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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID ALAN ROHLEDER, Appellant.	No. 57369-5-II PART PUBLISHED OPINION

MAXA, P.J. – David Rohleder appeals his convictions of first degree child rape, three counts of first degree child molestation, and second degree child molestation. The convictions were based on the testimony of 12-year-old MC, the granddaughter of Rohleder's long-time girlfriend. MC testified that Rohleder sexually assaulted her for seven years.

The trial court gave a "no corroboration" jury instruction, which stated that in order to convict a person of the charged offenses, "it is not necessary that the testimony of the alleged victim be corroborated." Clerk's Papers (CP) at 40. Rohleder argues that the trial court erred in giving a no corroboration instruction because it constituted a comment on the evidence and violated his right to a jury trial under article I, section 21 of the Washington Constitution.

We hold that (1) even though Rohleder's argument that the no corroboration instruction constitutes a comment on the evidence has merit and the better practice is not to give the instruction, we are constrained by the Supreme Court's opinion in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949) to conclude that giving such an instruction was not a comment on the evidence; and (2) the instruction did not violate Rohleder's right to a jury trial. We reject Rohleder's additional arguments except for challenges to legal financial obligations in an

unpublished portion of this opinion. Accordingly, we affirm Rohleder's convictions, but we remand for the trial court to strike the crime victim penalty assessment (VPA) and the DNA collection fee from the judgment and sentence.

FACTS

Rohleder and Sherri Hood dated for 15 years and lived together in Vancouver, Washington. In 2018, Hood's daughter Joanne Howard, Howard's son, and Howard's daughter, MC, moved in with Rohleder and Hood and lived with them for about two and a half years. Before moving in with Rohleder and Hood, Howard would bring MC to their house every week while Howard worked.

In May 2021, when MC was 12 years old, she told Howard that Rohleder had been sexually assaulting her for the past seven years. The Vancouver Police Department initiated an investigation and MC participated in a forensic interview. The State charged Rohleder with first degree child rape, three counts of first degree child molestation, and second degree child molestation.

At trial, the State proposed a no corroboration jury instruction. Rohleder objected, arguing that the instruction was "too easy to conflate with proof beyond a reasonable doubt," and that it was "prejudicial to the defense." Rep. of Proc.(RP) at 388-89.

The trial court ruled that it would give the no corroboration instruction. Rohleder then asked to add to the instruction a sentence stating, "It is also not necessary that the testimony of the defendant be corroborated." RP at 392. The court denied the request, stating that "it might invite some sort of burden shifting about something that [Rohleder] has a duty to prove." RP at 393.

The trial court gave the following no corroboration jury instruction:

> In order to convict a person of the crimes of Rape of a Child in the First Degree, or Child Molestation in the First Degree, or Child Molestation in the Second Degree as defined in these instructions, it is not necessary that the testimony of the alleged victim be corroborated.

CP at 40.

The jury found Rohleder guilty of first degree child rape, three counts of first degree child molestation, and second degree child molestation. Rohleder appeals his convictions and sentence.

ANALYSIS

A. COMMENT ON THE EVIDENCE

Rohleder argues that the trial court erred in instructing the jury that no corroboration of MC's testimony was needed to convict him of the charged offenses. He claims that giving this no corroboration jury instruction without additional language clarifying the jury's role in evaluating evidence and without instructing that no corroboration of his testimony was needed constituted a comment on the evidence. 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.

1. Legal Principles

Article IV, section 16 of the Washington Constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." 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. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). But because it is the trial court's duty to declare the law, a jury instruction that does no more than accurately state the law pertaining to an issue is proper. *State*

v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). We review the instructions de novo to determine if the trial court has improperly commented on the evidence. *Levy*, 156 Wn.2d at 721.

The trial court's no corroboration instruction was based on RCW 9A.44.020(1), which provides: "In 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."

Significantly, the Washington Pattern Criminal Jury Instructions (WPIC) do not propose a no corroboration instruction. Instead, a WPIC comment recommends against giving such an instruction:

> 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.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 45.02 cmt., at 1004 (5th ed. 2021).

