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Court of Appeals

Division III

State of Washington

COA No. 32968-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ERNEST GLASGOW BARELA, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

The Honorable Michael McCarthy

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the defendant's motion to arrest judgment.
2. The prosecutor's violation of a final order in limine allowed the jury to be tainted.
3. The trial court excluded relevant evidence.
4. The prosecutor committed misconduct in closing argument.
5. Cumulative error denied Mr. Barela a fair trial.
6. The court erred in admitting evidence about delayed reporting.
7. The trial court erroneously admitted hearsay evidence.
8. The State flagrantly misstated the burden of proof.
9. The assigned errors individually require reversal, and cumulatively require reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying the defendant's motion to arrest judgment and failing to order a new trial, which was based on:
 - a. The prosecutor's violation of a final order in limine allowing the jury to be tainted with discussions from a self-professed expert potential juror, stating that a child's sex abuse complaint is normally credible, with a delay in reporting;

b. The trial court's ruling sustaining the State's objection to relevant evidence of the complainant's mother's marital infidelity, which was crucial to the defense theory and supported by expert Dr. Johnson; and

c. The prosecutor's acts of committing several types of misconduct in closing argument, including expressions of personal opinion to which the defense objected, and disparagement of defense counsel?

2. Did cumulative error deny Mr. Barela a fair trial, including the errors addressed in Mr. Barela's motion to arrest judgment, and also:

a. The court's erroneous order allowing Detective Janis to testify regarding "delayed reporting" and is theory that it is normal or common for child sex abuse victims;

b. The trial court's erroneous admission of hearsay evidence that did not meet the "hue and cry" doctrine; and

c. The State's flagrant misstatement of the burden of proof beyond a reasonable doubt, by stating twice that the jury had to have a reason to find Mr. Barela not guilty?

C. STATEMENT OF THE CASE

1. Charging and conviction. Ernest Barela was charged with multiple counts of incest, child molestation, and rape of a child, based on allegations of conduct with E.B., his daughter then aged 11 and 12, in

January through April, 2012. The acts allegedly occurred in the small mobile or trailer home shared by Mr. Barela, his wife Michele Barela, and their two children. CP 1-2, 3, 13. The case commenced when E.B. stated to a youth pastor at her church in Yakima that she had been molested by her father. The pastor repeated the claim to E.B.'s mother, and subsequently E.B. was interviewed by Detective Chad Janis of the Yakima Police Department, and medically examined. CP 1-2; 10/1/14RP at 524.

At trial, the court partially granted the defense motion for directed verdicts, dismissing count 1 for lack of evidence of sexual intercourse, and allowing that count 2 could go forward to the jury, but only as the charge of second degree incest, which requires only sexual contact. 10/7/14RP at 764-68.

The jury found Mr. Barela not guilty on counts 4 and 6, the remaining offenses which required proof of intercourse. CP 88, 92; 10/8/14RP at 905-06. The counts of conviction – counts 2, 3, 5, 7 and 8 – were found by the jury to be aggravated by being part of an ongoing pattern of abuse.¹ 12/1/14RP at 944.

¹ The original charges and the counts that went to the jury, and the verdicts, were as follows.

Count 1, first degree rape of a child (charging period January 1-20, 2012). [DISMISSED]
Count 2 (second degree incest, originally charged as first degree incest) – January 1-20, 2012

At sentencing, the parties agreed that counts 2 and 3 (January molestation and incest), and counts 7 and 8 (March molestation and incest), were the same criminal conduct, with an offender score establishing a standard range of 98 to 130 months on count 3 (the first degree felony), and the other counts to be sentenced with concurrent terms. 12/1/14RP at 945-46, 956-59. The defense sought a sentence of 115 months on the count. 12/1/14RP at 959. The court imposed a sentence of 54 months on count 2; 130 months plus a 50 month exceptional term for an indeterminate sentence of 180 months to Life on count 3; 75 months as to count 5; 75 months on count 7, and 54 months on count 8. 12/1/14RP at 960-61; CP 133-35; see CP 131-32 (court's findings on exceptional sentence).

