No. 58436-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

EDWARD SCHINZING

PETITION FOR REVIEW

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A. Identity of Petitioner

Edward Schinzing asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

On December 24, 2024, the Court of Appeals affirmed Mr. Schinzing's conviction. A copy of the decision appears in the Appendix.

C. Issue Presented for Review

In 2000, this Court granted review of the important issue whether a No Corroboration Necessary jury instruction is an improper comment on the evidence in violation of Article 4, § 16 of the Washington Constitution, but the issue remains unresolved. Should this Court again grant review and reverse?

D. Statement of Facts

Edward Schinzing was charged by Amended Information with one count of First Degree Child Molestation., CP, 22. He was accused of having sexual contact with his daughter, R.L.Z.,

on a single occasion when she was approximately six-years-old. CP, 22.

At the close of evidence, the State proposed the following jury instruction, "In order to convict a person of Child Molestation in the First Degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." CP, 39. Mr. Schinzing objected to the proposed instruction. RP, 287. The trial court gave the proposed instruction, saying that whether to use the proposed instruction was a "close call." CP, 57; RP, 293.

R.L.Z. is Mr. Schinzing's biological daughter. RP, 126. She was born on February 5, 2010. RP, 125. She has an older brother, W.S. RP, 127. Although the record is a bit unclear, it appears R.L.Z. and W.S. spent a significant amount of their early childhood bouncing around from family member to family member. RP, 128. When R.L.Z. was in approximately first grade, she went to live with her father for a short period of time. RP, 129. At the time, Mr. Schinzing was living with some

friends, “Nicky and Joe,” who the jury learned are Nicole and Joseph Allison. RP, 129, 236, 248. According to R.L.Z., the sleeping arrangements were that R.L.Z. and W.S. slept on an air mattress in the living room while Mr. Schinzing slept on the couch. RP, 130-31. On occasion, R.L.Z. would get scared or get forced off the air mattress by her brother and she would share the couch with her father. RP, 131.

One time, according to R.L.Z.’s trial testimony, she was sleeping on the couch with her father. RP, 133. She was laying on the inside of the couch and he was on the outside. RP, 136. She was wearing pink pajamas with owls. RP, 133. R.L.Z. felt her father put his hands down her pants. RP, 133. Mr. Schinzing first put his hand on her butt under her pants, causing her to wake up. RP, 133. Neither of them said anything. RP, 134. Mr. Schinzing then moved his hand to the front of her pants, touching skin to skin. RP, 135. He touched her vagina. RP, 136. It did not hurt. RP, 138. The contact stopped when “her aunt” walked into the room and Mr. Schinzing fell off the couch,

although R.L.Z. could not recall what which happened first. RP, 137-38. She believes "her aunt" was getting ready for work. RP, 139. At the time, her aunt worked an early morning shift. RP, 139. She could not remember what her aunt was wearing except that it was a dark blue or black shirt with a name tag. RP, 139. This was the only time anything like this ever happened. RP, 143.

Nicole Allison testified that Mr. Schinzing, R.L.Z., and W.S. lived at her house for less than two months. RP, 237-39. R.L.Z. was "about six" years old. RP, 238. At the time, Ms. Allison was working for Safeway from 4:30 to 1:00 and would leave at 4:00 to go to work. RP, 241. According to Ms. Allison, Mr. Schinzing slept on the floor and R.L.Z. slept on the couch. RP, 240. W.S. shared a bedroom with X.A., Ms. Allison's son. RP, 240. She did not see or hear anything inappropriate between Mr. Schinzing and R.L.Z. RP, 241. She never observed Mr. Schinzing and R.L.Z. sleeping together on the couch. RP, 241. Likewise, her husband, Joseph Allison, never observed

anything inappropriate between Mr. Schinzing and R.L.Z. RP, 260. He occasionally saw them napping on the couch together. RP, 260.

R.L.Z. did not disclose the alleged assault right away. Several years later, when R.L.Z. was in the fifth grade, she was in a class at school where they were talking about sexual subjects. RP, 146. The children were encouraged to speak to a teacher or counselor if they had a secret they were holding in. RP, 147. R.L.Z. asked to speak with Ms. Petosa, the counselor, and disclosed to her. RP, 149. Soon after that, she made similar disclosures to her "Aunt Katie," a CPS worker, and a forensic interviewer. RP, 150, 152, 277.