Nevertheless, Court of Appeals cases have upheld no corroboration instructions for sexual offenses as correct statements of the law under RCW 9A.44.020(1). *E.g.*, *State v. Chenoweth*, 188 Wn. App. 521, 537, 354 P.3d 13 (2015); *State v. Johnson*, 152 Wn. App. 924, 936-37, 219 P.3d 958 (2009); *State v. Zimmerman*, 130 Wn. App. 170, 182–83, 121 P.3d 1216 (2005).

However, the concurring opinion in *Chenoweth* stated, "If the use of the noncorroboration instruction were a matter of first impression, I would hold it is a comment on the evidence and reverse the conviction." 188 Wn. App. at 538 (Becker, J., concurring). And this court in *Zimmerman* expressed misgivings about the no corroboration instruction, but believed that it was bound by the Supreme Court's holding decades earlier in *Clayton*, 32 Wn.2d

571, that the instruction was not an improper comment on the evidence. *Zimmerman*, 130 Wn. App. at 182-83.

In *Clayton*, the trial court gave the following instruction:

> 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 prosecutrix 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. The defendant argued that the instruction was a comment on the evidence because "the instruction singles out the prosecutrix from all the other witnesses and tells the jury that the weight of her testimony is such that a conviction can be based upon it alone." *Id.* at 573.

The Supreme Court rejected this argument, holding that the trial court did not commit reversible error in giving the no corroboration instruction. *Id.* at 578. The court stated,

> It is true that, in the instruction of which complaint is here made, the trial court in a sense singled out the testimony of the prosecutrix. However, what the court thereby told the jury was not that the uncorroborated testimony of the prosecutrix in the instant case was sufficient to convict the appellant of the crime with which he was charged, but, rather, that in cases of this particular character, a defendant *may be* convicted upon such testimony alone, provided the jury should believe from the evidence, and should be satisfied beyond a reasonable doubt, that the defendant was guilty of the crime charged. That was a correct statement of law.

Id. at 574.

2. Absence of Additional Language

Rohleder argues that the no corroboration instruction was an improper comment on the evidence because it did not include additional clarifying language affirming the jury's role in assessing evidence like the instruction in *Clayton* did. On this basis, he claims that *Clayton* does not control the result in this case.

In *Clayton*, the instruction at issue stated that a person "may" be convicted based on uncorroborated testimony of the victim. 32 Wn.2d at 572. The instruction also stated, "[T]he 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 the absence of corroboration. *Id.*

No case has held that this additional language is necessary to avoid a comment on the evidence challenge. This court in *Johnson* rejected this argument, stating, "We see no clear pronouncement from our Supreme Court on whether the additional language is necessary to prevent an impermissible comment on the evidence under article 4, section 16, and we hold that the trial court's corroboration instruction was not an erroneous statement of the law." 152 Wn. App. at 936. But the court also stated,

> When giving this instruction, however, trial courts should consider instructing the jury that it is to decide all questions of witness credibility as part of the instruction. Without this specific inclusion, the instruction stating that no corroboration is required may be an impermissible comment on the alleged victim's credibility.

Id. at 936-37.

In addition, in *State v. Galbreath*, the trial court gave a similar instruction informing the jury "that a person charged with indecent exposure may be convicted upon the uncorroborated testimony of the complaining witness" while omitting language "that such testimony must satisfy the jury of guilt beyond a reasonable doubt." 69 Wn.2d 664, 669, 419 P.2d 800 (1966). Although the Supreme Court held that the instruction did not amount to an unconstitutional comment on the evidence, it stated that it could not "commend it as a model instruction in cases such as this." *Id.* at 670.

Finally, language similar to the additional language included in the *Clayton* instruction already was included in the trial court's instructions. Instruction 1 stated, "You are the sole

judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP at 20. And the to-convict instructions all stated, "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP at 35-37, 39.