2. Trial. Several witnesses were allowed to repeat E.B.'s claim of molestation on April 12, 2012, under the "hue and cry" doctrine or fact of complaint exception to the hearsay rule. See also Part D.2, infra. Ms. Sydney Mutch was a college student working as a youth leader at the Stone Church in Yakima, in April of 2012. On April 11, E.B., a youth

Count 3 (first degree child molestation) – January 1-20, 2012
Count 4 [acquitted] (second degree rape of a child) – April 9, 2012
Count 5 (second degree child molestation) – April 9, 2012
Count 6 [acquitted] (first degree incest) -- April 9, 2012
Count 7 (second degree child molestation) – March 15-31, 2012
Count 8 (second degree incest) – March 15-31, 2012.

CP 56-73.

group participant, approached Sydney after a class and stated that her father, Ernest Barela, “had been molesting her.” 10/1/14RP at 362-64.

Ms. Miel Lindseth, a pastor at the Stone Church, stated that Sydney brought E.B. to her in a prayer room, where E.B. disclosed information to Ms. Lindseth; Ms. Lindseth summoned E.B.’s mother Michelle Barela and “made sure” that E.B. told her mother the information. 10/1/14RP at 374-77.

E.B. testified. 10/1/14RP at 380. She described the circumstances of the out-of-court claim she had made to youth pastors, including Sydney and Miel, at the Stone Church where she told personnel that for the past several years, her father had been “hurting me, sexually abusing me.” 10/1/14RP at 383-86.

Regarding April 9, 2012, E.B. claimed that the defendant approached her in her room in the family’s mobile home and lay next her on the bed, waking her up. 10/1/14RP at 392. E.B. said that the defendant “tried to put his penis between my legs.” 10/1/14RP at 395. The conduct was described as putting his penis “between my thighs.” 10/1/14RP at 396. He shortly thereafter got up and left. 10/1/14RP at 397.

In March of 2012, E.B. said, Mr. Barela approached E.B. while she was watching a show called Merlin in her parents’ room. 10/1/14RP at 404. The defendant watched TV with her briefly, but then started rubbing

her leg, took her leggings down, and then moved her to the bed and put his penis “between [her] legs.” 10/1/14RP at 407-10.

In January of 2012, according to E.B., the defendant had grabbed her chest, rubbed around a little bit, and said to her, “You’re developing well.” 10/1/14RP at 412. The defendant rubbed underneath her shirt. 10/1/14RP at 413. He pulled his pants down. 10/1/14RP at 413.

E.B. alleged that occurrences like this happened beginning when she was six or seven years old. 10/1/14RP at 414. She claimed that these things happened possibly over a hundred times. 10/1/14RP at 419. At one time there was an incident of the defendant having his pants down or he took his sleeping shorts off. He then had E.B. sit on his lap, and he hugged her. E.B. told her mother a couple of days later that her father had “hugged me too tight” because she did not know what words to use; her mother said sometimes people hug a little tight, because she didn’t know what E.B. really meant. 10/1/14RP at 415-17.

The complainant’s mother, Michelle Barela, repeated that she also heard the allegations from E.B. after she was contacted by the Stone Church on April 11. 10/1/14RP at 489-92. At home the next day, Ms. Barela woke the defendant while he was sleeping “and confronted him” with the fact that E.B. had said at the Church that he molested her and that CPS had been contacted. 10/1/14RP at 493. The defendant allegedly said,

“Yes. I’ve been inappropriate with her.” 10/1/14RP at 493. He stated that “[t]here was no sex.” 10/1/14RP at 494. Mr. Barela left the home after packing a bag, and asked if there was any hope for “our family.” 10/1/14RP at 495. On April 13, E.B. got a call from CPS asking her to bring E.B. to the Yakima Police Department. 10/1/14RP at 496-97.