Karis Kern is a pediatric nurse practitioner. RP, 323. She did a medical examination of R.L.Z. in July of 2021. The examination included a close examination of her genitals. RP, 330-31. She did not observe anything abnormal and her genital area was normal. RP, 330, 332. STD tests for gonorrhea and chlamydia were negative. RP, 332. R.L.Z. disclosed her father

touched her inappropriately while she was sleeping. RP, 333. He touched her on the butt and the "outside of the part of her body she pees from." RP, 333. It stopped when her father rolled off the couch. RP, 333.

Vancouver Police Detective Miranda Skeeter interviewed Mr. Schinzing. RP, 310. Mr. Schinzing denied ever sexually assaulting his daughter. RP, 321-22.

Mr. Schinzing testified and denied ever touching R.L.Z.'s "private parts" or "backside." RP, 340-41.

In its closing argument, the State made corroboration, and the apparent lack thereof, the center piece of its argument. The State began its argument saying, "Defense will tell you that this case rests entirely on [R.L.Z.'s] testimony and that there is no corroboration. That's true, sort of. The heart of this case – the foundation that this case rests on is [R.L.Z.'s] testimony. That is absolutely true. And there isn't corroboration – at least in the way that you may have expected when you came into this trial – at least in the way that you expected. And at least in the

way Defense is going to argue that there isn't." RP, 359-60. The State argued that R.L.Z.'s disclosures of sexual abuse to Ms. Petrosa, Ms. Pegler, and Ms. Roth corroborate her testimony. RP, 268. In total, the State referenced corroboration nine times in its closing argument and another five times in its rebuttal argument. RP, 359, 382. To be fair, the defense closing argument referenced corroboration six times. RP, 370.

The jury convicted. RP, 407. The Court of Appeals affirmed. Mr. Schinzing petitions for review.

E. Argument

Four years ago, this Court granted review of a case to decide whether a jury instruction that advises the jury that corroboration in unnecessary violates Article 4, § 16 of the Washington Constitution. *State v. Svaleson*, 3 Wn.App. 1065 (2018) (unpublished), *review granted*, 195 Wn.2d 1008 (2020). By granting review in 2020, this Court signaled that this issue is a significant question under the law of the Washington Constitution and involves as issue of substantial

public interest that should be decided by this Court. RAP 13.4. Unfortunately, the issue was not resolved because the defendant in *Svaleson* passed away before this Court could issue a decision and the Petition was dismissed as moot. It is time for this Court to decide this important issue with finality.

Under Article 4, § 16 of the Washington Constitution, judges are prohibited from making any statement which amounts to a "comment on the evidence." *State v. Jacobsen,* 78 Wn.2d 491, 495,477 P.2d 1 (1970); Article 4, § 16. The provision requires judges to refrain from "charg[ing] the jury with respect to matter of fact, nor comment thereon," and is limited to only declaring the law. *State v. Brush,* 183 Wn.2d 550, 353 P.3d 213 (2015). Further, it prohibits a judge from giving instructions which single out specific parts of the state's case or emphasize particular evidence. *State v. Lewis,* 6 Wn.App. 38, 41-42, 492 P.2d 1062 (1972). The provision also prevents judicial officers from conveying their "personal

attitudes towards the merits of the case" or "instructing a jury that matters of fact have been established as a matter of law." *State v. Jackman,* 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

In this case, over defense objection, the jury was given a jury instruction which provided: "In order to convict a person of Child Molestation in the First Degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." The issue of whether a No Corroboration Necessary jury instruction violates Article 4, § 16 has been a repeated issue for Washington courts for the past seventy-five years.

This Court has considered the propriety of a No Corroboration Necessary jury instruction exactly once – seventy-five years ago. *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949). But while it is true the Court in *Clayton* held it was not reversible error under the facts of that case to give a No Corroboration Necessary jury instruction, it is

also true the Court expressed some "hesitation" in reaching that ruling, even suggesting that the instruction may be error, albeit harmless. Initially, the Court said, "While the *Smith* and *Dahl* cases, were, in our opinion, correctly decided under all the facts, circumstances and conditions there existing, we would nevertheless hesitate to say, as was suggested in the *Smith* case, that the instructions therein may have been given by the trial court for the purpose of preventing counsel for appellant from making a certain argument before the jury." *Clayton* at 576, citing *State v. Smith*, 127 Wn. 588, 221 P. 603 (1923) and *State v. Dahl*, 139 Wn. 644, 247 P. 1023 (1926).

