NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see https://www.courts.wa.gov/opinions and the information that is linked there.

FILED
1/30/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSHUA LEE MCCABE, Appellant.	DIVISION ONE No. 84635-3-I OPINION PUBLISHED IN PART

DWYER, J. — Joshua McCabe appeals from the judgment entered on a jury's verdict finding him guilty of one count of child molestation in the first degree, one count of child molestation in the second degree, one count of incest in the second degree, and one count of bail jumping. The State concedes that McCabe's bail jumping conviction was not supported by sufficient evidence and that multiple errors require McCabe to be resentenced. We accept the State's concessions and remand for dismissal of McCabe's conviction for bail jumping. We affirm the remainder of McCabe's convictions and also remand for resentencing.

I

When McCabe's daughter S.M. was in high school, she reported to a school guidance counselor that her father had, on three separate occasions, inappropriately touched her genital area while she was attempting to sleep. After a forensic interview was conducted with S.M., the State charged McCabe with

two counts of child molestation in the first degree, one count of child molestation in the second degree, and one count of incest. When McCabe failed to appear for a pretrial hearing, the State amended the information to add a charge of bail jumping.

The jury acquitted McCabe on one count of child molestation in the first degree, but convicted on all other charges. McCabe appeals.

II

A

McCabe first asserts that he was constructively deprived of his constitutional right to counsel, in violation of his right to counsel under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), due to an alleged exceptionally poor performance by his defense attorney. However, he specifically disclaims a claim of ineffective assistance of counsel within the ambit of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Applying the legal standards applicable to a deprivation of counsel claim—as opposed to an ineffective assistance of counsel claim—we conclude that McCabe does not demonstrate an entitlement to appellate relief.

B

On May 14, 1984, the United States Supreme Court filed its opinion in Strickland. As noted by the Court, the right to counsel is included in the Sixth Amendment as a means of ensuring that the accused receives his fundamental right to a fair trial. Strickland, 466 U.S. at 684. "[A] fair trial," the Court stated, "is

one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland, 466 U.S. at 685. The right to counsel is a crucial part of ensuring a fair trial, because the knowledge and skill of counsel allows the accused to challenge the prosecution's case on an even footing. Strickland, 466 U.S. at 685. "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685. Accordingly, the Court has recognized that the right to counsel encompassed in the Sixth Amendment is the right to effective assistance of counsel. Strickland, 466 U.S. at 686.

In Strickland, David Washington, a criminal defendant sentenced to death in Florida for three counts of murder, filed a habeas petition alleging ineffective assistance of counsel at his sentencing hearing. 466 U.S. at 678. Until that point, the Supreme Court had not had the occasion to address a claim of "'actual ineffectiveness'" of counsel that did not involve a conflict of interest or interference by the government. Strickland, 466 U.S. at 686.

The Court first recognized that any claim of actual ineffectiveness must be guided by the purpose of the right to counsel—to ensure a fair trial. Strickland, 466 U.S. at 686. With this purpose in mind, the Supreme Court announced the following test applicable to claims of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

> defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

On the same day that it filed its opinion in Strickland, the United States Supreme Court also issued its opinion in Cronic. There, the Court of Appeals had held that the defendant had been completely denied counsel because the attorney appointed for him was inexperienced and lacked sufficient time to prepare for trial and, accordingly, reversal was required regardless of the quality of the defense counsel's actual performance. Cronic, 466 U.S. at 652-53. The Supreme Court in Cronic overturned the Court of Appeals' decision.

In reversing the appellate court decision, the Supreme Court noted, consistent with its opinion in Strickland, that the Sixth Amendment is not implicated absent an effect of the challenged conduct on the reliability of the trial process. Cronic, 466 U.S. at 658; see also Strickland, 466 U.S. at 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."). Ordinarily, the burden to prove an effect on the reliability of the trial process rests with the defendant. Cronic, 466 U.S. at 658; Strickland, 466 U.S. at 687. However, the Court recognized that there exists a limited set of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. Only when one of these circumstances applies will prejudice be presumed and

the defendant relieved of his burden under Strickland. Cronic, 466 U.S. at 658.