We conclude that we cannot distinguish *Clayton* on the basis that the no corroboration instruction did not contain additional language similar to the language in the *Clayton* instruction.

3. Absence of No Corroboration Instruction Regarding the Defendant

Rohleder argues in the alternative that giving the no corroboration jury instruction was improper without a corresponding instruction telling the jury that his testimony did not need corroboration. As Rohleder points out, the no corroboration instruction seems to favor the alleged victim's testimony over the defendant's testimony.

No case has held that a no corroboration instruction should address both the victim's and the defendant's testimony. However, a number of cases in other jurisdictions have disapproved of giving no corroboration instructions on the basis that the instruction favors the victim's testimony. *E.g.*, *State v. Stukes*, 416 S.C. 493, 499-500, 787 S.E.2d 480 (2016); *Gutierrez v. State*, 177 So.3d 226, 230-34 (Fla. 2015); *Ludy v. State*, 784 N.E.2d 459, 461-63 (Ind. 2003).

In *Stukes*, the South Carolina Supreme Court reversed criminal sexual conduct and first degree burglary convictions because the trial court gave a no corroboration instruction based on a statute similar to RCW 9A.44.020(1). *Stukes*, 416 S.C. at 495. The court stated,

> By addressing the veracity of a victim's testimony in its instructions, *the trial court emphasizes the weight of that evidence* in the eyes of the jury. The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, it is inescapable that this charge confused the jury. Specifying this qualification applies to one witness *creates the inference the same is not true for the others*.

Id. at 499-500 (emphasis added). The court overruled its precedent condoning the use of the South Carolina statute as a jury instruction. *Id.* at 500.

In *Gutierrez*, the court stated:

> [A]ny statement by the judge that suggests one witness's testimony need not be subjected to the same tests for weight or credibility as the testimony of others *has the unfortunate effect of bolstering that witness's testimony by according it special status.* The instruction in this case did just that, and in the process effectively placed the judge's thumb on the scale to *lend an extra element of weight to the victim's testimony*.

177 So.3d at 231-32 (emphasis added).

Like our colleagues in the earlier cases discussed above, we have strong concerns about the giving of the no corroboration instruction. We emphasize that there is no need for a no corroboration instruction, and the better practice is for trial courts not to give one.

However, despite being over 90 years old, *Clayton* remains good law. Until 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.

We hold that the trial court did not err in instructing the jury that no corroboration of MC's testimony was needed to convict Rohleder of first degree child rape, first degree child molestation, or second degree child molestation.

B. RIGHT TO A JURY TRIAL

Rohleder argues that the no corroboration instruction violated his right to a jury trial under article I, section 21 of the Washington Constitution. He claims that the instruction appears to foreclose a factual basis on which the jury could find the evidence insufficient. We disagree.

Article I, section 21 of the Washington Constitution states, "The right of trial by jury shall remain inviolate." "The right to have factual questions decided by the jury is crucial to the right to trial by jury. To the jury is consigned under the constitution 'the ultimate power to

weigh the evidence and determine the facts.' " *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (citation omitted) (quoting *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)).

Rohleder argues that the no corroboration instruction violated the right to a jury trial because it suggested that jurors were *required* to believe MC without corroboration. But the language of the instruction does not support this argument. The corroboration instruction stated that in order to convict, "it is not necessary that the testimony of the alleged victim be corroborated." CP at 40. This language clearly *allows* jurors to believe MC without corroboration, but does not require that result. And as noted above, a separate jury instruction stated, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP at 20. The instructions allowed the jury to decide whether to believe MC, with or without corroboration.

The no corroboration instruction did not comment on credibility and did not mislead the jury about their role as sole judges of witness credibility. The instruction did not state that MC's uncorroborated testimony *required* the jury to convict Rohleder. The instruction merely stated generally that a victim's testimony need not be corroborated to convict.

We hold that the no corroboration jury instruction did not violate Rohleder's right to a jury trial under article I, section 21.