Later, the Court stated, "It is a familiar rule that a judgment will not be reversed merely because some error has been committed during the trial, but to constitute reversible error it must appear that the appellant was prejudiced, or could reasonably be presumed to have been prejudiced, thereby. The mere fact, however, that error took

place is not of itself determinative. To warrant reversal, it must further appear that prejudice resulted, or could reasonably be presumed to have resulted, from such error. We are clearly of the opinion that, under all of the facts and circumstances of this case, as shown by the record and indicated above, the trial court committed no reversible error in giving the instruction of which appellant complains." *Clayton* at 577-78. Therefore, although this Court in *Clayton* was unwilling to reverse the conviction in that case, it also expressed some "hesitation" about the use of the instruction in the future.

These "hesitations" did not go away. In fact, they have been repeatedly reiterated. Since *Clayton*, the propriety of giving a No Corroboration Necessary jury instruction has been questioned repeatedly by courts and commentators. The Washington Supreme Court Committee on Jury Instructions recommends no such instruction be given. See Comment to WPIC 45.02. The Committee

opines, “The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.” Comment to WPIC 45.02.

Multiple Court of Appeals cases have also questioned the propriety of giving a No Corroboration Necessary instruction. Division II of the Court of Appeals case cited the Comment to WPIC 45.02, saying, “Although we share the Committee's misgivings, we are bound by *Clayton* to hold that the giving of such an instruction is not reversible error.” *State v. Zimmerman*, 130 Wn. App. 170, 182, 121 P.3d 1216 (2005), *reversed and remanded on other grounds*, 157 Wn.2d 1012 (2006), *modified*, 135 Wn.App.

970, 146 P.3d 1224 (2006), *review denied*, 161 Wn.2d 1012 (2007)[1].

Zimmerman was not the first time Division II expressed "misgivings" about a No Corroboration Necessary instruction. In *State v. Faucett*, 22 Wn.App. 869, 593 P.2d 559 (1979), the Court of Appeals found that adding the following paragraph to WPIC 6.01 constituted an impermissible comment on the evidence:

> You will be slow to believe that any witness has testified falsely in the case, but if you do believe that any witness has willfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely, except in so far as the same may be corroborated by other credible evidence in the case.

Faucett at 875. The Court stated the instruction "is fairly viewed as a comment on the State's testimony when the defendant elects not to take the stand, and its use should be avoided." Nevertheless, "Having expressed misgivings about a

[1] The second Petition for Review raised the issue of the No Corroboration Necessary instruction.

portion of instruction No. 20, we decline to hold that its use here was prejudicial error." *Faucett* at 876.

Division I of the Court of Appeals also expressed "concerns" about the instruction, saying, "While we are concerned with the use of such an instruction even in sex crimes, we do not conclude that its use in this case was a comment on the evidence." *State v. Chenoweth,* 188 Wn. App. 521, 354 P.3d 13, *review denied,* 184 Wn.2d 1023 (2015). One judge on the *Chenowith* panel specifically opined, "I agree with the committee on pattern jury instructions that the matter is really a matter of sufficiency of the evidence. But we are bound by *State v. Clayton* to hold that the giving of such an instruction is not reversible error." *Chenoweth* at 538 (Judge Becker, concurring).

Division II returned to this propriety of the instruction in *State v. Svaleson*, 3 Wn.App. 1065 (2018) (unpublished), *review granted*, 195 Wn.2d 1008 (2020). Like both of the earlier cases *Zimmerman* and *Chenowith*, the Court in

Svaleson felt bound by the *Clayton* decision. But after twice denying review on this issue, this time Supreme Court granted review. Unfortunately, the defendant in *Svaleson* passed away before the issue could be decided and the appeal was dismissed as moot.

Since *Svaleson,* the Court of Appeals has twice declined to grant relief on this issue, including Mr. Schinzing's case, unless and until this Court overrules *Clayton*. *State v. Rohleder*, 31 Wn. App. 2d 492, 550 P.3d 1042, review denied, 559 P.3d 492 (2024). In *Rohleder*, the Court of Appeals held, "Although we believe that Rohleder's arguments have merit, we are constrained by Clayton to conclude that this instruction was not a comment on the evidence." *Rohleder* at 496. Despite the merits of the argument and repeated hesitations, misgivings, and concerns, the issue remains unresolved. Inexplicitly, this Court denied review in *Rohleder*. It is time for this Court to address this important issue.