Although it did not purport to create an exclusive list of these circumstances, the Supreme Court did discuss three situations in which a presumption of prejudice is warranted. The first of these situations is when the defendant has been completely denied counsel at a critical stage of the proceedings. The Supreme Court listed multiple examples of cases that fell under this exception, including Geders v. United States, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), wherein the trial court prohibited the defendant from speaking to his counsel overnight during the trial, and Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961), in which the defendant did not have a private attorney nor was an attorney appointed to represent him at his arraignment. Cronic, 466 U.S. at 659 n.25.

The second situation discussed in Cronic arises when the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is minimal. Cronic, 466 U.S. at 659-60. As an example of this situation, the Supreme Court noted Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932), wherein the trial court first appointed the entire Alabama bar as counsel for eight defendants charged with a capital offense, then, on the day of trial (only six days after arraignment), instead appointed an attorney from Tennessee who was not licensed to practice law in Alabama. Cronic, 466 U.S. at 660.

The third and final situation discussed in Cronic arises when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."

Cronic, 466 U.S. at 659. If the defendant cannot establish that his case is sufficiently similar to one of these three situations, then the claim of denial of assistance of counsel is subject to the standard announced in Strickland, Cronic's companion case, and a showing of actual prejudice is required.

C

The Supreme Court elaborated on what it means for counsel to "'entirely fail[] to subject the prosecution's case to meaningful adversarial testing'" in Bell v. Cone, 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (quoting Cronic, 466 U.S. at 696). There, the defendant argued that he had been denied his Sixth Amendment right to counsel at his death penalty sentencing hearing because his attorney did not present mitigating evidence and waived closing argument. Bell, 535 U.S. at 692. The federal circuit court determined that because Bell's counsel had not asked for mercy following the prosecution's closing argument, the defense attorney had failed to subject the prosecution's call for the death penalty to "meaningful adversarial testing" and, accordingly, ruled that no showing of actual prejudice was required to establish a violation of the right to counsel. See Bell, 535 U.S. at 693 (citing Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001)). The Supreme Court reversed the decision of the Court of Appeals. Bell, 535 U.S. at 693.

In so doing, the Supreme Court clarified that "[w]hen we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure *must be complete*." Bell, 535 U.S. at 696-97 (emphasis added). When assessing whether a

complete failure has occurred, the Court indicated that the specific proceeding must be viewed "as a whole," not by assessing any claimed ineffectiveness "at specific points." Bell, 535 U.S. at 697. With respect to the case at hand, the Supreme Court stated that "[t]he aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." Bell, 535 U.S. at 697-98.

As Bell indicates, the cited exception is a narrow one and cases in which there is a complete failure to subject the prosecution's case to meaningful adversarial testing will be few and far between. Indeed, cases in which this exception has been properly applied are limited to those in which the defendant's counsel was so uninvolved that the attorney may as well have not been present in court at all. See Lewis v. Zatecky, 993 F.3d 994, 1006 (7th Cir. 2021), cert. denied sub nom. Reagle v. Lewis, 142 S. Ct. 897, 211 L. Ed. 2d 605 (2022) (counsel's only comment during sentencing hearing was "'Judge, I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add.'"); Burdine v. Johnson, 262 F.3d 336, 338-39 (5th Cir. 2001) (counsel slept through trial); Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (counsel was silent through entire trial); Martin v. Rose, 744 F.2d 1245, 1250 (6th Cir. 1984) (counsel refused to participate in trial).

On the other hand, federal courts have been consistent in holding that allegations of poor performance are subject to the Strickland analysis and actual

prejudice must be demonstrated in order for the defendant to obtain relief. See, e.g., Darden v. United States, 708 F.3d 1225, 1230 (11th Cir. 2013) (no presumption of prejudice when attorney conceded guilt on one charge and defended against others); McDowell v. Kingston, 497 F.3d 757, 763 (7th Cir. 2007) (counsel allowed client to testify in narrative form); United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (counsel conducted incomplete investigation, asked open-ended questions of witnesses, and was unfamiliar with federal rules); United States v. Thomas, 417 F.3d 1053, 1057 (9th Cir. 2005) (counsel conceded guilt on one charge while defending on others); United States v. Griffin, 324 F.3d 330, 363 (5th Cir. 2003) (counsel repeatedly deferred to counsel of co-defendant); Moss v. Hofbauer, 286 F.3d 851, 862 (6th Cir. 2002) (counsel did not conduct witness interviews, gave no opening statement, and conducted limited examination of State's witnesses). As one circuit court observed, "bad lawyering, regardless of *how* bad, does not support the presumption [of prejudice]; more is required." McInerney v. Puckett, 919 F.2d 350, 353 (5th Cir. 1990).

