State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988) (in rape prosecution, State's expert testimony on battered woman syndrome admissible to help the jury understand the victim's delays in reporting alleged rape and failing to discontinue relationship with the defendant); *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (expert testimony admissible regarding battered child syndrome to aid the jury in understanding the way in which the child perceives the imminence of danger and the tendency to use deadly force to repel the danger).

Well before the trial of this case, other courts held that grooming evidence typically requires expert testimony. *See, e.g., State v. Berosik*, 352 Mont. 16, 23, 214 P.3d 776 (2009) (grooming testimony "concerned a subject about which lay persons would have little or no experience"); *State v. Sorabella*, 277 Conn. 155, 211-14, 891 A.2d 897, *cert. denied*, 549 U.S. 821, 127 S.Ct. 131, 166 L.Ed.2d 36 (2006) (same); *see also Morris v. State*, 361 S.W.3d 649, 659-62 (Tex.Crim.App. 2011) (holding that the phenomenon of grooming children for sexual molestation is an appropriate topic for *expert* testimony).

Like the prosecutor in *Akins*, the prosecutor in this case also argued "facts not in evidence." The prosecutor asserted in closing argument that isolation, trust, secrecy, text messaging and emotional support were hallmarks of grooming. But no one testified to that. The prosecutor was

an unsworn “expert” witness. The prosecutor then cited behaviors that he believed were characteristics of grooming and that fit his view of the evidence. This is improper.

C. TO THE EXTENT THAT “GROOMING” IS WITHIN THE COMMON UNDERSTANDING OF THE JURORS, THAT “COMMON UNDERSTANDING” IS AN IMPROPER CONSIDERATION

The concept of grooming is perpetrator profile testimony. When the prosecutor introduced the concept during voir dire, it was clear that jurors understand the concept to include with it the implied assumption that a person who engages in grooming is the sort of person who would commit child rape. Thus, even without expert testimony to explain grooming behaviors, the prosecutor erred. It is impermissible for the prosecutor make arguments that invoke the jurors’ prejudices or misconceptions about “profiles” in a quest for a guilty finding. In essence the prosecutor was arguing that the conflicting evidence could be ignored because the jury knew that a person who befriended a troubled girl, texted her repeatedly and kissed her, was the kind of person who committed rape.

## II. CONCLUSION

This Personal Restraint Petition is not frivolous. Thus, the Acting Chief Judge should refer the petition to a panel of judges for a determination on the merits. RAP 16.11(b).

DATED this 15<sup>TH</sup> day of March, 2016.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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