CONCLUSION

We affirm Rohleder's convictions, but remand for the trial court to strike the VPA and the DNA collection fee from the judgment and sentence.

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 in accordance with RCW 2.06.040, it is so ordered.

UNPUBLISHED PORTION

In the unpublished portion of this opinion, we hold that (1) the trial court did not abuse its discretion in denying Rohleder's challenge for cause to excuse juror 21; (2) Rohleder did not preserve for appeal his challenge to MC's mother's alleged opinion testimony under RAP 2.5(a)(3); (3) the forensic interviewer did not provide improper opinion testimony and Rohleder cannot show prejudice from the prosecutor's improper questioning; (4) Rohleder did not receive ineffective assistance of counsel because defense counsel's performance was not deficient regarding a doctor's and a police officer's testimony; (5) the cumulative error doctrine is inapplicable because Rohleder did not demonstrate that any error denied him a fair trial; and (6) as the State concedes, the trial court should strike the $500 VPA and the $100 DNA collection fee from the judgment and sentence.

ADDITIONAL FACTS

Motion to Strike Juror for Cause

During voir dire, juror 21 noted that he wanted to discuss something in private. Outside of the presence of the other prospective jurors, juror 21 stated that his wife had experienced sexual assault when she was a teenager. The trial court asked him if it would affect his ability to weigh the evidence, apply the law, or apply the presumption of innocence and he responded,

> She talks about that kind of thing whenever she sees other instances of it just in our regular life and she has made statements to me that she feels as though probably the large majority of young ladies experience some form of that, especially at the younger time when they're not able to defend themselves so much. So, that kind of stuff does get in my mind.

RP at 118. The trial court asked if this would compromise his neutrality and objectivity as a juror. Juror 21 stated, "I don't believe myself to be vengeful, but like I said, when I was asked by the defense attorney before, can I a hundred percent eliminate any kind of bias in my mind, I cannot tell you I have a hundred percent confidence of that." RP at 118-19.

The trial court then asked juror 21 if he could compartmentalize his wife's history in order to be a juror in the case. RP 119. He replied, "I don't know. . . . If I asked to be a reasonable doubt, I'd have to say no." RP at 119. The court again asked juror 21 if he could try the case fairly and impartially, to which he stated, "I can try. That's the best I can offer." RP at 119.

The prosecutor asked juror 21 if he could wait until he heard all the testimony and evidence before he made a decision regarding the case. Juror 21 said he could.

During questioning from defense counsel, juror 21 stated that his "bias is towards there's such a prevalence of this type of activity, crimes against children." RP at 121. When defense counsel asked him if that bias would "push [him] over the line" if the evidence was not there, juror 21 responded, "If I had to answer that question, I don't know." RP at 121-22.

Defense counsel moved to dismiss juror 21 for cause. The trial court denied the motion, stating, "I think it's a close call. I think the gentleman is actually being over disclosing in an abundance of fairness here. He seems conscientious. I think he understands the rules. I'm not satisfied that the burden has been met that he is unfit, based upon the evidence given." RP at 122.

MC's Mother's Testimony

On direct examination, the prosecutor asked Howard, MC's mother, what her initial reaction was when MC disclosed the sexual abuse to her. Howard testified that the disclosure

was a "shock" but that "never once did [she] think that [MC] was lying to [her]." RP at 216. Rohleder did not object to this testimony.

Forensic Interviewer's Testimony

During direct examination of DeeDee Pegler, a forensic interviewer at the Children's Justice Center, the prosecutor asked Pegler about the challenges of children who had been abused multiple times over an extended period of time. Pegler then described "script narration," which is when children who were abused over an extended period of time tend to describe what usually happened rather than what happened during specific instances.