D

The Washington Supreme Court has discussed Cronic on only one occasion. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1 (2004). There, our Supreme Court rejected the petitioner's argument that the presumption of prejudice articulated in Cronic should apply to his 15 claims of ineffective assistance of counsel. Instead, the court held that "[a]bsent a complete denial of counsel or a breakdown in the adversarial process, Davis 'can

therefore make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel.'" Davis, 152 Wn.2d at 675 (quoting Cronic, 466 U.S. at 666). The court then proceeded to analyze the petitioner's claims of ineffective assistance of counsel under the Strickland standard.

Our Supreme Court has never upheld a claim of denial of assistance of counsel based on counsel's performance without a showing of prejudice. Only in rare cases have we done so. In State v. Harell, 80 Wn. App. 802, 805, 911 P.2d 1034 (1996), we held that the defendant was denied the right to counsel when his attorney took the stand to testify against him.[1] Similarly, in State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783 (2008), we held that the right to counsel was denied and we would presume prejudice when the defendant demonstrates an actual conflict of interest that adversely affected counsel's performance.

The sole appellate decision which relied on Cronic to find a deprivation of counsel without requiring a showing of prejudice was State v. Chavez, 162 Wn. App. 431, 257 P.3d 1114 (2011). There, Division Three considered a claim that the defendant was deprived of the assistance of counsel because his attorney filed an Anders[2] brief in conjunction with the defendant's request to withdraw a guilty plea. Division Three held that counsel was denied because an Anders brief is not an appropriate filing in a trial court and the brief effectively conceded that the motion was frivolous. Chavez, 162 Wn. App. at 439-40. The opinion did

[1] Although we did not cite Cronic in our opinion in Harell, the facts of that case fall squarely within the circumstances in which the United States Supreme Court has held that because a conflict of interest was present, assistance of counsel is denied and prejudice is presumed.

[2] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

not address the issue of prejudice, instead remanding for further review of the defendant's motion to withdraw his guilty plea. Chavez, 162 Wn. App. at 440.

Judge Korsmo dissented. In his dissent, Judge Korsmo concluded that counsel's filing of an Anders brief did not constitute a "complete denial of counsel at a critical stage of the proceedings" under Cronic whereby prejudice could be presumed. Chavez, 162 Wn. App. at 445 (Korsmo, A.C.J., dissenting). This was so, Judge Korsmo stated, because counsel "did present the arguments to the court." Chavez, 162 Wn. App. at 445 (Korsmo, A.C.J., dissenting).

Although we believe the dissent in Chavez had the better of this exchange, the majority opinion can charitably be read to hold that an issue of fact existed by virtue of counsel's concession that the motion was meritless. Nonetheless, we decline to adopt the approach taken by Division Three.

E

We turn now to the specific arguments made in this case. McCabe asserts that he was constructively denied the assistance of counsel because his attorney failed to alert the court that McCabe was falling asleep during trial, did not object to inadmissible evidence, did not cross-examine many of the State's witnesses, did not make an opening statement, did not move for dismissal of the bail jumping charge, was inattentive at sentencing, did not correct a miscalculated offender score, and argued for sentencing alternatives for which McCabe was not eligible.

All of McCabe's complaints concern his counsel's level of performance. Nevertheless, he specifically bases his claim on Cronic and affirmatively

disclaims a Strickland claim. However, allegations of poor performance, no matter how poor, cannot form the basis of a Cronic claim. McInerney, 919 F.2d at 353. For such a claim to be presented, counsel must have been absent or entirely nonparticipatory. But McCabe makes no such allegation. On the contrary, McCabe's counsel clearly participated in the trial, even if not in a manner satisfactory to McCabe. Accordingly, McCabe's assertions of underperformance and "lack of dedication" are not cognizable under Cronic.

McCabe discusses his counsel's performance in a manner that is typical of a Strickland ineffective assistance of counsel claim. However, because he affirmatively disclaims advancing such a claim, we will not treat his claim as such.

McCabe fails to demonstrate that he was deprived of the assistance of counsel within the meaning of Cronic. His claim fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

III

At trial, the State primarily relied on the testimony of S.M. S.M. testified that when she was in third grade, she woke up feeling a hand on her buttocks inside of her pants. After the touching stopped, S.M. waited, then opened her eyes to see McCabe getting up from underneath the raised footrest of the recliner on which she had been sleeping. S.M. testified that the same thing

happened a second time while she was in third grade. However, she could not remember as many of the details. She did not see McCabe during the second incident.

