Supreme Court No. _____
(COA No. 57789-5-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KERRY SMITH,

Petitioner.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Throughout Kerry Smith's trial, the government ilicited irrelevant and prejudicial evidence that Mr. Smith wore women's underwear and T-shirts. It relied on this evidence to "other" Mr. Smith and to evoke stereotypes that gender nonconforming individuals are more likely to be dangerous and sexually deviant. The criminal legal system cannot tolerate a conviction sercured by the government's appeal to bias.

Additionally, the court commented on the evidence and implied Mr. Smith's guilt when it used the complainant's initials rather than her name in the jury instructions. To correct these errors, Mr. Smith asks this Court to accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Kerry Smith, the petitioner, seeks review of the Court of Appeals opinion terminating review dated

April 23, 2024, a copy of which is attached. RAP 13.3 and RAP 13.4.

C. ISSUES PRESENTED FOR REVIEW

1. The government committed misconduct when it repeatedly highlighted irrelevant evidence about Mr. Smith's gender nonconforming practices. The insidious and improper reliance on stereotypes that gender nonconforming individuals are dangerous and deviant deprived Mr. Smith of a fair trial. RAP 13.4(b)(1), (3), and (4).

2. Article IV, section 16 forbids a court from commenting on the evidence. The jury instructions used the complainant's initials rather than her name, implying she was a victim who needed protection. This necessarily implied to the jury that Mr. Smith was guilty. The trial court's use of initials in the jury

instructions was an impermissible comment on the evidence. RAP 13.4(b)(1), (3), and (4).

D. STATEMENT OF THE CASE

Kerry Smith took care of I.R. and her brother to help her parents, who were too poor to pay for traditional daycare. RP 284. Mr. Smith had been married to I.R.'s grandmother and remained close to his step-children. RP 277. He lived in a fifth-wheel motor home and worked on his property fixing Hondas. RP 281, 368.

I.R. and her brother would spend the night with Mr. Smith when their parents planned to go with Mr. Smith to church the next day. RP 289. The babysitting slowed down after I.R.'s parents moved away. Mr. Smith remained in good contact with her family.

Many years later, when I.R. was about 11, she dreamed that Mr. Smith asked her to touch his penis

when she was three. RP 282. When she began to believe the dream was real, she told her mother, who reported to the police. RP 335–36, 290.

After completing its investigation, the sheriff's office arrested Mr. Smith. RP 254. He was placed in the police car and driven a short way from his home, where the police then questioned him about the incident. *Id.* Mr. Smith denied ever inappropriately touching I.R. RP 258. The police also asked Mr. Smith about the type of underwear he wore. RP 259. He told them that he used to wear women's underwear but no longer did. *Id.* The police also asked him about sex toys that he owned. RP 261. The police also questioned him about his use of diapers. *Id.*

The government charged Mr. Smith with first-degree child molestation. CP 1. At his trial, the prosecutor asked the police about Mr. Smith's

statements, eliciting that he wore women's underwear. RP 259. The prosecutor also asked the officer about Mr. Smith's current ownership of sex toys, and whether he used diapers. RP 261.

The prosecutor asked other witnesses the same questions. The prosecutor asked the complainant's mother:

> Q Looking back, do you remember anything unique about the defendant's clothing preferences?
>
> A Sometimes there was a tendency to gravitate towards the women's clothing.
>
> Q What kind of women's clothing do you remember him wearing?
>
> A I know that he wore women's underwear sometimes and also women's T-shirts.

RP 281.

The prosecutor also asked the complainant about Mr. Smith's clothing choices. RP 325. She told the jury

that Mr. Smith had a preference for "granny panties." RP 325. The following questioning took place:

> Q Do you remember anything about his underwear?
>
> A Um, they were also one solid color.
>
> They were women's underwear just, like, I guess you could say, like, granny panties because, um, they completely covered the butt and everything. Which some people, if I say girl's underwear they will be like, oh, a thong or whatever. But I guess you could say granny panties, in a way.

RP 325.

Mr. Smith testified and denied the allegations. RP 395. But in addition to defending against the charges, Mr. Smith had to explain why he made gender nonconforming choices about his clothing. He explained that he wore the underwear because it caused less discomfort than traditional male underwear. RP 386.

He chose T-shirts intended for women because of their lower cost. RP 387.

In closing arguments, the prosecutor reminded the jury about Mr. Smith's "different" preference for women's clothing. RP 421. Mr. Smith was found guilty. CP 48.

Mr. Smith appealed. The Court of Appeals considered the evidence about Mr. Smith's gender nonconforming clothing preferences "highly relevant, corroborative, and probative evidence." App. 7. It declined to condemn government misconduct that seeks to "other" a defendant by evoking bias based on stereotypes. App. 7–8. It also disagreed that use of the complainant's initials in the to-convict instruction constituted an inappropriate comment on the evidence. App. 10.

E. ARGUMENT

1. This Court should review whether the prosecutor's improper reliance on gender nonconforming evidence to convict Mr. Smith requires reversal.

Throughout Mr. Smith's trial, the government relied on his preference to wear women's underwear and T-shirts even though his decision to wear gender nonconforming clothing was irrelevant to whether he committed the charged crimes. The government used this prejudicial evidence to "other" Mr. Smith and to represent him to the jury as deviant or dangerous. These errors deprived Mr. Smith of his right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22.