3. Defense experts. Two experts testified for the defense. Dr. Robert Mendelson was a pediatrician with experience evaluating allegations of child sexual abuse as part of the CARES coalition, associated with Kaiser Hospital in Oregon. 10/6/14RP at 580-81. Dr. Mendelson reviewed the police reports and medical reports regarding E.B. 10/6/14RP at 592-94. He gave his professional opinion that a complete rectal examination of E.B. would have been the proper standard of care in her case, to determine if the abuse alleged could have occurred or not. 10/6/14RP at 594. This would have revealed trauma. 10/6/14RP at 595.²

Dr. Christopher Johnson, a forensic psychologist who works in Clark County, Washington assessing allegations of sexual abuse, reviewed the police interview of E.B. that was conducted by Detective Chad Janis.

² Dr. Roy Simms, a prosecution witness and E.B.’s pediatrician, who had not reviewed the police reports or interviews, testified that a more complete but difficult rectal examination of a child would not necessarily result in findings, dependent on the timing and circumstances of the allegations. 10/7/14RP at 750-53. Dr. Simms conceded, however, that when these examinations are done in abuse cases, they are done properly and according to a standard of care. 10/7/14RP at 760-62.

10/6/14RP at 654, 661. Detective Janis appeared to have generally followed the Harborview Protocol for child interviewing regarding non-leading questions. However, in this case at no point had any assessment been done on the social history of E.B., the history of the parents, and other critical components for assessing the child's sex abuse allegations. 10/6/14RP at 665, 669. In addition, the detective had not done an interview with the first person to whom E.B. made the claims, Alyssa Brandt; this made it difficult to assess the child's assertions of abuse, including in other interviews. 10/6/14RP at 668-69.

D. ARGUMENT

1. THE COURT SHOULD HAVE GRANTED MR. BARELA'S POST-TRIAL MOTION TO ARREST JUDGMENT BECAUSE THE DEFENDANT DID NOT HAVE A FAIR TRIAL.

(a). **Post-trial motion**. A defendant may bring a post-trial motion arguing that his trial was unfair and violated his Due Process rights under the Fourteenth Amendment. U.S. Const. amend. 14. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).³

³ The appellate courts review a court's decision to deny a motion for a new trial for an abuse of discretion. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). The reviewing court will normally reverse a trial court's exercise of discretion only if it is manifestly unreasonable, but if the ruling is predicated on legal error, it is reviewed de novo. State v. Powell, 126 Wn.2d

Here, Mr. Barela brought a post-trial motion to arrest judgment and for a new trial, by noting specific violations of various of the court's orders in limine. CP 29-31; CP 92; CP 98-100; CP 109-15; CP 126-30; see CP 101 (State's response). In addition to noting evidentiary and other issues, 12/1/14RP at 914-21, Mr. Barela argued that taint of the jury caused during jury selection, and the State's improper closing argument, required reversal, where the jury was prejudiced to believe a child who delayed reporting, and where the prosecutor in rebuttal argument made statements of personal opinion, and disparaged defense counsel. 12/1/14RP at 922-39.

Notably, prior to jury selection, the defense had moved in limine to preclude the State in voir dire from engaging the prospective jurors in discussions regarding the delayed reporting of child abuse by the complainant or in other discussions which would affect the deliberations of jurors who were ultimately seated. CP 116-22 (Motions in Limine).

Also prior to trial, Mr. Barela had moved to prohibit the prosecutor from expressing a belief in the testimony of the State's witnesses, vouching for witness credibility, and expressing a personal opinion as to guilt. CP 116-22 (Defendant's Motions in Limine) (citing, inter alia, State

244, 258, 893 P.2d 615 (1995); Edwards v. Le Due, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010).

v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)); 9/29/14RP at 61-67.⁴

(b). Errors alleged in post-trial motion.

(i). Jury taint – ‘expert’ juror discussing child credibility and the ‘normality’ of delayed reporting in voir dire.