The *Clayton* case is not in line with the modern approach to Article 4, §16 for two reasons. First, Washington Courts have recognized the power of the judge to influence how jurors view evidence and witnesses and have repeatedly struck down jury instructions that convey to the jury how they should evaluate a particular piece of evidence, including sexual assault victims. *Kirkland v. O'Connor,* 40 Wn. App. 521, 522,698 P.2d 1128 (1985); *State v. Mellis,* 2 Wn. App. 859, 470 P.2d 558 (1970). In *Laudermilk v. Carpenter,* 78 Wn.2d 92, 101, 457 P.2d 1004 (1969) this Court acknowledged this sea change when it said:

> It has, for some years, been the policy of our Washington system of jurisprudence, in regard to the instruction of juries, to avoid instructions which emphasize certain aspects of the case and which might subject the trial judge to the charge of commenting on the evidence, and also, to avoid slanted instructions, formula instructions, or any instruction other than those which enunciate the basic and essential elements of the legal rules necessary for a jury to reach a verdict. Under this theory, counsel has been free, and, indeed, has the responsibility, to argue to the jury, the refinements of these rules within the factual framework of his

> case. Detailed instructions, such as those proposed here, though once common, are now deemed to be instructions which 'point up,' 'underline,' or 'buttress' portions of counsel's argument.

Laudermilk at 100-101.

Additionally, the fact that a comment may be a correct statement of the law does not countenance it being read to the jury. For instance, the Court in *Clayton* emphasized the fact that the No Corroboration Necessary instruction is a correct statement of the law, which it clearly is. RCW 9A.44.020(1). But under the modern understanding of Article 4, § 16, that is not enough. *In re Det. Of R.W.,* 98 Wn. App. 140, 988 P.2d 1034 (1999). An instruction that instructs the jury how to weigh a particular piece of evidence is an impermissible comment, even if the instructions align with the legislative intent. *R.W.* at 144.

The second change that has occurred is how Washington courts evaluate prejudice when there is a comment on the evidence. In Court in *Clayton*, despite its

hesitation in countenancing the jury instruction, put the burden on the defense to show prejudicial error. But the modern approach is to presume prejudice and place the burden on the State "to affirmatively show[] that no prejudice could have resulted" from the comment. *State v. Levy,* 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). This weighty standard reflects the severity of the potential impact of constitutional error. Where, as here, the only evidence that the defendant committed a crime is the word of the alleged victim, giving a No Corroboration Necessary instruction directly affects the jury's consideration of the sole evidence of alleged guilt.

In light of this modern understanding of Article 4, §16, it is not surprising that the WPIC Committee recommends against such an instruction; and four published Courts of Appeals decisions (*Zimmerman*; *Faucett; Chenoweth;* and *Rohleder*), as well as multiple unpublished decisions, have expressed "misgivings" or "concerns" with the No

Corroboration Necessary jury instruction. But each of these Courts of Appeals have felt bound this Court's decision in *Clayton*. The *Clayton* decision is not in line with the modern approach to Article 4, §16. Reversal is required.

F. Conclusion

This Court should grant review, reverse, and remand for a new trial.

This Petition for Review is in 14-point font and contains 3096 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 9th day of January, 2025.

Thomas E. Weaver

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Attorney for Appellant

Filed
Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. EDWARD THOMAS SCHINZING, Appellant.	No. 58436-1-II UNPUBLISHED OPINION

PRICE, J. — Edward T. Schinzing appeals his conviction for first degree child molestation. Schinzing argues that the trial court erred by (1) improperly commenting on the evidence when it instructed the jury that the alleged victim's testimony did not require corroboration, (2) admitting improper evidence when it allowed testimony about the victim's disclosures of the sexual abuse several years after the abuse occurred, and (3) using an offender score for sentencing that wrongfully included a federal arson conviction.

We affirm.

FACTS

In 2021, R.L.S. disclosed that she had been sexually abused by her father, Schinzing, several years prior. R.L.S. was 11 years old at the time of the disclosure. Following an investigation, the State charged Schinzing with one count of first degree child molestation—domestic violence.

The case proceeded to a jury trial. In a pretrial motion in limine, the State sought permission to admit R.L.S.'s disclosures to her school social worker, her guardian, a forensic interviewer, and to CPS. The trial court asked Schinzing's counsel if he had any objection. Defense counsel responded that the trial court first needed to determine whether the disclosures were timely made and if so, then make sure the testimony was limited in scope consistent with the fact of complaint doctrine.[1]

The parties did not develop the record with respect to the timing of the disclosures in relation to when the alleged abuse occurred, and the trial court did not address this timing in its ruling. Yet, the trial court granted the State's motion in limine, noting that Schinzing could object during testimony if the testimony about the disclosures overstepped the bounds of the fact of complaint doctrine.