The prosecutor then asked Pegler whether script narration was "significant to [her] with regards to its reliability." RP at 308. Rohleder objected to the use of the word "reliability" and the trial court asked the prosecutor to rephrase the question. The prosecutor then used the word "accuracy" instead of reliability. RP at 308. Rohleder again objected and the trial court told the State to ask the question again. The prosecutor asked Pegler if there was a "significant difference" between a child's script narration of what normally happened and the child saying what actually happened in a specific instance. RP at 309. Pegler responded that there was not a significant difference. The prosecutor later asked Pegler on redirect examination if it was her role to judge or assess the credibility of the information that she hears from a child. Pegler responded, "No." RP at 317.

Pediatrician's Testimony

On direct examination, the prosecutor asked Dr. Kimberly Copeland, a child abuse pediatrician, whether she formed an assessment or diagnosis at the end of MC's visit. Dr. Copeland responded that she found MC's "history highly concerning for prolonged chronic sexual assault that had gone on with the contact that she was describing. I felt that her affect,

how she presented, was consistent with how she was feeling about what had happened." RP at 343-44. Rohleder did not object to this testimony.

Police Officer's Testimony

During direct examination of Gunnar Skollingsberg, a detective with the Vancouver Police Department, the prosecutor asked Skollingsberg what his next steps were after he interviewed MC and her parents. Skollingsberg responded that he "authored a search warrant for the residence . . . where the majority of the crimes had occurred, and most recent one had also occurred." RP at 352. Rohleder did not object to this testimony.

Imposition of VPA and DNA Collection Fee

At sentencing in August 2022, the trial court determined that Rohleder was indigent under RCW 10.101.010(3). The court also ordered Rohleder to pay a $500 VPA and a $100 DNA collection fee.

Rohleder appeals his convictions and sentence.

ANALYSIS

A. DENIAL OF FOR CAUSE CHALLENGE

Rohleder argues that the trial court erred when it denied his for cause challenge to excuse juror 21 because juror 21 demonstrated actual bias. We disagree.

1. Legal Principles

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution both guarantee a defendant the right to a trial by an impartial jury. *State v. Guevara Diaz*, 11 Wn. App. 2d 843, 854-55, 456 P.3d 869 (2020).

A party may excuse a juror for cause based on the juror's individual qualifications for service. RCW 4.44.150. Actual bias serves as a basis to challenge a juror for cause. RCW

4.44.170(2). Actual bias exists when a juror "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). But actual bias must be established by proof. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 808, 425 P.3d 807 (2018). Ambiguous answers alone cannot establish actual bias warranting the dismissal of a potential juror. *Id.* at 808-09. And a juror's opinion is not sufficient to sustain a challenge; "the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially." RCW 4.44.190; *Guevara Diaz*, 11 Wn. App. 2d at 855-56.

In addition, the mere possibility of bias cannot prove actual bias. *Sassen Van Elsloo*, 191 Wn.2d at 809. Instead, the record must demonstrate that a probability of actual bias existed. *Id.* If a juror makes a " 'statement of partiality without a subsequent assurance of impartiality,' " then the trial court should presume juror bias. *Guevara Diaz*, 11 Wn. App. 2d at 855 (quoting *Miller v. Webb*, 385 F.3d 666, 674 (6th Cir. 2004)).

We review a trial court's denial of a for cause challenge for an abuse of discretion. *Guevara Diaz*, 11 Wn. App. 2d at 856. A court abuses its discretion if its decision is based on untenable grounds. *Sassen Van Elsloo*, 191 Wn.2d at 807. Significantly, " 'the trial court is in the best position to determine a juror's ability to be fair and impartial.' " *Guevara Diaz*, 11 Wn. App. 2d at 856 (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)). The trial court can observe the juror's demeanor and thereby evaluate the juror's answers to determine whether the juror could be fair and impartial. *State v. Lawler*, 194 Wn. App. 275, 282, 374 P.3d 278 (2016).

2. Analysis

During voir dire, juror 21 stated that his wife had experienced sexual assault when she was a teenager. The trial court asked if this would compromise his neutrality and objectivity as a

juror. Juror 21 stated that he could not be 100 percent confident that he could 100 percent eliminate any kind of bias in his mind.