As noted prior to trial Mr. Barela asked that there be no transforming the process of jury selection into a brain-storming type of discussion of delayed reporting with potential jurors. CP 124 (First supplemental Defendant’s motions in limine); 9/29/14RP at 49-52. The court had denied this motion, stating that it was appropriate for the State to be able to identify potential jurors who would support a theory of delayed reporting. 9/29/14RP at 53.

The extensive discussion that ensued in voir dire violated Mr. Barela’s right to a fair trial. The defense objection to this predicted event was preserved, and it was also manifest constitutional error under RAP 2.5(a) and State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). 12/1/14RP at 929-22; 9/29/14RP at 49; 9/30/14RP at 262. The jury was so tainted by the remarks of potential jurors during voir dire that Due

⁴The defense motions in limine preserved these objections. RAP 2.5. When a party makes a motion prior to trial, and the trial court considers and issues a final ruling, the movant is deemed to have preserved the matter for purposes of the trial. See State v. McDaniell, 155 Wn. App. 829, 853 n. 18, 230 P.3d 245 (2010); State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

Process was violated. State v. Strange, ___ Wn. App. ___, 354 P.3d 917, 920 (2015) (citing Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997)); U.S. Const. amend. 14.

As Mr. Barela argued post-trial, during the several rounds of juror questioning, there were repeated questions from the prosecutor about whether the jury could believe a child who delayed reporting abuse. 12/1/14RP at 921-25. The prosecutor questioned the panel extensively about whether the jurors understood that delayed reporting did not render a child's claim of sexual abuse false, or whether they would "hold that . . . against her" that she waited a period of time. 9/30/14RP at 245-46, 255.

As a result, several jurors spoke up to say that delayed reporting happens all the time, what with reports being made to churches and daycares, and a juror opined that delay in reporting can follow abuse because of the child being scared. 9/30/14RP at 245-46, 255. Another juror even agreed with the prosecutor that the passage of a large period to time could actually result in memory difficulties because they had experienced something "painful and scar and traumatic." 9/30/14RP at 257-58. Another juror opined that an abused child might delay reporting because of embarrassment, guilt, or shame. 9/30/14RP at 260.

During the State's second round of voir dire, the prosecutor and the panel delved into the topic again. In the post-trial motion, Mr. Barela

noted that this round of questioning resulted in even worse, prejudicial remarks by a juror who was, or professed to be, a qualified expert in evaluating sex abuse. See 12/1/14RP at 921-23. This juror, Wilkensen, described how he had worked extensively with children who had been sexually abused. 9/30/14RP at 291-92. Answering the prosecutor's questions, he confirmed the impressions of other jurors who had spoke earlier, stating it was absolutely true that abused children do delay reporting. 9/30/14RP at 292.

This caused taint of the jury. All of these juror statements equated delay in reporting with reasons why an *actually abused* child might fail to timely report the abuse that *did occur*. As a result the jury pool and jury were pre-set to deem delayed reporting to be a *hallmark of abuse*. But the Washington Constitution guarantees a criminal defendant the right to a fair trial by "unbiased jurors." Wash. Const., art. I, § 22; State v. Momah, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). The Sixth Amendment to the United States Constitution also guarantees the right to a fair trial by impartial jurors. Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Mach v. Stewart, 137 F.3d at 633; U.S. Const. amend. 6.

The trial court's post-trial ruling on this matter was error. In its ruling denying the motion for new trial, the court stated that what stood

out in the court's mind was that an actual witness Dr. Johnson (a defense witness) stated that delay in reporting is the norm -- the court held that therefore the jury selection process did not have any effect on the jury's decision-making process. 12/1/14RP at 926.