At trial, R.L.S. testified in detail about the abuse. She explained that one day when she was in first grade, she was sleeping on a couch with Schinzing when she felt him put his hands down her pants and on her bottom, causing her to wake up. Schinzing then moved his hand to the front of her pants and touched her vagina. The abuse eventually stopped, although she was unsure whether it stopped when her aunt walked into the room or when Schinzing fell off the couch.

A few years later, when R.L.S. was in fifth grade, she disclosed the abuse to multiple adults. Several of these adults testified at the trial, including the school social worker, R.L.S.'s guardian, the forensic interviewer, a CPS employee, and a pediatric nurse practitioner. For example, the

[1] Discussed in more detail below, the fact of complaint doctrine, in general terms, permits the admission of limited evidence about disclosures of sexual misconduct despite evidentiary rules that might otherwise exclude the evidence. *State v. Martinez*, 196 Wn.2d 605, 611, 476 P.3d 189 (2020).

pediatric nurse practitioner testified that R.L.S. said that Schinzing touched her inappropriately on her bottom and "the part of her body that she pees from" while she was sleeping. Verbatim Rep. of Proc. (VRP) at 333. Schinzing did not object to any of this testimony about the disclosures.

Schinzing also testified and denied the allegations.

Following the testimony, the State proposed a jury instruction related to the corroboration of an alleged victim's testimony. The State's proposed instruction stated, "In order to convict a person of the crime of Child Molestation in the First Degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated." Clerk's Papers (CP) at 39. Defense counsel responded that his preference was to not use the instruction, arguing that the parties could fairly argue the importance of corroboration to the jury without it. The trial court agreed to give the instruction.

At the close of the trial, the jury found Schinzing guilty of the charged crime of first degree child molestation—domestic violence.

At sentencing, the parties disputed Schinzing's offender score. The State argued that Schinzing's 2020 federal conviction for arson under 18 U.S.C. § 844(f)(1) should be included in his offender score because it was comparable to second degree arson in Washington. The trial court agreed and counted the conviction as two points for the offender score. Based on a total offender score of 5, the trial court imposed an indeterminate sentence with a minimum term of 90 months and a maximum term of life.

Schinzing appeals.

ANALYSIS

Schinzing makes three arguments. Schinzing argues that (1) the trial court erred in issuing a jury instruction related to the corroboration of the alleged victim's testimony because it amounted to a comment on the evidence, (2) the trial court erred in admitting R.L.S.'s delayed disclosures of sexual abuse under the fact of complaint doctrine, and (3) the trial court erred in including his federal arson conviction in his offender score because it was not comparable to a Washington offense.

I. NO CORROBORATION JURY INSTRUCTION

Schinzing first argues that the trial court commented on the evidence by instructing the jury that no corroboration was necessary to convict him of first degree child molestation. We disagree.

The Washington constitution prohibits judges from commenting on the evidence. WASH. CONST. art. IV, § 16. The purpose of prohibiting judicial comments on the evidence "is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999).

Jury instructions can be the source of an improper comment. "A trial court makes an improper comment on the evidence if it gives a jury instruction that conveys to the jury his or her personal attitude on the merits of the case." *State v. Rohleder*, 31 Wn. App. 2d 492, 496, 550 P.3d 1042, *review denied*, ___ P.3d ___ (2024). Jury instructions that correctly state the law are not comments on the evidence. *See id.* at 497. We review de novo whether a jury instruction amounts to a judicial comment on the evidence in the context of the instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

Washington law specifically provides that corroboration is unnecessary to convict a person of a sex offense. RCW 9A.44.020(1).[2] A jury instruction setting forth this principle, known as the "no corroboration jury instruction" has been in use for decades. *Rohleder*, 31 Wn. App. 2d at 502; *see State v. Clayton*, 32 Wn.2d 571, 573-74, 202 P.2d 922 (1949). In *Clayton*, the defendant argued that the no corroboration instruction was an improper comment on the evidence.[3] 32 Wn.2d at 573. Our Supreme Court disagreed, holding that because the instruction "expressed no opinion as to the truth or falsity of the testimony of the [victim], or as to the weight which the court attached to her testimony, but submitted all questions involving the credibility and weight of the evidence to the jury for its decision[,]" the instruction was not an improper comment on the evidence. *Id.* at 573-74.