Because this misconduct deprived Mr. Smith of a fair trial, this Court should accept review. Further, the decision of the Court of Appeals is in conflict with decisions of this Court, involves a significant question of constitutional law, and involves an issue of

substantial public interest that should be determined by this Court. RAP 13.4(b).

a. The criminal legal system cannot tolerate appeals to bias on the basis of gender and sexuality.

Discrimination against LGBTQ+ individuals persists within the United States criminal legal system. It was only in 2003 that the Supreme Court declared sodomy laws unconstitutional. *Lawrence v. Texas*, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). The United States Supreme Court did not extend the right to marry to the LGBTQ+ community until 2015. *Obergefell v. Hodges*, 576 U.S. 644, 681, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

This discrimination has worsened in some respects. The Supreme Court recently held that the First Amendment allows a person to refuse to provide creative design work on a website to LGBTQ+ persons.

303 Creative LLC v. Elenis, 600 U.S. 570, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023). 2023 saw a record number of new laws intended to impact access to health care, student athletics, the military, incarceration, and education. Adeel Hassan, *States Passed a Record Number of Transgender Laws. Here's What They Say*, New York Times (June 27, 2023).[1] Even the Anheuser-Busch brand Bud Light has not been immune, as it saw its sales plummet after its promotion of a transgender influencer led to a nationwide boycott. Amanda Holpuch, *Behind the Backlash Against Bud Light*, New York Times (June 30, 2023).[2]

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[1]https://www.nytimes.com/2023/06/27/us/transgender-laws-states.html?name=styln-trans-legislation&region=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&variant=undefined

[2] https://www.nytimes.com/article/bud-light-boycott.html

Like racial discrimination, discrimination against LGBTQ+ and gender nonconforming persons persists in the criminal legal system. Discrimination based on gender or sexuality is, like racial discrimination, "odious in all aspects." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 208, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)).

Indeed, few protections have been created within the criminal legal system for persons discriminated against because of their sexuality or gender nonconforming actions. In *Rhines v. South Dakota*, for example, the Supreme Court refused to take review in a case where there was substantial evidence that the jury's verdict to approve the death penalty was influenced by LGBTQ+ bias. Petition for Writ of Certiorari App. at 96, *Rhines v. S. Dakota*, 585 U.S.

1008, 138 S. Ct. 2660, 201 L. Ed. 2d 1058 (2018) ("We ... knew that he was a homosexual and thought that he shouldn't be able to spend his life with men in prison.") Mr. Rhines was executed in 2019. *Charles Rhines Executed by South Dakota Despite Evidence of Jurors' Anti-Gay Bias*, Am. Bar Ass'n (Dec. 1, 2019).[3]

Persons who wear gender nonconforming clothing are subject to abuse. In a study completed in 2011, transgender persons in Washington experienced job loss, harassment, economic instability, and housing insecurity because of discrimination. National LGBTQ Task Force, *Injustice at Every Turn: State Reports of the National Transgender Discrimination Survey* (June

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[3]https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/year-end-2019/charles-rhines-executed-by-south-dakota-despite-evidence-of-juro

2011).[4] Likewise, a United Nations report found that gender-diverse and trans people are subjected to levels of violence and discrimination that offend the human conscience and are "caught in a spiral of exclusion and marginalization." Office of the High Commission, United Nations Human Rights, *The Struggle of Trans and Gender-Diverse Persons: Independent Expert On Sexual Orientation and Gender Identity* (2023).

This discrimination has no place in the criminal legal system. "Our law punishes people for what they do, not who they are." *Buck v. Davis*, 580 U.S. 100, 123, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017). Using LGBTQ+ or gender nonconforming practices to secure a conviction is inconsistent with this principle. Matt Kellner, Note, *Queer and Unusual: Capital*

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[4]https://www.thetaskforce.org/resources/injustice-every-turn-report-national-transgender-discrimination-survey/

Punishment, LGBTQ+ Identity, and the Constitutional Path Forward, 29 Tul. J.L. & Sexuality 1, 14 (2020).

b. The government employed tactics designed to distinguish Mr. Smith based on his gender nonconforming characteristics.

Although this Court's decision in *State v. Bagby* concerns racial bias, the holding that trials must be free of bias and prejudice holds equally true for issues of other historically marginalized and immutable traits, like sexuality and gender expression. 200 Wn.2d 777, 804, 522 P.3d 982 (2023). This Court should apply the same analysis here. When a prosecutor's conduct is improper and constitutes flagrant or an apparently intentional appeal to discrimination based on sexuality or gender nonconformity, such conduct is per se prejudicial. *Id.*

Bagby involved "othering" and coded language to secure the government's conviction. The government in

Bagby continuously referred to Mr. Bagby's nationality, ethnicity, and race. *Id.* at 795. This misconduct primed the all-white jury to pay more attention to this racial difference, thereby activating any anti-Black implicit biases they may have held. *Id.*

Here, the prosecutor "othered" Mr. Smith by drawing attention to the fact that he wears women's underwear and T-shirts. The prosecutor used this information to secure Mr. Smith's conviction. RP 421. This evidence was irrelevant as to whether Mr. Smith committed a crime, and the prosecutor only introduced this evidence to suggest that Mr. Smith was a sexual deviant with a proclivity to pedophilia.