S.M. further testified that when she was in sixth grade, she was asleep on her grandparents' couch when she awoke to a "tickling feeling" under her underwear on the skin of her vagina. S.M. saw McCabe's head peeking up from the back of the couch. When S.M. looked at him, McCabe "ducked down" and then "went into the kitchen."

S.M. told several people about these incidents, including her best friend Kambria, S.M.'s mother Samantha, her "mom's girlfriend" Maxine Buhler, and S.M.'s grandparents. In 2019, when S.M. was in high school, she disclosed the three incidents to her school guidance counselor. S.M.'s guidance counselor made a report to law enforcement, which then scheduled a forensic interview. Deedee Pegler, a forensic interviewer with the Arthur D. Curtis Children's Justice Center, conducted the interview with Vancouver Police Department Officer Darren Oceguera observing.

Kambria, Samantha, Pegler, Oceguera, and S.M.'s brother Jeremy all testified at trial that S.M. had told them that she had been abused. None of the witnesses were questioned about what precisely S.M. had said to them or about other specifics of the disclosures.

During her testimony, Pegler was questioned about her experience in conducting forensic interviews of children. Pegler testified that:

> So, different children process events in different ways. And some of those children, not all, have undergone traumatic events that they could process in different ways. So, so their reactions to what we're discussing are gonna be different.

Pegler also testified that delayed disclosures of abuse are common due to a wide variety of factors, including "loyalty to the offender," feelings of "shame, blame, [or] embarrassment," "developmental factors," not wanting the "positive aspects" of a relationship with the offending family member "to go away," and whether someone else had been in the room when the abuse was occurring.

During closing argument, the prosecutor informed the jury that "we as the State have the burden to prove to you each element of each crime charged beyond a reasonable doubt." After defining all of the elements of each of the charged sexual offenses, the prosecutor argued to the jury, "If you believe [S.M.], every single one of the elements in the sex crimes is met. If you believe [S.M.], the defendant is guilty of the first four counts." McCabe did not object to this argument.

The prosecutor admitted that S.M.'s memory of the incident giving rise to the second count of child molestation in the first degree was not as clear as her memory of other incidents. The prosecutor argued:

> Doesn't remember as many details and that's okay and that makes sense. Trauma affects memory and reactions. So, going through a traumatic event of your father touching you inappropriately, sexually is not something you remember every detail of.

McCabe did not object to this argument.

The prosecutor additionally addressed the fact that the charged incidents had occurred multiple years before S.M. had told her guidance counselor about

them. As part of this argument, the prosecutor stated the following:

> [S.M.] told her mom, her brother, her friend, her mom's partner, and the counselor. She's been consistent with everyone that she's been abused. But until this point, nothing has ever happened about it. And she did delay her disclosure. She did not tell right away.

The prosecutor then recounted the testimony of Oceguera and Pegler about why children commonly delay disclosing abuse. McCabe did not object to this testimony.

The jury found McCabe guilty of one count of child molestation in the first degree, one count of child molestation in the second degree, one count of incest, and one count of bail jumping. The jury found McCabe not guilty on the second count of child molestation in the first degree.

The trial court began McCabe's sentencing hearing on September 10, 2021.[3] At the hearing, the State asserted that McCabe had an offender score of 9, but did not present any evidence of McCabe's prior convictions. The trial court accepted the State's assertion. The trial court sentenced McCabe to a minimum of 149 months of confinement on count one (child molestation in the first degree), 116 months of confinement on count three (child molestation in the second degree), 60 months of confinement on count four (incest in the second degree), and 29 months on count five (bail jumping), all to be served concurrently.

As conditions of his community custody, the trial court ordered that McCabe "[m]ay not possess or access sexually explicit materials that are

[3] Defense counsel sought to appear at sentencing by telephone. The sentencing hearing had to be continued due to defense counsel's poor telephone connection. The hearing was continued a second time in order for McCabe to undergo a competency evaluation.

intended for sexual gratification" and "[m]ay not enter into or frequent establishments or areas where minors congregate without being accompanied by a responsible adult approved by [Department of Corrections] and sex offender treatment provider to include, but not limited to: . . . parks."