In *Rohleder*, this court recently addressed and rejected the argument that a no corroboration jury instruction amounts to a comment on the evidence. 31 Wn. App. 2d at 494. There, in a case involving multiple sexual abuse crimes, the defendant argued, like Schinzing here, that the trial

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[2] RCW 9A.44.020(1) states, in relevant part, that "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." (Former RCW 9A.44.020(1) (2013) was in effect at the time that Schinzing committed the offense, but we cite to the current version of the statute because the language of the relevant portion of the statute has not changed.)

[3] The no corroboration jury instruction at issue in *Clayton* was longer than, but similar in substance to, the instruction used in this case. There, the instruction provided:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the [victim] alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

32 Wn.2d at 572 (internal quotation marks omitted).

court erred in giving the no corroboration instruction because it was an impermissible comment on the evidence. *Id*. at 493-94. The defendant contended that *Clayton* should not be followed because of differences in the language of the instructions that were used. *Id.* at 495-96. This court held that the language differences were irrelevant and confirmed the applicability of *Clayton*, reasoning that despite being old, *Clayton* remained binding precedent and that "[u]ntil the Supreme Court addresses this issue, we are constrained by *Clayton* to conclude that giving a no corroboration instruction is not a comment on the evidence." *Id.* at 501.

We agree with *Rohleder*. *Clayton* remains binding precedent, and until our Supreme Court readdresses the issue, we must conclude that giving a no corroboration instruction is not a comment on the evidence.[4] 31 Wn. App. 2d at 501; *see 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006) (the court of appeals is bound to follow precedent established by our Supreme Court). Thus, we hold that the trial court did not err in giving the no corroboration jury instruction.

II. FACT OF COMPLAINT DOCTRINE

Schinzing next argues that the trial court erred by using the fact of complaint doctrine to admit the testimony about R.L.S.'s disclosures of the sexual abuse approximately five years after the alleged abuse occurred. According to Schinzing, the fact of complaint doctrine requires that

[4] Schinzing argues, in part, that *Clayton* is no longer binding precedent because our Supreme Court "unequivocally signaled its intent to review the underpinnings of *Clayton*" by granting review in 2020 of a case involving the no corroboration instruction (and only failed to review the case because the defendant passed away). Br. of Appellant at 22. But Schinzing cites no authority holding that when our Supreme Court merely grants review of an issue, previous case law is no longer binding on us. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Moreover, our Supreme Court has recently denied review of *Rohleder*. 31 Wn. App. 2d 492.

the disclosures must be "timely" and an 11-year-old disclosing sexual assault when they were about 6 years old does not qualify as timely. Br. of Appellant at 23. The State responds that Schinzing has failed to adequately brief this issue on appeal because he provides no analysis on what constitutes an untimely complaint or how that may apply in the context of this case. We agree with the State.

The fact of complaint doctrine is a common law doctrine that permits the admission of evidence that the victim disclosed sexual violence to someone. *State v. Martinez*, 196 Wn.2d 605, 611, 476 P.3d 189 (2020). The purpose of the doctrine is to negate the inference that just because the victim failed to report immediately that they had been sexually assaulted, their claim could not be believed. *Id.* at 610. According to our Supreme Court, the doctrine is necessary because "mistaken beliefs about sexual violence are still pervasive in our society and in our jury boxes." *Id.* at 613. The doctrine serves to counteract the sexist expectations of some jurors, which can be important in cases where there is little physical evidence or the victim's credibility suffers due to other stereotypes or biases. *Id.* We review the trial court's decision to admit evidence, including under this doctrine, for an abuse of discretion. *Id.* at 614.

The evidence admissible under the fact of compliant doctrine is limited in scope. *Id.* at 611. Testimony under the doctrine is admissible to demonstrate that the victim reported the abuse to someone, but not to prove the truth of the matter asserted. *Id.* And the disclosure must be "timely made." *Id*. at 614 (quoting *State v. Ferguson*, 100 Wn.2d 131, 136, 667 P.2d 68 (1983)). "A complaint is timely if it is made when there is an 'opportunity to complain.' " *Id.* (internal quotation marks omitted) (quoting *State v.* Griffin, 43 Wn.2d 591, 597, 86 P. 951 (1906)).