However, contrary to the court's reasoning, although Dr. Johnson was a defense witness, his testimony in fact dramatically contributed to the prejudicial effect of the voir dire discussions, exacerbating the taint of the juror statements during selection. Dr. Johnson's testimony unfortunately acted to confirm the statements of juror Wilkensen and others, who had decided amongst themselves that delayed reporting is characteristic of genuine child sex abuse victims. Additionally, the juror statements in voir dire, and their taint, was further exacerbated by Detective Janis being allowed (improperly) to testify to his assessment of delayed reporting in the Barela case as being normal. All of this was highly prejudicial, throughout trial.⁵

For these reasons, the defendant's trial was unfair, similar to Mach v. Stewart, supra, 137 F.3d 630. In Mach, the Ninth Circuit held that a

⁵ These circumstances during trial rendered the post-trial motion a proper manner of re-raising the issue of jury taint that Mr. Barela, before jury selection, had unsuccessfully sought to avoid. Mr. Barela had also moved unsuccessfully in limine to prevent Detective Chad Janis from testifying regarding "delay in . . . victim reporting," 12/1/14RP at 921, i.e., testifying as to why delays in reporting could be a result of natural occurrences incident to sexual abuse and post-abuse periods. See Part D.2, infra.

prospective juror who was a social worker had tainted the entire jury venire with her responses to questions from counsel and the court. Mach, 137 F.3d at 631–33. The defendant was charged with sexual misconduct with a minor and, in response to questions, the prospective juror, who had worked with a psychologist on these issues, stated that “sexual assault had been confirmed in every case in which one of her clients reported such an assault.” Mach, 137 F.3d at 632.

Here, the taint was worse. Juror Wilkensen described how he had worked at a psychiatric hospital for nine years, and served as a program manager at “a long-term treatment facility for severely emotionally disturbed children and teens who had been sexually abused.” 9/30/14RP at 291-92. His remarks confirmed the earlier jurors’ statements that genuinely abused children delay reporting because of fear and trauma, particularly where Wilkensen stated with authority that “delay in disclosing abuse” was “absolutely” common in his work. 9/30/14RP at 292.

The jury was embedded with the idea that delayed reporting equaled the defendant’s guilt. Mr. Barela did not have a constitutionally fair trial with this jury. Mach, 137 F.3d at 632; cf. State v. Strange, 354 P.3d at 920-21 (holding that jury venire was not tainted where no prospective juror professed expertise about sex cases, and no jurors stated

that children who are sexually abused do not lie about their abuse.

Strange, 354 P.3d at 920-21. Reversal of Mr. Barela's convictions is required.

(ii) Relevant Evidence improperly excluded.

Mr. Barela also argued post-trial that the trial court's erroneous limitation of the defense questioning of Ms. Barela regarding her marital infidelity during the marriage was error. Defense counsel was prohibited from making this inquiry, by State objection. CP 110 (Motion to arrest judgment); 10/1/14RP at 512 (defense questioning and State's objection).

This was error. Relevant evidence is admissible. ER 401, ER 402. The evidence of infidelity was specifically relevant to the defense theory, supported by Dr. Johnson, who had worked extensively in the criminal case context of evaluating sexual abuse cases. State v. Bernson, 40 Wn. App. 729, 735, 700 P.2d 758, opinion modified on denial of reconsideration (1985) (discussing relevant evidence of knife blade attributes, and expert testimony regarding knife markings); 10/6/14RP at 654, 657. The evidence was necessary because it strongly supported Dr. Johnson's testimony that, in order to correctly employ the evaluative standards of the National Institute of Child and Human Development – from which the “Harborview protocol” emanates – the police in this case

needed to, but failed to inquire into possible alternative explanations for claims of sexual abuse. 10/6/14RP at 659-72.

The erroneous exclusion of evidence is harmless only if, within reasonable probabilities, the error did not affect the result of the trial.