It is a common tactic to link gender nonconforming behavior with pedophilia, even though no such link exists. Ilan H. Meyer, et al., *LGBTQ*

People On Sex Offender Registries in the US, Williams Institute, UCLA School of Law (May 2022).

Instead, science and case management experience demonstrates that most child molesters are heterosexual. Dr. Gene G. Abel, *"The Child Abuser: How Can You Spot Him?,"* Redbook (August 1987). Medical research backs this up. Jenny, Carole, et al., *Are Children At Risk For Sexual Abuse By Homosexuals?*, Pediatrics, 94(1), 41–44 (1994).[5] In one study, researchers found that fewer than 1 percent of adult molesters were gay or lesbian. *Id.*

Despite evidence that gender nonconforming practices are irrelevant as to whether a child has been assaulted, the government relied on such practices to suggest Mr. Smith committed the alleged crimes. Even before the complainant or her mother testified, the

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[5] https://pubmed.ncbi.nlm.nih.gov/8008535/

government highlighted Mr. Smith's decision to wear women's underwear. RP 259. The government also introduced evidence of Mr. Smith's sex toys and that he wore diapers. RP 261.

When the complainant's mother testified, the government returned to this subject. It asked her whether Mr. Smith had "unique" clothing preferences. RP 281. The mother replied that Mr. Smith had a preference for women's clothing and tended to wear women's T-shirts and underwear. *Id*. The government asked the complainant the same questions. RP 325. She described the underwear Mr. Smith wore as "granny panties." *Id*.

When Mr. Smith testified, the government's questioning compelled him to explain his choice of underwear and women's T-shirts. RP 385, 387.

The Court of Appeals' opinion mistakenly found this repeated testimony was relevant to corroborate I.R.'s memory. App. 6–7. But Mr. Smith's preference for women's clothing was not unique to the timeline of the alleged molestation. It was a longstanding "tendency to gravitate toward" women's clothing. RP 281. And it was common knowledge among people who knew him. RP 281, 324, 421.

The government's questions served an insidious purpose. They distinguished Mr. Smith from the "normal" people on his jury and made him seem, as his attorney stated, weird. RP 385. When the government questioned witnesses about Mr. Smith's clothing choices and referenced them in closing argument, the government committed misconduct. RP 421.

c. By othering Mr. Smith, the government engaged in impermissible misconduct.

Persons with gender nonconforming practices or non-heterosexual practices are often "othered" by being presented as "inferior" to a "normal" group of people. Jacques Rothmann & Shan Simmonds, *"Othering" Non-Normative Sexualities Through The Objectification Of "The Homosexual": Discursive Discrimination By Pre-Service Teachers*, Agenda 6 (March 2015).[6] Heterosexuality is associated with normative, "normal," or "natural" social and sexual relations. *Id.* at 1. Concomitantly, those who do not conform to heterosexual standards are "othered." *Id.*

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[6]https://www.researchgate.net/publication/311814405_%27Othering%27_non-normative_sexualities_through_the_objectification_of_the_homosexual_Discursive_discrimination_by_pre-service_teachers

Othering is a "set of dynamics, processes, and structures that engender marginality and persistent inequality across any of the full range of human differences based on group identities." john a. powell & Stephen Menendian, *The Problem of Othering: Towards Inclusiveness and Belonging*, 1 Othering & Belonging 14, 18 (2016);[7] Susan Stabile, *Othering and the Law*, 12 U. St. Thomas L.J. 381, 382 (2016). It is rooted in "the conscious or unconscious assumption that a certain identified group poses a threat to the favoured group." john a. powell, *Us vs. Them: The Sinister Techniques of 'Othering' – and How to Avoid Them*, The Guardian (November 8, 2017).[8]

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[7] https://www.otheringandbelonging.org/wp-content/uploads/2016/07/OtheringAndBelonging_Issue1.pdf

[8]https://www.theguardian.com/inequality/2017/nov/08/us-vs-them-the-sinister-techniques-of-othering-and-how-to-avoid-them

Without need for any explicit argument, the prosecutor "othered" Mr. Smith, drawing a line between him and the jury, thereby defining him as capable of awful things and deserving of punishment. RP 421. This technique also allowed the prosecutor to connect with the jurors, subtly reinforcing the idea that Mr. Smith's differences made him untrustworthy.

Playing on these biases is especially effective in child sexual assault cases. Tisha Wiley & Bette Bottoms, *Effects of Defendant Sexual Orientation on Jurors' Perceptions of Child Sexual Assault*, Law and Human Behavior (May 2008).[9] In their study, the scientists concluded that jurors are more pro-prosecution in cases involving gay men. *Id*. at 46. Persons with gender nonconforming clothing choices

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[9]https://www.researchgate.net/publication/5449077_Effects_of_Defendant_Sexual_Orientation_on_Jurors%27_Perceptions_of_Child_Sexual_Assault

are likewise believed to be more likely to commit sex offenses against children, even though there is no evidence to support this theory. D.E. Newton, *Homosexual Behavior and Child Molestation - A Review of the Evidence*, Adolescence, Vol. 13, Issue 49, 29 (Spring 1978).