The trial court then asked juror 21 if he could compartmentalize his wife's history in order to be a juror in the case. He replied, "I don't know. . . . If I asked to be a reasonable doubt, I'd have to say no." RP at 119. The court again asked juror 21 if he could try the case fairly and impartially, to which he stated, "I can try. That's the best I can offer." RP at 119.

The prosecutor asked juror 21 if he could wait until he heard all the testimony and evidence before he made a decision regarding the case. Juror 21 said he could.

During questioning from defense counsel, juror 21 stated that his "bias is towards there's such a prevalence of this type of activity, crimes against children." RP at 121. When defense counsel asked him if that bias would "push [him] over the line" if the evidence was not there, juror 21 responded, "If I had to answer that question, I don't know." RP at 121-22.

Juror 21's answers certainly were equivocal. But juror 21 never definitively stated that he could not try the case impartially. *See* RCW 4.44.170(2). Although he stated that his wife's history would be on his mind, he did not make a direct statement of partiality. Instead, he gave ambiguous answers, stating, "I don't know," and "I can try." Ambiguous answers alone cannot establish actual bias warranting dismissal. *Sassen Van Elsloo,* 191 Wn.2d at 808-09.

Actual bias must be established by proof. *Id.* at 808. Here, the record does not demonstrate that a probability of actual bias existed. Juror 21's answers merely gave the possibility of bias, which is not sufficient to prove actual bias. In addition, the trial court is in the best position to determine a juror's fairness and impartiality. *Guevara Diaz,* 11 Wn. App. 2d at 856. And the standard of review is abuse of discretion. *Id.*

Therefore, we hold that the trial court did not abuse its discretion in denying Rohleder's for cause challenge to excuse juror 21.

B. ADMISSION OF OPINION TESTIMONY

Rohleder argues that MC's mother's and the forensic interviewer's testimony violated his right to a jury trial because they offered opinions as to MC's credibility. We disagree.

1. Legal Principles

In general, no witness may offer opinion testimony about the defendant's guilt. *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). This rule applies to statements regarding guilt made both directly or by inference. *Id.* In addition, opinion testimony regarding the veracity of witnesses is inappropriate. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Such opinion testimony is unfairly prejudicial to the defendant because determining the defendant's guilt is the jury's exclusive province. *King*, 167 Wn.2d at 331. "Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

However, lay witnesses may testify to opinions or inferences that are "rationally based on the perception of the witness." ER 701(a).

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Slater*, 197 Wn.2d 660, 667, 486 P.3d 873 (2021). An abuse of discretion occurs when the court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

2. MC's Mother's Testimony

On direct examination, Howard, MC's mother, testified that "never once did [she] think that [MC] was lying to [her]." RP at 216. Rohleder argues that this testimony presented an improper opinion regarding MC's credibility.

Initially, the State argues that Rohleder did not preserve this issue for appeal because he did not object to the testimony at the trial court and he did not raise a manifest constitutional error. We agree.

RAP 2.5(a) states that the "appellate court may refuse to review any claim of error which was not raised in the trial court." Here, Rohleder did not object to Howard's testimony. Therefore, he did not preserve the alleged error. However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3).

We first determine whether the alleged error is truly constitutional. *State v. J.W.M.*, 1 Wn.3d 58, 90-91, 524 P.3d 596 (2023). Rohleder alleges that impermissible opinion testimony violates the right to a jury trial, which is constitutional in nature. *Quaale*, 182 Wn.2d at 199.

We next determine whether the alleged error is manifest, which requires a showing of actual prejudice. *J.W.M.*, 1 Wn.3d at 91. In order to demonstrate actual prejudice, the appellant must plausibly show that the alleged error had " 'practical and identifiable' " consequences. *Id.* (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). And whether the jury was properly instructed is important in determining whether opinion testimony prejudiced the defendant. *J.W.M.*, 1 Wn.3d at 91.

Here, the trial court instructed the jury that they were "the sole judges of the credibility of each witness" and "the value or weight to be given to the testimony of each witness." CP at 20. There was no evidence that the jury was unfairly influenced by Howard's testimony, "and we

should presume the jury followed the court's instructions absent evidence to the contrary." *Montgomery,* 163 Wn.2d at 596.