State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Exclusion of this evidence prejudiced the defense's ability to pursue its theory of the case, based on Dr. Christopher Johnson's expert opinion that the family dynamic assessment was a crucial inquiry to be made in evaluating a child's allegations in a sex abuse case, something that the Yakima Police Department, Detective Janis, and the prosecution had not done. It was important for the defense to support Dr. Johnson's testimony with information regarding conflict in the Barela family, and, given the expert's experience in evaluating sexual abuse cases in the law enforcement context, this evidence would have been particularly persuasive to the jury. The error requires reversal.

(iii). Misconduct in closing argument.

As Mr. Barela argued in his motion to arrest judgment, the State's attorney committed misconduct in closing argument. 12/1/14RP at 914.

Misconduct in closing requires reversal if within reasonable probabilities it affected the outcome of trial. State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004). In addition, flagrant, incurable misconduct may be

raised for the first time on appeal, in particular as an aspect of cumulative error. See, e.g., In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); see also State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, first, the defense had objected during closing argument when the prosecutor stated that he had not understood Ms. Barela to testify that the defendant told her his inappropriate conduct with E.B. “wasn’t sexual” rather than him saying there was no sex. 10/7/14RP at 877. The prosecutor had argued, “Gosh, I didn’t hear that. I didn’t hear that at all.” 10/7/14RP at 877. The prosecutor also stated that this was “a sweet, little slick spin on the evidence.” 10/7/14RP at 877. The court sustained the defense objection, stating,

You can’t – you can’t express your own opinion, Mr. Jackson. When you say “I didn’t hear that,” you can’t use – you can’t say that.

10/7/14RP at 877. The argument was improper because it is misconduct for a prosecutor to state a personal belief as to either the defendant's guilt or as to the credibility of witnesses. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); accord, State v. Reed, 102 Wn.2d 140, 145–46, 684 P.2d 699 (1984) (comment on credibility of defense witnesses). It is specifically improper for the prosecutor to vouch for the victim's

credibility, including by personal opinion. Improper vouching occurs when the prosecutor expresses a personal belief as to the case. State v. Thorgerson, 172 Wn.2d 438, 443-44, 258 P.3d 43 (2011); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

In closing argument, the prosecutor also *disparaged* defense counsel, which is error. Disparaging the role of defense counsel during closing argument in order to make it appear that only the prosecutor is serving the cause of justice is improper prosecutorial conduct. State v. Gonzales, 111 Wn. App. 276, 282–84, 45 P.3d 205 (2002). A closing argument may not “draw the cloak of righteousness around the prosecutor in his personal status as government attorney and impugn . . . the integrity of defense counsel.” Id. at 283 (quoting United States v. Frascone, 747 F.2d 953, 957–58 (5th Cir.1984)).

Here, as counsel argued post-trial, the prosecutor on several occasions derided the defense effort to show reasonable doubt, by telling the jury to not be fooled by the defense, which was trying to point the jury down the road toward concluding that this abuse did not happen.

10/8/14RP at 931; see 10/7/14RP at 871-72 (stating that “Mr. Walker weaves his facts” in order to “chip away” at the case and show it “never happened” and the child is “lying”). The prosecutor also derisively referred to the defense efforts as a “weaving of the facts” as part of an

effort of trying to plant a seed of doubt. 10/8/14RP at 931-32, see 10/7/14RP at 875 (stating that the defense was trying to say the State was trying to pull a big ruse over the jury). The impropriety of this conduct in closing is rooted both in the promotion of the prosecutor as the champion of justice and the disparagement of defense counsel as an obstacle to justice, and these standards have long bound prosecutors – rendering the State’s argument flagrant and incurable. See Gonzales, 111 Wn. App. at 283–84. Reversal is required.

(c). **Reversal required.** The trial court should have granted the motion for a new trial. The jury pool was so tainted that the defendant did not have a fair trial. Mach v. Stewart, 137 F.3d at 632. The court wrongly excluded relevant evidence necessary to support the defense theory. ER 401, ER 402. Personal opinion and vouching require reversal where the case at trial hinged on whether or not the jury found the victim to be credible, as here. See State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). See also, e.g., State v. Holmes, supra, 122 Wn. App. at 447 (reversing molestation convictions for misconduct by the prosecutor, because although the victims’ testimony was compelling, the defense’s theory of the case was also believable). Given the errors below, and the competing factual assertions and arguments in the case, a new trial is required.