Othering has real consequences for criminal defendants. Chan Tov McNamarah, *Sexuality on Trial: Expanding Peña-Rodriguez to Combat Juror Queerphobia*, 17 Dukeminier Awards J. Sexual Orientation & Gender Identity L. 393, 402 (2018). In *State v. Lovely*, the Maine Supreme Court reversed an arson conviction where the trial judge refused to allow voir dire on whether the jurors were biased against queer persons. 451 A.2d 900, 902 (Me. 1982).

Similarly, in *Neill v. Gibson*, a prosecutor asked the jury to consider the defendant's homosexuality as

evidence of an undesirable character in deciding to sentence him to death. 278 F.3d. 1044, 1065 (10th Cir. 2001). The Tenth Circuit found the comments improper but refused to reverse the sentence on appeal. *Id.* at 1061.

In *People v. Mata*, the government highlighted that the defendant was a lesbian, implying she was masculine and capable of murder. 366 Ill. App. 3d 1068, 1069, 853 N.E.2d 110 (Ill. App. Ct. 2006); Joey L. Mogul, *The Dykier, The Butcher, The Better: The State's Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. City L. Rev. 473 (2005). Arguing that a "normal heterosexual woman" would not have been offended by such conduct that led to the defendant's decision to commit a homicide, the jury found her guilty and sentenced her to death. *Id.* at 474. The governor commuted her sentence to life in prison.

Seasoned prosecutors understand how to draw lines and when to go over them. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015). As in *Bagby*, the government's emphasis of gender nonconformity created a bias against Mr. Smith. *Bagby*, 200 Wn.2d at 795. When the prosecutor highlighted Mr. Smith's nonconformity to gender norms, it was intentional and improper.

d. This Court should apply the objective observer standard when a prosecutor relies on gender nonconformity to secure a conviction.

The Sixth and Fourteenth Amendments and article I, section 22 of the state constitution protect the right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Prosecutorial misconduct deprives a person accused of a crime of their constitutional right to a fair trial. *Id.*

at 703–04 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). Likewise, Washington guarantees "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex. Const. art. XXXI, § 1.

In *Bagby*, this Court utilized the objective observer standard to find that misconduct had occurred. 200 Wn.2d at 793 (citing *State v. Zamora*, 199 Wn.2d 698, 718–19, 512 P.3d 512 (2022); *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011)). The objective observer test requires the court to decide whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." *Zamora*, 199 Wn.2d at 718. This Court should apply the standard equally to misconduct relating to gender and sexuality. Const. art. XXXI, § 1.

Because an objective observer could find that the prosecutor's use of Mr. Smith's gender nonconforming activities was an appeal to jurors' potential prejudice, bias, or stereotypes in a manner that undermined Mr. Smith's credibility or the presumption of innocence, the prosecutor's tactics deprived Mr. Smith of a fair trial

In *Zamora*, the prosecutor's statements revolved around unauthorized immigration, crime at the border, and border security. 199 Wn.2d at 719. This Court reversed and held that the apparent purpose of the prosecutor's remarks was to highlight the defendant's perceived ethnicity and link it to the worst kinds of racist stereotypes the prosecutor had introduced about the Latin community. *Id.*

Similarly, in *Bagby*, this Court found that the use of coded language compromised the defendant's right to a fair trial. By calling attention to the defendant's

"nationality," the prosecutor played into a stereotype that to be American is to be white, and to be Black is somehow "foreign." *Bagby*, 200 Wn.2d at 795.

As in *Bagby* and *Zamora*, no legitimate reason existed to highlight Mr. Smith's decision to wear gender nonconforming clothing. 200 Wn.2d at 797. The type of underwear and T-shirts Mr. Smith wore were irrelevant to any element of the crime. Mr. Smith's identification was not at issue. Nor was his longstanding and generally known preference for women's clothing corroborative of the complainant's recollections. Instead, the evidence sugggested potential deviancy and was used to other Mr. Smith from the jury and everyone else in the courtroom.

Under these circumstances, this Court should find that an objective observer could view the prosecutor's questions and closing argument improper.

Bagby, 200 Wn.2d at 804. There is never a place for bias based on gender or sexuality, and this Court should make clear that where it is relied on to secure a conviction, the misconduct is per se prejudicial and reversal must follow. *Bagby*, 200 Wn.2d at 802.

e. Relying on gender nonconforming evidence was also flagrant and ill-intentioned, and flagrant or apparently ill-intentioned.

This Court should accept review and apply the objective observer test to reverse Mr. Smith's conviction. But review is also warranted because the Court of Appeals' mistaken characterization of the government's repeated focus on Mr. Smith's gender nonconformity as relevant distorted its view of the government's misconduct as flagrant and ill-intentioned. *Monday*, 171 Wn.2d at 681.

Relying on stereotypes is improper. Once the jurors heard about Mr. Smith's irrelevant choice to

wear gender nonconforming clothing, they would have seen him as different and perhaps deviant. The prosecutor did not need to do more than elicit that Mr. Smith wore women's underwear to signal to the jury that Mr. Smith was different and more likely to be guilty of committing the charged offense. RP 259. Indeed, this evidence was a central focus of Mr. Smith's testimony, as the government's elicitation of this information forced him to explain why he made the choices he did about clothing. RP 385.