IV

McCabe asserts that the prosecutor committed misconduct during closing argument and that this misconduct deprived him of a fair trial. The State counters that no misconduct occurred and, if it did, McCabe has failed to demonstrate any prejudice. The State has the better argument.

A defendant claiming prosecutorial misconduct has the burden to prove that the prosecutor's conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).

When reviewing a claim of prosecutorial misconduct, we consider the prosecutor's statements and actions in the context of the entire case. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The prosecutor has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006) (citing State v. Gentry, 125 Wn.2d 570, 641, 888 P.2d

1105 (1995)), overruled on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

McCabe asserts that the prosecutor committed misconduct in three different respects.[4] First, McCabe contends that the prosecutor engaged in misconduct by suggesting that the jury could only acquit if they believe the victim lied. Second, McCabe contends that the prosecutor engaged in misconduct by arguing facts that were not in evidence at trial. Third, McCabe contends that the prosecutor engaged in misconduct by attempting to bolster S.M.'s credibility through the improper use of prior consistent statements. We address each of these arguments in turn.

First, McCabe contends that the prosecutor committed misconduct by suggesting that the jurors could acquit only if they believe that the victim lied. During closing argument, the prosecutor made the following argument to the jury:

> If you believe [S.M.], every single one of the elements in the sex crimes is met. If you believe [S.M.], the defendant is guilty of the first four counts. So, how do we know [S.M.] is telling the truth? That comes down to credibility. Jury Instruction 1 talks about that. That you are the sole judges of credibility. You decide how much weight you put on the testimony and the evidence that you heard come out of that box. Consider someone's motive. [Their] reasons for testifying. What they have to gain or to lose. And [S.M.] has nothing to gain from this. Something she doesn't want to be a part of. Think about the details that she gave. Where it happened to her, what happened to her, in graphic detail. And think about her demeanor while testifying.
>
> . . . .

[4] A fourth claim of misconduct pertains to the introduction of evidence in support of the charge of bail jumping. Because we order that McCabe's bail jumping conviction be dismissed on other grounds, we do not consider this claim of error.

> And does [S.M.] have any motive to lie and make and exaggerate, no. None whatsoever. She tried to tell people what happened to her too.

McCabe interposed no objection to this argument.

McCabe asserts that this argument constituted flagrant and ill-intentioned misconduct, likening this circumstance to that in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). In Fleming, the prosecutor began his closing argument by stating:

> "Ladies and gentlemen of the jury, *for you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree,* with which each of them have been charged, based on the unequivocal testimony of [D.S.] as to what occurred to her back in her bedroom that night, *you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom."*

Fleming, 83 Wn. App. at 213. The prosecutor further argued that because there was no evidence the victim lied, the defendants must be guilty. Fleming, 83 Wn. App. at 214. We held that this constituted flagrant misconduct because it had been well-established in case law that a prosecutor cannot argue that the jury must find that the complaining witness was lying or mistaken in order to acquit. Fleming, 83 Wn. App. at 213.

This case is not like Fleming. Here, the prosecutor argued that if the jury believed S.M. to be telling the truth, then all of the elements of child molestation had been established. It does not follow that this statement would lead the jury to believe that they could acquit only if they believed S.M. had lied. When considered in the context of the entire closing argument, we cannot say that this single statement constituted misconduct. Unlike in Fleming, the prosecutor here

correctly informed the jurors of the law, repeatedly informing them that they could convict only if the State proved each element of each charge beyond a reasonable doubt.

Furthermore, in order to obtain the relief he seeks, McCabe must show not only that the prosecutor committed flagrant and ill-intentioned misconduct, but also that any prejudice from the misconduct could not have been cured by a jury instruction. Padilla, 69 Wn. App. at 300. McCabe presents no argument as to how he was prejudiced, let alone how any prejudice could not have been cured by a jury instruction. Here, the jury was correctly instructed that the State had the burden of proving each element of the charges beyond a reasonable doubt. The jury is presumed to have followed that instruction. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

Second, McCabe contends that the prosecutor engaged in misconduct by arguing facts that were not in evidence at trial. Specifically, McCabe avers that the prosecutor transgressed by stating "that's okay and that makes sense. Trauma affects memory and reactions."

The prosecutor's full statement was as follows:

> And then Count 2 is child molestation in the first degree as well. This is the other incident that happened to [S.M.] in third grade. It's the one where she described it happening almost the same, almost identically. Doesn't remember as many details and that's okay and that makes sense. Trauma affects memory and reactions. So, going through a traumatic event of your father touching you inappropriately, sexually is not something you remember every detail of.