Here, Schinzing generally argues that the trial court erred because R.L.S.'s disclosures to the adults were not timely made as required by the doctrine. But his argument is limited to a conclusory assertion that a five-year delay in the disclosure is untimely, and he provides no meaningful analysis as to why such a delay is untimely in the context of this case. Schinzing undertakes no explanation of why the disclosures to the various adults were not the first "opportunity to complain" under the circumstances. And critically, none of these issues were developed with the trial court, when a factual record could have been made about the timeliness of these disclosures given the surrounding circumstances. As our Supreme Court has recognized, the trial court is in the best position to determine what constitutes a timely complaint based on the surrounding circumstances. *See Martinez,* 196 Wn.2d at 614-15 ("We leave it in the able hands of the trial court to determine what constitutes a timely complaint based on the surrounding circumstances.").

Without meaningful analysis from Schinzing (especially considering the absence of a relevant factual record), we reject Schinzing's fact of complaint doctrine argument.

III. COMPARABILITY OF FEDERAL ARSON TO A WASHINGTON OFFENSE

Finally, Schinzing argues that the trial court erred by sentencing him with an incorrect offender score. He contends that the trial court wrongfully included a federal arson conviction in his offender score when the conviction was not comparable to a Washington offense. We disagree.

A. LEGAL PRINCIPLES

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, the trial court uses the defendant's prior convictions to determine an offender score, which (along with the seriousness level of the current offense) establishes the defendant's presumptive standard sentencing range.

State v. Arndt, 179 Wn. App. 373, 377, 320 P.3d 104 (2014). "We review the trial court's calculation of a defendant's offender score de novo." *State v. Olsen*, 180 Wn.2d 468, 472, 325 P.3d 187 (2014).

When the defendant has out-of-state convictions, the trial court must make a determination of whether the out-of-state offense is comparable to a Washington offense. *In re Pers. Restraint of Canha*, 189 Wn.2d 359, 367, 402 P.3d 266 (2017). When evaluating comparability, we apply a two-part test. *Olsen*, 180 Wn.2d at 472. First, we determine if the offenses are legally comparable by comparing their elements. *Id.* Legal comparability exists when the out-of-state offense is the same or narrower than the Washington offense. *Id.*at 472-73. If the crimes are legally comparable, our analysis ends and the out-of-state offense is included in the defendant's offender score. *Canha*, 189 Wn.2d at 367.

If the offenses are not legally comparable, such as when the out-of-state offense is broader than the Washington offense, we determine whether the offenses are factually comparable by deciding if "the defendant's conduct would have violated a Washington statute." *Id.* The State has the burden to prove the comparability of an out-of-state conviction. *Olsen*, 180 Wn.2d at 472. If an out-of-state conviction involves an offense that is neither legally nor factually comparable to a Washington offense, the conviction may not be included in the defendant's offender score. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

B. LEGAL COMPARABILITY

Schinzing argues that his federal arson conviction is not legally comparable to a Washington offense (the closest Washington offense is second degree arson). Schinzing makes two arguments. First, in a single sentence, he contends that the federal arson statute requires a

person to act "maliciously," while Washington's second degree arson requires more—specifically that a person act both "knowingly and maliciously." Second, in another brief reference, he appears to argue that Washington's definition of malice requires intent to be directed at another person, while the federal definition of malice is not limited to another person. Schinzing contends these additional requirements in Washington makes the state arson statute narrower and the federal statute broader and, thus, not comparable. Schinzing is correct that there are differences in language between the two statutes, but we disagree that the differences mean the statutes are not legally comparable.

Focusing on Schinzing's first argument, Washington's second degree arson statute only would be narrower than the federal statute if the state's use of "knowingly and maliciously" was effectively more selective than the federal use of the singular word "maliciously." *Compare* RCW 9A.48.030 *with* 18 U.S.C. § 844(f)(1). In other words, if a person's conduct met the standard of "maliciously" under the federal law, but not the standard of "knowingly and maliciously" under state law, then the federal statute would be broader. *Id.* The State argues that the federal statute is not broader because the federal definition of "maliciously" narrows the conduct it criminalizes to encompass fewer actions than that of the state statute. We agree the federal definition of maliciously makes these two statutes legally comparable.

This conclusion requires comparing the federal concept of maliciousness with what is required under state law to be knowing and malicious. The federal arson statute does not define the term "maliciously" so federal courts have presumed that Congress intended to adopt the term's common law meaning. *Togonon v. Garland*, 23 F.4th 876, 878 (9th Cir. 2022); *see* 18 U.S.C. § 844(f)(1). At common law, a defendant acted maliciously by

> *intentionally* burning the dwelling house of another or by doing so *wantonly*, meaning intentionally doing an act (e.g., starting a fire or burning his own premises) under circumstances in which the act created a very high risk of burning the dwelling house of another, where the actor **knew** of that risk but nonetheless engaged in the risk-taking act.