Should this Court decline to extend *Bagby*'s objective observer standard, it should follow *Monday*'s higher standard of flagrant or apparently ill-intentioned misconduct. *Monday*, 171 Wn.2d at 257. As argued above, playing to bias is improper, whether it is an attempt to play on racial bias or bias based on gender or sexuality.

No physical evidence corroborated the complainant's allegations. Mr. Smith has no criminal history. A literal dream instigated the charges in this case. RP 282. The complainant's mother and system advocates reinforced this dream.

Distracting the jury with Mr. Smith's underwear and other clothing choices took away his ability to have a fair trial. Mr. Smith had to defend his clothing choices, rather than focus on the weaknesses in the government's case. *Id.*

This Court cannot have confidence in this verdict. It should reverse Mr. Smith's conviction. *Bagby*, 200 Wn.2d at 803; *Glasmann*, 175 Wn.2d at 703–04.

2. The court commented on the evidence when it used the complainant's initials in the jury instructions.

A trial court may not comment on the evidence. Const. art. IV, § 16. More concretely, a court may not

"'convey[] to the jury [the court's] personal attitudes toward the merits of the case' or instruct[] a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). A comment on the evidence is "presumed prejudicial." *Id.* at 725.

A to-convict instruction that conveys to the jury the defendant's guilt has been proved is a comment on the evidence. *See State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). In *Jackman*, the charges required proof the victims were minors. *Id.* at 740 & n.3. The to-convict instructions included each victim's birthdate, implying to the jury the fact of the victims' minority was already established. *Id.* at 740–41 & n.3, 744. Accordingly, this Court held the instructions were comments on the evidence. *Id.* at 744.

As in *Jackman*, the to-convict instructions in this case conveyed to the jury Mr. Smith was guilty of an offense against the complainant. In opening and closing arguments and with every witness who testified, the complaining witness was referred to by her name. *See, e.g.*, RP 229, 230, 234, 240, 250, 276, 318, 351, 415, 425. Nevertheless, when the time came to instruct the jury, the trial court used her initials rather than her name. CP 45.

This grant of anonymity conveyed to the jury the court believed the complaining witness was a crime victim who needed protection. Based on the evidence, the only person who could have victimized the complainant was Mr. Smith. By implying in the to-convict instructions the complaining witness was a victim in need of protection, the trial court commented on the evidence. *Jackman*, 156 Wn.2d at 744.

Many courts remark that a jury may perceive a grant of anonymity as "a subliminal comment on the harm the alleged encounter with the defendant has caused." *Doe v. Cabrera*, 307 F.R.D. 1, 10 (D.D.C. 2014). "[T]he very knowledge by the jury that pseudonyms were being used would convey a message to the fact-finder that the court thought there was merit to the plaintiffs' claims." *James v. Jacobson*, 6 F.3d 233, 240–41 (4th Cir. 1993); *accord Doe v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). "The effect of this 'subliminal' suggestion . . . is likely to be strong enough that a limiting instruction would not sufficiently eliminate the resulting prejudice." *Doe v. Rose*, No. CV-15-07503-MWF-JCx, 2016 WL 9150620, at *3 (C.D. Cal. Sept. 22, 2016) (unpub.); *see* GR 14.1(b).

In affirming Mr. Smith's conviction, the Court of Appeals relied on an opinion from Division One which held the use of initials in the to-convict instructions is not a judicial comment in *State v. Mansour*, 14 Wn. App. 2d 323, 470 P.3d 543 (2020), *rev. denied*, 196 Wn.2d 1040 (2021).

Division One observed, "the name of the victim . . . is not a factual issue requiring resolution." 14 Wn. App. 2d at 329–30. It also found that "a juror would likely not presume that [the minor] was a victim—or believe the court considered her one—merely because the court chose to use [the minor]'s initials." *Id.* at 330. Finally, the court noted the federal cases cited above concerned civil plaintiffs' requests to proceed anonymously, while in *Mansour*, the parties used the complainant's full name outside the instructions. *Id.*

Mansour's reasoning is unpersuasive. First, it does not matter that the victim's name is not an element—the court's use of the complainant's initials communicated she was a victim and, therefore, the defendant committed a crime. Second, it is not plausible to suggest the jury would not catch on to the implications of using initials. Third, granting anonymity to any degree in any context risks appearing as "a subliminal comment" on the need for protection from the defendant. *Doe,* 307 F.R.D. at 10.

For these reasons, this Court should reject *Mansour*.

Anonymizing the complaining witness in the jury instructions was a comment on the evidence. *Jackman*, 156 Wn.2d at 744; Const. art. IV, § 16. The error is presumptively prejudicial. *Levy*, 156 Wn.2d at 725. This case was all about credibility and who to believe.

By using the complainant's initials in the to-convict instruction, the court bolstered the complainant's credibility. The instructions alerted the jury that it must see her as a victim worthy of protection.

This Court should accept review.

F. CONCLUSION

For the reasons stated in this petition, Mr. Smith respectfully requests that this Court accept review.

This brief is 4,530 words long and complies with RAP 18.17.