The record does not establish actual prejudice. *See id.* Therefore, the error was not manifest and we will not consider Rohleder's challenge to Howard's opinion testimony under RAP 2.5(a)(3).

3. Forensic Interviewer's Testimony

On direct examination, Pegler, the forensic interviewer, explained "script narration." RP at 308. The prosecutor then asked Pegler whether script narration was "significant to [her] with regards to its reliability." RP at 308. Rohleder objected to the use of the word "reliability," and the prosecutor rephrased to "accuracy." RP at 308. Rohleder again objected and the trial court told the State to ask the question again. The prosecutor then asked Pegler if there was a significant difference between a child's script narration of what normally happened and the child saying what actually happened in a specific instance. Pegler responded that there was not a significant difference.

a. Opinion Testimony

Rohleder argues that Pegler's testimony offered scientific evidence that supported the credibility of MC's testimony. And he claims that Pegler's expert opinion suggested to the jury how to weigh the evidence.

But Pegler did not speak directly about MC or the credibility of her testimony. She merely spoke generally about what script narration was and whether it differed significantly to children explaining what happened during specific instances. In addition, the core issue at trial was not about the type of narration MC gave, but whether her narration was credible. *See Quaale*, 182 Wn.2d at 200. And Pegler's testimony did not comment on MC's credibility. In

fact, Pegler later stated that it was not her role to judge or assess the credibility of the information that she hears from a child. Therefore, Pegler did not provide improper opinion testimony.

b. Prosecutorial Misconduct

Rohleder also argues that the prosecutor engaged in misconduct when he tried to elicit inadmissible testimony from Pegler by asking her to comment on the reliability and accuracy of script narration.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Our analysis considers "the context of the case, the arguments as a whole, the evidence presented, and the jury instructions." *State v. Slater*, 197 Wn.2d 660, 681, 486 P.3d 873 (2021). To show prejudice, the defendant is required to show a substantial likelihood that the misconduct affected the jury verdict. *Id.*

Assuming without deciding that the prosecutor's questions were improper, the misconduct was not prejudicial. Rohleder objected both times to the prosecutor's questions regarding reliability and accuracy of script narration. As a result, Pegler did not answer those questions. Instead, Pegler answered the question regarding whether any significant differences existed between script narration and describing specific instances. And as we discussed above, Pegler's testimony was not improper opinion testimony.

Because Pegler did not provide inadmissible testimony and did not answer any of the questions that were objected to, we conclude that Rohleder cannot show prejudice from the prosecutor's allegedly improper questions.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Rohleder argues that he received ineffective assistance of counsel when defense counsel failed to object to the pediatrician's and police officer's opinion testimony. We disagree.

1. Legal Principles

A defendant who claims that they received ineffective assistance of counsel must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced the defendant. *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Representation is deficient if after considering all the circumstances, the performance falls below an objective standard of reasonableness. *Id.* at 247-48. Prejudice exists if there is a reasonable probability that but for defense counsel's errors, the result of the proceeding would have differed. *Id.* at 248.

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* at 247. Defense counsel's conduct is not deficient if it was based on legitimate trial strategy or tactics. *Id.* at 248. To rebut the strong presumption that counsel's performance was effective, the defendant bears the burden of establishing the absence of any legitimate strategic or tactical reason explaining defense counsel's conduct. *Id.* Whether and when to object typically is a strategic or tactical decision. *Id.* And a legitimate trial strategy is to forgo an objection when defense counsel wishes to avoid highlighting certain evidence. *Id.*

2. Pediatrician's Testimony

The prosecutor asked Dr. Copeland, MC's pediatrician, whether she formed an assessment or diagnosis for MC. Dr. Copeland responded that she found MC's "history highly concerning for prolonged chronic sexual assault that had gone on with the contact that she was describing. I felt that her affect, how she presented, was consistent with how she was feeling

about what had happened." RP at 343-44. Rohleder argues that defense counsel should have objected to this testimony because it invaded the province of the jury to determine credibility.