2. CUMULATIVE ERROR REQUIRES REVERSAL, INCLUDING THE ERRORS RAISED POST-TRIAL AND ADDITIONAL TRIAL ERROR.

(a). **Cumulative error.** The cumulative error doctrine allows this Court to reverse for multiple errors that together resulted in denial of the Due Process right of a fair trial, and this rule protects a principle so important that it applies even in cases where, as here, some of the errors were inadequately preserved. State v. Russell, 125 Wn.2d at 93; State v. Alexander, 64 Wn. App. at 150; U.S. Const. amend. 14, Wash. Const. art. 1, § 3. This Court also has discretion under RAP 2.5(a)(3) to review all errors as part of a cumulative error analysis to ensure that Mr. Barela was not deprived of a fair trial. State v. Alexander, 64 Wn. App. at 150-51.

(b). **Improper bolstering and credibility testimony; Detective Janis.** A police officer's authoritative testimony on the veracity of a crime victim or witness raises additional concerns beyond merely the general rule prohibiting comments on credibility. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); State v. Rafay, 168 Wn. App. 734, 805, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013).

In this case, the testimony of Detective Chad Janis, a Yakima police officer with the Sexual Assault Unit, was permitted to be injected into the case before, and indeed in the absence of, any targeted attack on E.B.'s truthfulness. These were improper comments on credibility, and

inadmissible, and further, none of this should have been permitted in the State's case-in-chief. State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009). Prior to trial, the defendant moved to limit general discussion of delayed reporting by Detective Janis, and alternatively, to preclude it prior to any attack on credibility for delayed reporting. CP 124 (First supplemental Defendant's motions in limine); 9/29/14RP at 48-49, 51-52. The trial court denied the motion, holding that it was appropriate to allow some testimony in this regard in the State's case-in-chief. 9/29/14RP at 53.

Thus, Detective Janis was allowed to testify extensively in direct examination on the first day of trial about the concept of "delayed disclosure" and discuss this as associated with traits the jury would understand as common to actually abused children – such as fear of the abuser, or on the other hand, dependence or loyalty. 10/1/14RP at 540-41. He discussed the concept of "triggering events," leading to disclosures, and noted the specific child's reason's for delay is unique to that child. 10/1/14RP at 541-42. The prosecutor then questioned the detective expressly about E.B.; the witness noted that an abused child may delay but later disclose abuse to "a family member or church member;" and he described the fear a child has that causes delay. 10/1/14RP at 541-45. The detective then recounted that E.B. made disclosures to church

members and then her mother, and repeated that he (the detective) had interviewed all these people and that he was a trial expert on delayed disclosure in abuse cases, and taught classes in that area. 10/1/14RP at 545-48.

The defense again objected during the testimony; and the court overruled the objection. 10/1/14RP at 524, 541, 544. The trial court erred. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (court reviews a trial court's evidentiary rulings for an abuse of discretion). This evidence requires reversal. Officer testimony vouching for victim credibility carries a special aura of reliability. State v. Kirkman, 159 Wn.2d at 927; State v. Rafay, 168 Wn. App. at 805. The detective's testimony in this case very likely swayed the lay jurors.

(c). **Hue and Cry**. The hearsay rule was violated by the multiple witnesses who were allowed to testify to E.B.'s assertions. ER 801, ER 802. The defense moved twice under the "hue and cry" requirements to exclude E.B.'s hearsay, through Sydney Mutch's testimony, and those of the other witnesses. 9/29/14RP at 77. E.B. had revealed that she actually had made a similar, earlier claim that she was scared to a school friend, Alyssa Brant, a "couple weeks" previously to the April 12 hearsay. 10/1/14RP at 386. See also 10/1/14RP at 554 (Detective Janis);

10/1/14RP at 339-42 (second ruling, allowing witness Sydney Mutch to testify under “hue and cry”).