DATED this 22nd day of May 2024.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 23, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KERRY G. SMITH, Appellant.	No. 57789-5-II UNPUBLISHED OPINION

CHE, J. — Kerry Glenn Smith appeals his conviction for first degree child molestation. Smith's step-granddaughter, IMR, reported that when she was around three years old, Smith told her to touch his penis, which she did. The State charged Smith with first degree child molestation and alleged an aggravating factor of abuse of a position of trust. At trial, IMR testified that Smith was wearing women's underwear when he told her to touch his penis. The jury instructions used IMR's initials. The jury convicted Smith. The trial court ordered Smith to pay legal financial obligations (LFOs) including community custody supervision fees and a victim penalty assessment (VPA).

Smith argues on appeal that (1) the State committed impermissible misconduct when it referred to Smith wearing women's V-neck shirts and underwear at the time of the crime, (2) the trial court erred when it commented on the evidence by using the child victim's initials in a to-convict instruction, and (3) the trial court erred when it ordered Smith to pay certain LFOs.

We hold (1) the State's elicitation of testimony and argument regarding Smith's clothing was neither improper nor flagrant and ill-intentioned, (2) the use of IMR's initials in the to-convict instruction did not qualify as a judicial comment, (3) the community custody supervision fees should be stricken, and (4) VPA should be stricken.

Accordingly, we affirm Smith's conviction but remand for the trial court to strike the community custody supervision fees and VPA.

FACTS

Smith is the stepfather of IMR's mother. Smith lived in a trailer near IMR's family. Smith began regularly babysitting IMR at Smith's residence when IMR was around three years old. This included overnight stays. When IMR was about five years old, IMR's family moved away so babysitting became less frequent.

When IMR was 13 years old, she told her parents that she remembered something had happened with Smith when she was younger. Detective Gerald Swayze watched a child interviewer speak to IMR. During the interview, Swayze saw IMR draw a picture of what he believed to be a "penis pump."[1] Rep. of Proc. (RP) (Nov. 30, 2022) at 251.

The State charged Smith with first degree child molestation and alleged an aggravating factor of abuse of a position of trust. The case proceeded to a jury trial.

IMR was 17 years old at the time she testified at trial. She testified about events that occurred when she was roughly three years old. IMR described Smith wearing "short-sleeve V-necks" that were each one solid color and "granny panties" to bed when she would stay

[1] A device consisting of a plastic tube, pump, and band that fits over the penis, which can help a person achieve an erection. *Penis Pump*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/penis-pump/about/pac-20385225 (last visited Apr. 17, 2024).

overnight at his trailer. RP (Dec. 5, 2022) at 324-25. Smith did not object. She remembered at least two or three incidents of touching Smith's penis because he was wearing different colored shirts during each incident.

IMR recalled an incident when Smith was on his bed wearing underwear. IMR was standing on the ground, leaning against the bed, and they were watching television. Smith's underwear was pulled down around his thighs. Smith told IMR to touch his penis, so she did. IMR remembered that after she would touch Smith's penis, generally, Smith would go into the bathroom and "finish[]" in a "weird container." RP (Dec. 5, 2022) at 331.

The State asked IMR's mother about Smith's clothing. The mother stated that Smith wore "women's underwear sometimes and also women's tee-shirts." RP (Dec. 5, 2022) at 281. Swayze testified that during an interview after Smith's arrest, Smith explained that he wore women's underwear because of "a [medical condition] in his belly button and the elastic . . . irritate[d] it less." RP (Nov. 30, 2022) at 259. Smith did not object to the testimony. During the police interview and at trial, Smith acknowledged wearing women's V-neck shirts because he could get a pack of the shirts with a friend's discount.

Swayze testified that he showed Smith IMR's drawing from her child interview. Swayze stated that Smith identified the drawing as a penis pump and acknowledged he owned one at the time of his arrest but not ten years earlier. When Smith testified at trial, he denied owning a penis pump at any time and denied identifying IMR's drawing as one of a penis pump.

During his testimony, Smith denied having any inappropriate contact with IMR. Smith claimed that IMR could have "accidently grabbed [his penis] when digging for change in his pocket," or that it "could have happened in his sleep." RP (Nov. 30, 2022) at 257, 264. Smith

denied ever sleeping in his underwear with IMR. Smith said IMR would sleep on his bed once in a while. He said that when she would sleep under the covers, he would sleep on top of the covers because he wanted a barrier from IMR's bed-wetting tendencies.

Throughout the trial, IMR was referred to by name and a nickname. However, the to-convict jury instruction referred to IMR by her initials. The instruction provided that to convict Smith of first degree child molestation, the jury had to find, in addition to other elements, that "I.M.R. was less than twelve years old at the time" and that "I.M.R. was at least thirty-six months younger" than Smith. Clerk's Papers at 45. Smith raised no objection to this instruction.

During closing argument, the State told the jury, "[IMR] remembers his underwear. She remembers different tee-shirts. She is certain that this happened at least once but she feels like it might have been more because she remembers different tee-shirts." RP (Dec. 5, 2022) at 421. Smith did not object.

The jury found Smith guilty as charged. The trial court imposed a standard range sentence. The trial court did not make any findings at sentencing about whether Smith was indigent, and imposed community custody supervision fees and a VPA as part of his sentence.