Dr. Copeland's testimony was not a conclusion that MC was in fact sexually abused or a comment on MC's credibility. *See State v. Florczak*, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994). Witnesses may testify to opinions or inferences that are "rationally based on the perception of the witness." ER 701(a). Her assessment of MC's history was based only on what MC had told her and her perception of MC; Dr. Copeland did not testify whether she believed MC or not. *See State v. Kirkman*, 159 Wn.2d 918, 929-30, 155 P.3d 125 (2007). And observing that a victim exhibited behavior that was typical of a group does not directly relate to an inference of the defendant's guilt. *Florczak*, 76 Wn. App. at 73.

Because Dr. Copeland's testimony was not improper, Rohleder cannot show that defense counsel's representation was deficient. And even if Dr. Copeland's testimony was improper, defense counsel may have decided not to object because he did not want to highlight the suggestion regarding MC's credibility. This is a legitimate trial tactic. *Vazquez*, 198 Wn.2d at 248. And we presume that defense counsel's performance was reasonable. *Id.* at 247.

Therefore, we conclude that defense counsel's performance was not deficient regarding Dr. Copeland's testimony.

3. Police Officer's Testimony

The prosecutor asked Skollingsberg, the investigating detective, what steps he took after he interviewed MC and her parents. Skollingsberg responded that he "authored a search warrant for the residence. . . where the majority *of the crimes* had occurred, and most recent one had also occurred. RP at 352 (emphasis added). Rohleder argues that defense counsel should have objected to this testimony because it presented an improper opinion that crimes took place.

Skollingsberg's testimony was simply an account of the investigation process he used after obtaining MC's statement. *See Kirkman*, 159 Wn.2d at 930-31. Skollingsberg did not relate the crimes to Rohleder and so was not offering a direct opinion on Rohleder's guilt or commenting on MC's credibility.

Because Skollingsberg's testimony was not improper, Rohleder cannot show that defense counsel's representation was deficient. Therefore, we conclude that defense counsel's performance was not deficient regarding this issue.

D. CUMULATIVE ERROR

Rohleder argues that cumulative error deprived him of his right to a fair trial. We disagree.

Under the cumulative error doctrine, a defendant "must show that while multiple trial errors, 'standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.' " *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462 (2017) (quoting *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)).

Here, Rohleder has not demonstrated that any error denied him a fair trial. Therefore, we hold that the cumulative error doctrine is inapplicable.

E. IMPOSITION OF VPA AND DNA COLLECTION FEE

Rohleder argues, and the State concedes, that the $500 VPA and the $100 DNA collection fee should be stricken from his judgment and sentence. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). For purposes of RCW 10.01.160(3), a defendant is indigent if they meet

the criteria in RCW 10.101.010(3). Although this amendment took effect after Rohleder's sentencing, it applies to cases pending on appeal. *Ellis*, 27 Wn. App. 2d at 16.

Former RCW 43.43.7541 (2018) required every sentence to include a $100 DNA collection fee unless the offender's DNA previously had been collected. However, the legislature eliminated this provision effective July 1, 2023. LAWS OF 2023, ch. 449 §4. In addition, upon motion by the defendant, RCW 43.43.7541(2) now requires the trial court to waive any DNA collection fees that were imposed before July 1, 2023. Although these amendments took effect after Rohleder's sentencing, they apply to cases pending on appeal. *See Ellis*, 27 Wn. App. 2d at 16.

The trial court determined that Rohleder was indigent under RCW 10.101.010(3). Therefore, on remand the VPA and the DNA collection fee must be stricken from the judgment and sentence.

CONCLUSION

We affirm Rohleder's convictions, but we remand for the trial court to strike the VPA and the DNA collection fee from the judgment and sentence.

MAXA, P.J.

We concur:

LEE, J.

CHE, J.