Allowing this testimony was error. The fact of complaint or “hue and cry” doctrine is a specific case law exception to the hearsay rule. State v. DeBolt, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). It allows the State in a sex offense case to present evidence that the victim made a timely complaint to someone after the assault. State v. Alexander, 64 Wn. App. at 151; State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983).

But this rule is grounded in the assumption that, in rape cases and the like, an outcry very shortly after an incident – compared to a claim made against a person some time later – is reliable *enough to overcome* the general prohibition against hearsay. Allowing a witness to testify about a complaint of sexual abuse that is merely one in a series of allegations made over time is completely outside the justifications of this exception to the hearsay bar. See State v. Bray, 23 Wn. App. 117, 121–22, 594 P.2d 1363 (1979) (citing State v. Griffin, 43 Wash. 591, 86 P. 951 (1906)). Admission of the evidence was error, which infused the trial.

(d). Flagrant misconduct in closing. Finally, despite existing case law labeling it improper for the State to define the “beyond a reasonable doubt” standard in a way that asserts the jury must have a “reason” to acquit, the prosecutor in the present case misstated the burden

of proof, twice saying that the standard required a reason to find Mr. Barela not guilty.

In rebuttal closing argument the prosecutor told the jury that reasonable doubt needed to be a “clean picture.” 10/7/14RP at 875. When telling the jury that it was the judge of credibility, the prosecutor stated the jury’s duty was

to assess what came out of that chair, what was said to you, to assess the credibility. You must make reasonable doubt into some type of comfortable, clean picture. That’s not the standard, abiding conviction is. That Mr. Barela did these acts to his daughter.

10/7/14RP at 875. Despite the confusing statements surrounding the prosecutor’s argument, it was clear from the context that the prosecutor was endorsing the idea that reasonable doubt needed to be a “clean picture.” Then, later, when further purporting to define the State’s burden, the State argued that reasonable doubt means “some reason.” 10/7/14RP at 882. The prosecutor stated:

Reasonable doubt is defined for – it’s an abiding conviction (inaudible). Reasonable doubt, some reason, not any reason. It’s not beyond any doubt. Read the instructions.

10/7/14RP at 882. This was misconduct. It is misconduct for the prosecutor to tell the jury it must provide a reason to find the defendant not guilty. State v. Johnson, 158 Wn. App. 677, 684–85, 243 P.3d 936

(2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011); State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010).

This was incurable, flagrant misconduct and Mr. Barela may appeal it. State v. Emery, 174 Wn.2d 741, 760–61, 278 P.3d 653 (2012). First, it was individually prejudicial error. The misconduct shifted the burden of proof to Mr. Barela – but the State bears the burden of proof. U.S. Const. amend. 14. Further, in this case, the error also requires reversal in combination with the other errors, which resulted in cumulative prejudice. Alexander, supra. In the context of the case – where, inter alia, the jury was tainted from the commencement of the trial to believe a child who delayed reporting, where the defense was not allowed to introduce relevant evidence, where a detective endorsed the idea of delayed reporting as a sign of actual abuse, and where the prosecutor interjected personal opinion into closing argument and disparaged defense counsel’s efforts to raise reasonable doubt – this error was prejudicial. The State’s misconduct was “prejudicial in the context of the entire record and the circumstances at trial.” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In a defendant’s criminal case, while some

errors, “standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors” may require a new trial. State v. Coe, supra, 101 Wn.2d at 789. That is the case here. This Court should reverse Mr. Barela’s convictions.

E. CONCLUSION

Based on the foregoing, Ernest Barela asks that this Court reverse his convictions, in favor of a new trial.

Respectfully submitted this 8th day of October, 2015.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 32968-2-III
v.)	
)	
ERNEST BARELA, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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