Smith appeals.

ANALYSIS

I. PROSECUTORIAL MISCONDUCT

Smith argues the State committed misconduct throughout the trial by relying on gender nonconforming evidence to secure Smith's conviction. Smith argues that evidence of his clothing was irrelevant to the commission of the crime charged and thus, improper. Specifically, Smith contends that the State's introduction of gender nonconforming evidence suggested Smith

was a sexual deviant and was an appeal to the jurors' potential LGBTQ+ and gender nonconforming prejudices. We disagree.

A. *Legal Principles*

In prosecutorial misconduct claims, the defendant must prove that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The challenged conduct is reviewed "'in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury.'" *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021) (quoting *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)).

A defendant who does not object to the prosecutor's remarks waives their prosecutorial misconduct claim unless they show that (1) the prosecutor's comments were improper, (2) the comments were both flagrant and ill-intentioned, (3) a curative instruction could not have obviated the effect of the improper comments, and (4) it was substantially likely the misconduct affected the verdict. *Id.* at 201.

In evaluating whether a nonobjecting defendant has overcome waiver, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762. When a defendant who does not object to the prosecutor's remarks fails to demonstrate that the improper remarks were incurable, the claim "necessarily fails, and our analysis need go no further." *Id.* at 764.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. Prosecutors have "wide latitude to argue reasonable inferences from the

evidence, including evidence respecting the credibility of witnesses" in closing argument. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). But a prosecutor commits misconduct if they present a derogatory depiction of the defendant. *State v. Walker*, 182 Wn.2d 463, 478, 341 P.3d 976 (2015).

B. *The Evidence and Comments in This Case*

Here, Smith did not object to the State's elicitation of testimony regarding Smith's clothing during witness testimony nor to the State's references to such clothing during closing argument. Thus, Smith waived his prosecutorial misconduct claim unless he can show that the prosecutor's comments were improper, flagrant, and ill-intentioned; no curative instruction could have remedied their effect; and the comments were substantially likely to affect the verdict. *Gouley*, 19 Wn. App. 2d at 201.

Smith first asserts that the prosecutor committed misconduct by eliciting testimony about his clothing. But evidence that Smith wore women's V-neck shirts and underwear during the period Smith babysat IMR was relevant to corroborate IMR's account of the crime. Because of IMR's young age at the time of the crime and Smith's contradictory testimony denying intentionally and inappropriately touching IMR or ever sleeping in his underwear with IMR, IMR's description of Smith's sleeping garments tended to establish the fact that IMR saw Smith in his underwear in bed with her. Other witnesses' testimony corroborating Smith's undergarments further established the likelihood that IMR's version of events was accurate. Because the evidence about Smith's clothing was highly probative of the strength of IMR's memory, the State did not elicit improper testimony on that subject.

Smith next contends that the prosecutor's comments about his clothing during closing argument constituted misconduct. In closing argument, the State noted that IMR "remembers his underwear" and "is certain that this happened at least once but she feels like it might have been more because she remembers different tee-shirts." RP (Dec. 5, 2022) at 421. The State did *not* mention that Smith's clothing and underwear were women's clothing, and the reference to Smith's clothing was fleeting and not repeated.

Viewed in context, general references to Smith's clothing in closing argument by the prosecutor were made to argue the inference that IMR was credible based on evidence admitted at trial. IMR recalled what shirts and underwear Smith wore during the commission of the crime, and Smith confirmed that he did indeed wear such things, though he denied ever sleeping in his underwear with IMR. The references were to relevant, corroborating evidence and spoke to IMR's credibility and memory. The State's comments were not improper.

Even if Smith had demonstrated that the remarks he challenges were improper, he fails to show the prosecutor's conduct was so flagrant and ill-intentioned that an instruction could not have obviated any prejudice. As established above, the State elicited testimony about highly relevant, corroborative, and probative evidence, and argued a permissible inference of IMR's credibility from that evidence. The record does not support that the State elicited the testimony to distinguish Smith based on gender nonconforming characteristics or "othering."[2] Specifically, Smith does not show that the State drew the jury's attention to Smith's wearing of women's

[2] To "other" a person is to use rhetoric that labels that person as someone outside the moral community in order to induce a negative emotional response towards them. Ryan Patrick Alford, *Appellate Review of Racist Summations: Redeeming the Promise of Searching Analysis*, 11 MICH. J. RACE & L. 325, 335 (2006).

shirts or underwear in an appeal to their implicit or explicit bias or prejudice and that he was "othered" as a result. In consideration of the broader context of the trial, the State's intended purpose was to elicit relevant, corroborating evidence and argue a permissible inference that IMR was credible based on the evidence admitted. Smith does not show how the State's conduct was flagrant or ill-intentioned.

Lastly, Smith asks this court to find the prosecutor's conduct per se prejudicial under *State v. Bagby*, 200 Wn.2d 777, 522 P.3d 982 (2023). We decline to reach this issue because we determine above that the prosecutor's references to Smith's clothing served a proper purpose.

Smith does not show that the testimony elicited by the State or its comments during closing argument related to his clothing and underwear, none of which Smith objected to, were improper. Even if the State's elicited testimony and closing arguments were improper, they were not flagrant or ill intentioned, nor incurable by a curative instruction. Thus, Smith's prosecutorial misconduct claim is waived and his arguments fail.