The prosecutor later argued on rebuttal:

> And so, ladies and gentlemen, why is [S.M.] credible, again. This case comes down to [S.M.]'s credibility. Again, it's common sense. People don't give the same details or every single detail, every time they talk about something. It depends on who they're with, how comfortable they are and what questions you're asking them.
>
> The memories of trauma are also not static. It affects people differently. While defense points out inconsistencies in [S.M.]'s account of the abuse. What she should or shouldn't have done. That she didn't remember every little detail. That's natural and normal.

References to facts outside the evidentiary record constitute misconduct. Fisher, 165 Wn.2d at 747 (citing State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). However, it is not misconduct to draw or suggest inferences based on the evidence. Thorgerson, 172 Wn.2d at 448.

In In re Personal Restraint of Phelps, 190 Wn.2d 155, 410 P.3d 1142 (2018), our Supreme Court considered whether it constituted flagrant and ill-intentioned misconduct when the prosecutor used the word "grooming" 19 times during closing argument, given that no expert witness had testified about grooming. The court held that no misconduct had occurred because the prosecutor did not urge the jury to consider grooming as a fact establishing the defendant's guilt. Phelps, 190 Wn.2d at 167. Rather, the prosecutor used grooming as a means of summarizing the evidence presented, basically "to paint a picture of the evidence for the jury." Phelps, 190 Wn.2d at 167. By using the word "grooming" in this manner, the prosecutor's statement was more akin to an inference than a fact not in evidence. Phelps, 190 Wn.2d at 167.

Here, the prosecutor's two references to trauma affecting memory similarly were more akin to an inference than a fact. The jury herein heard

testimony from Pegler that children who experience traumatic events process the events in different ways and that delayed disclosure of abuse is common for children. Officer Oceguera testified that, in his experience, children commonly make disclosures in bits and pieces, rather than all at once. Pegler testified that, with regard to S.M. specifically, S.M. acted nervous, "look[ed] away a few times," and cried during her forensic interview. S.M. herself testified that the "whole case" made her sad. From this evidence, it could reasonably be inferred that S.M. had experienced a traumatic event and that it had an effect on her. The prosecutor was permitted to encourage the fact finders to draw such inferences.

Our decision today is in line with courts in other states that have held that similar remarks about trauma affecting a child subject to sexual abuse did not constitute prosecutorial misconduct, even in the absence of any expert testimony concerning trauma. See People v. Maloy, 465 P.3d 146, 160 (Colo. App. 2020) (not misconduct for prosecutor to argue "Is she absolutely supposed to cry every time she talks about it, or perhaps is there more than one way to deal with that trauma[?]" as reasonable jurors could have inferred from evidence that child experienced trauma); State v. Ringstad, 424 P.3d 1052, 1070 (Utah Ct. App. 2018) (argument, based on counsel's personal experience, that "'[w]e don't remember everything . . . especially when it's a traumatic experience,'" did not constitute misconduct); State v. Ceballos, 832 A.2d 14, 42 (Conn. 2003), overruled on other grounds by State v. Douglas C., 2022 WL 17660010 (Conn. Dec. 13, 2022) ("In our view, it is axiomatic that child sexual abuse has mental and emotional repercussions for the victim. Thus, the state's attorney's

comments about the psychological effects of the sexual acts alleged to have been committed against S were proper."); cf. Petric v. State, 157 So.3d 176, 224 (Ala. Crim. App. 2013) (reference to "post-traumatic stress disorder" not misconduct when evidence showed witness was frightened of domestic violence perpetrator).

Even if the prosecutor's statements about trauma affecting memory had been in reference to facts outside of the record, McCabe makes no attempt to demonstrate how the statements were so prejudicial that no jury instruction could have cured the prejudice. Nor could he. The prosecutor's argument that trauma affects memory was made in support of count 2, the second charge of child molestation in the first degree. The jury found McCabe not guilty on count 2. McCabe could not have been unfairly prejudiced by an argument that the jury plainly did not accept.

Third, McCabe contends that the prosecutor committed misconduct by arguing that S.M. was "consistent with everyone that she's been abused," thereby urging the jury to consider matters outside of the record. As McCabe did not object to this argument, he must demonstrate that the prosecutor's misconduct was so flagrant and ill-intentioned that no jury instruction could have cured the prejudice. Once again, he does not do so.