Togonon, 23 F.4th at 878 (boldface added) (internal quotation marks omitted). Thus, a defendant acts "maliciously" in the context of the federal arson statute if they either intentionally damage property covered by the statute or intentionally do an act *knowing* there is a very high risk that damage or injury would result. *See id.*

As previously discussed, the mens rea component to the state statute contains two components, "knowingly and maliciously." RCW 9A.48.030. Under Washington law, the concept of "knowingly" is defined broadly as when a person is "aware of a fact, facts, or circumstances or result described by a statute defining an offense" or they have "information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense." RCW 9A.08.010(1)(b)(i), (ii). The definition of maliciously is also expansive; it includes an evil intent to injure another person and may be inferred from an act done in willful disregard of the rights of another. RCW 9A.04.110(12).

From looking at these definitions, the addition of the word "knowingly" under the state statute does not make the state statute narrower—it adds nothing that is not subsumed with the federal concept of maliciousness. The federal definition of maliciousness includes either (1) specific intent to damage property or (2) an intentional act where the person knows of the risk of damage to property. *Togonon*, 23 F.4th at 878. If a person acts intentionally, they necessarily act

knowingly. *State v. Thomas*, 98 Wn. App. 422, 425, 989 P.2d 612 (1999) ("By acting intentionally, a person by law also acts knowingly."), *review denied*, 140 Wn.2d 1020 (2000). Thus, under either aspect of the federal definition of maliciousness, the concept of an intentional act is at least concurrent with the state concept of knowledge in this context. Indeed, Schinzing offers no analysis of how someone could possibly act maliciously under this federal definition and not also have that act be committed knowingly and maliciously under the state arson statute. Accordingly, we are unpersuaded by Schinzing's argument that the addition of the word "knowingly" in the state statute makes the state and the federal statutes legally incomparable.

Having rejected Schinzing's first argument for why the statutes are not legally comparable, we briefly consider Schinzing's second argument. With little explanation, Schinzing appears to argue that the federal arson statute is broader because Washington's definition of malice requires evil intent to be directed *at another person*, while the federal definition of malice is not limited to conduct directed at another person, but also can include an intent to damage property.[5] The State responds, in part, that Schinzing's interpretation of the state definition of malice would lead to an absurd result in the context of an arson statute.

[5] Compare RCW 9A.04.110(12) ("maliciously" includes "an evil intent . . . *to* . . . *injure another person*" and may also be inferred from an act done in willful disregard of the rights of another) (emphasis added)) with the federal definition from *Togonon*, 23 F.4th at 878 (explaining that a defendant acts maliciously if they either *intentionally damage property* covered by the statute or intentionally do an act with willful disregard of the likelihood that damage or injury would result).

The state definition of "maliciously" is not just limited to an evil intent to injure "another person," it also includes an act that is done "in willful disregard of the rights of another . . . or an act or omission of duty betraying a willful disregard of social duty." RCW 9A.04.110(12). Damaging property of another through arson would clearly be action taken "in willful disregard of the rights of the another" or a "willful disregard of social duty." *Id.* Accordingly, this difference in definitions of malice in the federal and state statutes does not make the statutes legally incomparable.[6]

Having rejected Schinzing's arguments that the federal statute is broader, we conclude that the two offenses are legally comparable.[7] With this conclusion, we may end our inquiry and need not consider factual comparability. *Canha*, 189 Wn.2d at 367. Thus, we hold that the trial court did not err in including Schinzing's federal arson conviction in his offender score.

CONCLUSION

We affirm.

[6] With respect to the term "maliciously" as used in both the federal and state statutes, Schinzing limits his argument to the state statute's reference to an evil intent to injure "another person," and he does not argue more broadly that any other differences in those definitions might create a lack of comparability. We are limited by the arguments made by the parties and, accordingly, do not address any other potential differences in the definitions. *See Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 50, 534 P.3d 339 (2023) (explaining that Washington courts generally follow the rule of party presentation).

[7] Not only is the federal statute not broader than the state statute, but the opposite may be true—the federal statute actually might be narrower. The federal statute applies to damage or destruction of *federal* property, while the state statute applies more broadly to damage of *any property*. *Compare* 18 U.S.C. § 844(f)(1) *with* RCW 9A.48.030.

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.

PRICE, J.

We concur:

MAXA, P.J.

CHE, J.

THE LAW OFFICE OF THOMAS E. WEAVER

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