II. JUDICIAL COMMENT ON EVIDENCE

Smith argues that the trial court's to-convict instruction was an impermissible comment on the evidence because the use of the victim's initials suggested to the jury that the court considered IMR a victim in need of protection and that Smith was guilty of an offense against the victim. We disagree.

A. *Legal Principles*

We review a trial court's choice of jury instructions for an abuse of discretion, but the inquiry of whether an instruction comprises a comment on the evidence is reviewed de novo. *State v. Bogdanov*, 27 Wn. App. 2d 603, 624, 532 P.3d 1035, *review denied*, 2 Wn.3d 1008

(2023). Under article IV, section 16 of the Washington Constitution, a judge is barred "from expressing to the jury [their] personal attitudes regarding the merits of the case or instructing the jury that issues of fact have been established as a matter of law." *Gouley*, 19 Wn. App. 2d at 197. We presume that such judicial comments are prejudicial. *Id.*. Unless the record affirmatively shows no prejudice could have transpired, the State has the burden of showing such comments did not prejudice the defendant. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

Generally, we will decline review of a claim of error not raised at the trial court, but a manifest error affecting a constitutional right is reviewable for the first time on appeal. RAP 2.5(a) and (a)(3). A claimed error based on a judicial comment is of constitutional magnitude. *Levy*, 156 Wn.2d at 719-20. However, not all constitutional errors are reviewable under RAP 2.5. *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007).

To determine whether the error was manifest, the defendant must show actual prejudice—how the alleged error "actually affected" their rights in the context of trial. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Put differently, a showing of actual prejudice requires a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (alteration in original) (internal quotation marks omitted) (quoting *Kirkman,* 159 Wn.2d at 935).

B. *The Trial Court's Use of IMR's Initials in the To-Convict Instruction Did Not Constitute a Judicial Comment on the Evidence*

Though a judicial comment is an error of constitutional magnitude that a defendant may raise for the first time on appeal, use of initials in a to-convict instruction does not qualify as a judicial comment. In *State v. Mansour*, the defendant challenged his first degree child molestation conviction, arguing that using the child victim's initials constituted a judicial comment on the evidence. 14 Wn. App. 2d 323, 329, 470 P.3d 543 (2020). Division One held that the use of initials to identify the victim of child molestation in the to-convict instruction was not a judicial comment on the evidence because the name of the victim was not a factual issue requiring resolution, and a juror would be unlikely to presume that the child victim was a victim because of the use of their initials. *Id.* at 329-30.

Like in *Mansour*, the trial court's use of IMR's initials in the to-convict instruction did not constitute a judicial comment on the evidence. Similarly, IMR's name was not a factual issue requiring resolution. IMR's identity was not concealed; IMR was referred to by her full name, first name, and nickname throughout trial. A juror would likely not presume that IMR was a victim needing protection merely because the trial court used her initials in the to-convict instruction. Therefore, Smith fails to show that the trial court's use of IMR's initials in the to-convict instruction constituted a judicial comment or was an error of constitutional magnitude warranting review for the first time on appeal under RAP 2.5(a)(3).

Thus, Smith fails to make the required showing under RAP 2.5(a)(3) that any alleged error resulting from the instruction was a manifest error affecting a constitutional right

warranting review for the first time on appeal. We hold that the use of IMR's initials in the to-convict instruction did not qualify as a judicial comment.

III. LEGAL FINANCIAL OBLIGATIONS

A. *Victim Penalty Assessment*

Smith argues, and the State concedes, that this court should strike the VPA because of a recent amendment to RCW 7.68.035, which requires the waiver of a VPA if the trial court finds the defendant is indigent. We accept the State's concession. Under the amended RCW 7.68.035(4), if a defendant is indigent at sentencing, trial courts must waive any VPA imposed prior to the effective date of the amendment. *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). This amendment applies to cases on direct appeal. *Id.* We interpret the State's concession as conceding that, on remand, the court would necessarily find indigency under RCW 10.101.010(3). Therefore, we remand for the trial court to strike the VPA.

B. *Community Custody Supervision Fees*

Smith additionally argues this court should strike the community custody supervision fees because such fees are discretionary LFOs and Smith is indigent. Effective July 2022, RCW 9.94A.703(2) no longer allows trial courts to impose community custody supervision fees. *Ellis*, 27 Wn. App. 2d at 17. This amendment applies to cases pending on appeal. *Id.* Although the amendment to RCW 9.94A.703 regarding community custody supervision fees took effect after Smith was sentenced, it applies to Smith because his case is on direct appeal. *Id.* Therefore, we remand for the trial court to strike the community custody supervision fees from Smith's judgment and sentence.

CONCLUSION

We affirm Smith's conviction but remand for the trial court to strike the community custody supervision fees and VPA.[3]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Glasgow, J.

Cruser, C.J.

[3] While this appeal was pending, the State moved for permission to modify a sexual assault protection order (SAPO) issued in this case. Under RAP 7.2(e)(2), a post-judgment motion must "first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e)(2). In light of our resolution of this appeal, the parties are free to pursue amendment of the SAPO with the trial court.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57789-5-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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