McCabe likens the prosecutor's argument to the closing argument given in State v. Boehning, 127 Wn. App. 511, 111 P.3d 899 (2005). In that case, we held that the prosecutor had committed misconduct in three respects: first, by referencing three counts of rape that had been dismissed; second, by bolstering

the victim's credibility by arguing that her prior unadmitted statements were consistent with her trial testimony; and third, by asking the defendant whether the victim had "'made [it all] up.'" Boehning, 127 Wn. App. at 513-14. It is the second of these circumstances that McCabe contends occurred in his case as well. However, the prosecutor in Boehning did not merely state that the victim was "consistent" in reporting abuse. Rather, the prosecutor argued:

> "And then she comes and she talks to you. And *there wasn't anything brought up that she told a different story to Diana Tomlinson. If she had told a different story to Diana Tomlinson about the touching, you would have heard about it, because Defense counsel would bring up something if it was different. So the reasonable inference, when she spoke to Diana Tomlinson, she told her the same thing she told you.*
>
> . . . .
>
> Is open court—you know, just think about this common sense, common experience, is open court going to be the best place to gather information from a child? Or is it going to be in a place where a child might feel a little bit safer? The *State would submit that it's in a place where a child would feel a little safer. And so it's reasonable that this child might have gone a little farther in discussing what happened to her in a safer environment.*

Boehning, 127 Wn. App. at 521.

By making this argument, the prosecutor not only urged the jury to surmise the substance of the victim's earlier statements, but also suggested that the witnesses possessed far more information favorable to the State than was introduced at trial. Boehning, 127 Wn. App. at 522. Furthermore, the prosecutor also argued that because the defendant had not shown that the victim made prior inconsistent statements, that this proved that the victim was credible. Boehning, 127 Wn. App. at 523. This argument impermissibly shifted the burden of proof to the defendant. Boehning, 127 Wn. App. at 523.

The prosecutor's argument here is far different from the one made in Boehning. Here, the prosecutor argued only that S.M. was consistent about the fact that she had been abused. This was well-supported by the testimony of multiple witnesses. The prosecutor did not suggest that the substance of S.M.'s earlier disclosures was consistent with her trial testimony; nor did the prosecutor suggest that S.M. had disclosed more than what she testified to at trial. To the contrary, the prosecutor argued on rebuttal that the substance of S.M.'s earlier statements did not matter; that the only thing the jury could consider was the testimony given in court. Furthermore, the prosecutor's argument was not made to bolster S.M.'s credibility by the fact of repetition, but to explain why S.M. had delayed disclosure: that she had repeatedly said she was abused, but no one did anything about it. Boehning is therefore inapposite. The prosecutor's argument did not constitute misconduct.[5]

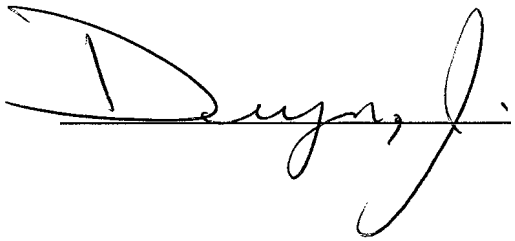
Furthermore, McCabe once again fails to demonstrate prejudice. McCabe states in his brief that the cumulative effect of the prosecutor's argument prejudiced him without explaining how this is so. Nor does McCabe assert how a curative instruction could not have cured any prejudice that may have occurred. We cannot simply presume prejudice based on the facts of this case, particularly when McCabe was acquitted on one of the charges. We therefore affirm McCabe's convictions for child molestation in the first degree, child molestation in the second degree, and incest in the second degree.

[5] Similarly, the prosecutor did not misstate the law by arguing that S.M. was "consistent with everyone that she's been abused." This argument was a summation of witness testimony, not a statement of law.

V

McCabe additionally asserts that his conviction for bail jumping was not supported by sufficient evidence, that the State did not present evidence of his prior convictions, and that his community custody conditions prohibiting him from entering parks or possessing sexually explicit material are not crime-related. The State concedes error as to all of these assertions. We accept the State's concessions. Accordingly, we order that McCabe's conviction for bail jumping be dismissed, and remand this matter for such dismissal and for resentencing.

Affirmed in part, reversed in part, and remanded for further proceedings.



WE CONCUR: