

**NO. 43199-8-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**RONALD LEE SORENSON,**

Appellant.

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

The Honorable Scott Collier, Judge  
The Honorable Rich Melnick, Judge

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**AMENDED BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	Page
<b>A. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. The prosecutor committed misconduct in closing argument when she repeatedly misstated the reasonable doubt standard. ....</b>	<b>1</b>
<b>2. The prosecutor’s flagrant misconduct in closing argument denied Sorenson a fair trial.....</b>	<b>1</b>
<b>3. Because Sorenson did not have a fair trial, the court erred in entering a judgment against Sorenson.....</b>	<b>1</b>
<b>4. The judgment and sentence contains scrivener's errors as to the dates of the offenses charged in Counts 2, 3, and 9. ....</b>	<b>1</b>
<b>B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. Reasonable doubt does not mean the jury has to convict if they find the state’s witnesses credible. But this is what the prosecutor told the jury over and over again during closing argument. Sorenson did not object to the improper argument. Was the prosecutor’s argument so flagrant and ill-intentioned that no instruction would have cured the prejudice caused by the prosecutor’s improper atgment? .....</b>	<b>1</b>
<b>2. Sorenson is entitled to a judgment and sentence free of scrivener’s errors. His judgment and sentence contains scrivener’s errors as to the date of offense on Counts 2, 3, and 9. Should Sorenson’s case be remanded to correct the judgment and sentence? .....</b>	<b>1</b>
<b>C. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS...2</b>	
<b>1. Sorenson and his wife split up.....</b>	<b>2</b>

2. The state filed charges after Sabrina kicked Sorenson out of the house.....	4
3. At trial, the girls could not provide specific detail about how old they were when the alleged offenses occurred. ....	4
4. The jury acquitted Sorenson on Counts 5 and 6.....	8
<b>D. ARGUMENT.....</b>	<b>8</b>
<b>1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED SORENSON’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL. ....</b>	<b>8</b>
a. The prosecutor repeatedly misstated the burden of proof in closing argument. ....	9
b. No curative instruction could have undone the prosecutor’s misconduct. ....	11
<b>2. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND A SCRIVENER’S ERROR.....</b>	<b>13</b>
<b>E. CONCLUSION .....</b>	<b>14</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>15</b>

**TABLE OF AUTHORITIES**

Page

**Cases**

*In re Glasmann* \_\_ Wn.2d. \_\_, 286 P.3d 673, 682(2012)..... 11

*In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 11

*State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010) ..... 11

*State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 14

*State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 13

*State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978)..... 9

*State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 9

*State v. Moten*, 95 Wn. App. 927, 976 P.2d 1286 (1999)..... 14

*State v. Naillieux*, 158 Wn. App. 630, 241 P.3d 1280 (2010)..... 14

*State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984)..... 8

*State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997)..... 9

**Statutes**

RCW 9A.44.083..... 4

RCW 9A.44.086..... 4

RCW 9A.44.089..... 4

**Other Authorities**

11 Washington Practice, Washington Pattern Jury Instructions (Criminal)  
4.01..... 14

Const. Art. I, §§ 3, 22..... 13

U.S. Const. Amends VI, XIV ..... 13

**A. ASSIGNMENTS OF ERROR**

1. The prosecutor committed misconduct in closing argument when she repeatedly misstated the reasonable doubt standard.

2. The prosecutor's flagrant misconduct in closing argument denied Sorenson a fair trial.

3. Because Sorenson did not have a fair trial, the court erred in entering a judgment against Sorenson.

4. The judgment and sentence contains scrivener's errors as to the dates of the offenses charged in Counts 2, 3, and 9.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Reasonable doubt does not mean the jury has to convict if they find the state's witnesses credible. But this is what the prosecutor told the jury over and over again during closing argument. Sorenson did not object to the improper argument. Was the prosecutor's argument so flagrant and ill-intentioned that no instruction could have cured the prejudice caused by the prosecutor's improper argument?

2. Sorenson is entitled to a judgment and sentence free of scrivener's errors. His judgment and sentence contains scrivener's errors as to the date of offense on Counts 2, 3, and 9. Should Sorenson's case be remanded to correct the judgment and sentence?

## **C. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS**

### **1. Sorenson and his wife split up.**

After 20 years of marriage, Ron Sorenson and his wife, Sabrina, drifted apart and fell out of love. RP 2 at 132. In July 2010, they agreed to separate and planned to divorce. Sabrina took up the task of breaking the news to their three daughters, BLS, BES, and BJS, and their daughter-like niece, AH.<sup>1</sup> RP 2 at 130, 133, 161-69. Sabrina planned to take the blame for the separation. She would tell the girls that her failure to address her molestation as a child made it impossible for her to continue her marriage to their father. RP 2 at 133-34.

Although the girls noticed their parents drifting away from each other, the household seemed happy. RP 2 at 192; RP 3A at 252. The parents encouraged the girls to excel in school. The girls were very active in sports: softball, volleyball, bowling. RP 3A at 233. By all appearances, particularly to each other, they had a cohesive, affectionate, loving family. RP 2 at 192. The family was so comfortable with each other that, on any given night, any one of the biological daughters would fall asleep in their parents' bed while watching a movie and would spend the night there. RP 2 at 139, 210; RP 3 at 254. It was also not unusual for

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<sup>1</sup> Sorenson and Sabrina obtained legal custody of A.H. when she was 13. RP 3A at 383.

any of the girls to cuddle on the couch with their father while watching TV. RP 3A at 287.

This couch cuddling extended to a frequent guest at the house, AB. AB is a niece Sabrina babysat her for years. RP 3 at 370-71.

Sorenson is a union truck driver. RP 4A at 427. To support his family, he put in long hours driving truck. The competitive softball played by his daughters was expensive to equip. To make the best money, he often worked swing shift and graveyard. That meant he often was not home at night and, consequently, was not the parent who frequently shared a bed with a daughter. RP 4A at 477-83, 491-92.

About four months before Sorenson and Sabrina separated, daughter BJS told Sabrina she woke up one night in her parents' bed to find her hand in her father's pants. RP 2 at 134, 196-98. Per BJS, this incident happened years earlier. RP 2 at 192-96. And it only happened the one time. RP 2 at 193-201. Sabrina asked Sorenson about BJS's claim. Sorenson denied any inappropriate touching and Sabrina wanted to believe him. RP 2 at 134-35.

Sorenson wanted to be with Sabrina when she told the girls about the intended separation. RP 4A at 501. But Sabrina went ahead without Sorenson. She gathered the girls together in her bedroom and started to explain about the separation, her personal history of being molested, and



how Sorenson may have molested BJS. AH and BES both volunteered that they too felt Sorenson touched them inappropriately. BLS just got quiet. RP 2 at 133-141.

**2. The state filed charges after Sabrina kicked Sorenson out of the house.**

After her discussion with the girls, Sabrina called Sorenson and told him not to come home. RP 2 at 155.

Thereafter, the police got involved and the girls were interviewed by a police detective. The state filed multiple child molestation first,<sup>2</sup> second,<sup>3</sup> and third degree<sup>4</sup> charges against Sorenson. RP 2 at 178-185; CP 1-16, 24-33.

**3. At trial, the girls could not provide specific detail about how old they were when the alleged offenses occurred.**

Each of the girls testified at trial.

BJS's birthday is December 9, 1996. RP 2 at 190. Once, when she was 6, 7 or 8, she was asleep in her parents' bed. She woke up to find her hand under her dad's underwear and on top of his penis. She moved her hand and got out of the bed. Her mother was asleep. Her father asked her where she was going. She told him "the bathroom." This incident made her uncomfortable. She never slept in the bed with her dad again. She

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<sup>2</sup> RCW 9A.44.083

<sup>3</sup> RCW 9A.44.086

<sup>4</sup> RCW 9A.44.089

never told anyone about the incident until eighth grade when her mother told her about being molested as a child. BJS only characterized the touching as molestation after that conversation. RP 2 at 192-201. The jury acquitted Sorenson of first degree child molestation as it related to BJS. CP 31, 86.

BES's birthday is March 9, 1990. RP 2 at 131. She testified the first time anything happened with Sorenson was on a trip to the beach. RP 3A at 234. She was sleeping with her parents. When she woke up, Sorenson's hand was in her pants and was moving on her vagina. RP 3A at 234. When she got out of bed, Sorenson asked her where she was going and she told him "the bathroom." Thereafter, she continued to sleep in bed with her parents. RP 3A at 234-37.

Over the years, additional touching happened more than 10 times. She would wake up to find her hand on Sorenson's penis or Sorenson's hand up her shirt or on her vagina. RP 3A at 237. After the initial incident, all the touching occurred at the various homes that family lived at in Vancouver. RP 3A at 238. Most of the touching occurred around the same time when she was 11 and 12 and in the eighth grade. RP 3A at 240. There was one incident where she was in her parent's bed and felt Sorenson's fingertips inside her vagina. She then moved to her own bed but woke up to find Sorenson in bed with her and his hand on her "boob."

She moved to the couch but Sorenson slipped in behind her. She got off the couch and locked herself in the bathroom. RP 3A at 240. There was an instance where she woke up and her hand was on Sorenson's hard penis. Another time she felt Sorenson's penis "in between the butt cheeks a little bit." RP 3A at 241. Sabrina was often asleep in the bed. RP 3A at 243. The touching stopped when she was a 14 year-old freshman and "got" her first boyfriend. RP 3A at 246.

She did not tell her sisters at the time. She believed she was the only one this was happening to and she did not want to spoil her sisters' love for their father. RP 3A at 249. She did tell her best friend Desirae about it when she was a freshman or sophomore. RP 3A at 250; RP 3B at 365-67.

AH's birthday is March 21, 1988. RP 3A at 282. She moved in with the Sorenson's when she was 13. RP 3A at 282. About 6-8 months after moving in with the family, she was spooning on the couch with Sorenson. It was normal for Sorenson to be affectionate toward her. RP 3A at 287. Sorenson put his hands down her pants and moved his hand back and forth on her vagina. She was not sure if it was over or under her underwear. RP 3A at 290. He asked her if it was okay. She did not respond and pretended to be asleep. RP 3A at 287, 293. She got up as soon as she could and went outside. RP 3A at 288.

After that, she did her best not to be alone with Sorenson. RP 3A at 297-300. She did not tell Sabrina or the other girls until the night Sabrina told them she and Sorenson were splitting up. She was afraid to tell anyone because she really had no other place to go as her own parents were not available to her. RP 3A at 293-94.

AB's birthday is December 12, 1993. RP 3B at 368. Sabrina babysat her especially when she was in fourth grade and when she was 8-9 years old. RP 3B at 370. Sorenson would spoon with her on the couch when they watched TV. He would touch her breasts and crotch area. This happened around 15-20 times. She would just act like it did not happen. 3B at 371-73. Although she testified she told her mother what happened, her mom did not testify and corroborate AB's story. RP 3B at 373.

BLS's birthday is August 23, 1993. RP 3B at 399. When she was 11 to 15, she experienced several instances when she woke to find her hand in Sorenson's pants or Sorenson's hand in her pants while sleeping in her parents' bed. At least some of the time Sabrina was in the bed too. RP 3B at 405-13. BLS described Sabrina as a heavy sleeper. "Nothing wakes her up." RP 3B at 410. She did not tell anyone about the touching. She never wanted to talk about it. The first time she learned about her sisters' allegations is when Sabrina gathered them together to tell them she and Sorenson were splitting up. RP 3B at 414.

**4. The jury acquitted Sorenson on Counts 5 and 6.**

The jury returned a guilty verdict on all but two counts, Count 5 (BJS) and Count 6 (AH). The jury also returned special verdicts on each count finding Sorenson abused a position of trust and that the multiple convictions created a high offender score with the result that some of the current offenses were unpunished. CP 84-105.

Sorenson did not object to the court entering judgments on each count and the court did so. CP 122-43. The court imposed an exceptional minimum term of 240 months and a maximum term of life on counts 1, 2, 10, and 11. CP 126. On all other counts, the court imposed a standard range sentence. CP 126.

**D. ARGUMENT**

**1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED SORENSON'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

A public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The prosecutor violated this duty when, in closing argument, she repeatedly misstated the burden of proof by telling the jurors they only had to believe the state's witnesses to find Sorenson guilty.

Prosecutorial misconduct may deprive a defendant a fair trial. Only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978) (when a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial is violated).

Where, as here, the defendant did not object to the improper argument at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653 (2012)).

**a. The prosecutor repeatedly misstated the burden of proof in closing argument.**

In closing argument, the prosecutor dumbed down the definition of reasonable doubt to two words: "abiding belief." RP 4B at 576. Thereafter she told the jury over and over again that to convict all they needed was an abiding belief that all five of the witnesses against Sorenson were credible.

[I]f you have an abiding belief that these girls testified truthfully, you have an abiding belief in what they said, you are satisfied beyond a reasonable doubt.

RP 4B at 578.

[I] want to go through each girl and submit – and show you how they are credible and how you should have an abiding belief in what they are saying.

RP 4B at 578.

And they have come forward now and taken an oath to tell all of you the truth and what happened.

RP 4B at 593.

And you should have an abiding belief that they told you the truth. You should have an abiding belief that he is guilty. And if you do have an abiding belief in the truth of what those girls said, then it is your sworn duty, your sworn obligation, and your sworn responsibility to find him guilty.

RP 4B at 594.

[I]f you have an abiding belief that equals a reasonable doubt – beyond a reasonable doubt.

RP 4B at 649.

In reality, due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury is required to look at all the evidence and decide whether the state had proven every element of the crime beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417,

431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010); U.S. Const. Amends VI, XIV; Const. Art. I, §§ 3, 22. It is not the jury's job to determine the "truth" or solve the case, but to determine if the state proved its allegations beyond a reasonable doubt. *Id.*

In closing argument the prosecutor never got that right and no one corrected her. "Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." *In re Glasmann*, \_\_\_ Wn.2d. \_\_\_, 286 P.3d 673, 682 (2012).

**b. No curative instruction could have undone the prosecutor's misconduct.**

The reasonable doubt instruction, although a standard instruction used in courtrooms across the state every working day, is not a model of clarity.

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If,



from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 39; 11 Washington Practice, Washington Pattern Jury Instructions (Criminal) 4.01.

The instruction does not use common language to explain what reasonable doubt actually is and it allows argument like the one given by the prosecutor here: reasonable doubt means “abiding belief.” RP 4B at 578. The prosecutor noted correctly, “nowhere in this definition of reasonable doubt, are you given a set recipe of what the State must prove in order for you to convict the Defendant.” RP 4B at 576. And that is why the prosecutor’s unchecked and misleading argument is so damaging. The prosecutor provided the jury with the recipe the reasonable doubt instructions failed to give. Because Sorenson did not challenge the prosecutor’s flawed recipe of “you just have to believe the girls,” it is the only recipe the jury used. WPIC 4.01 does not tell the jury otherwise. A misstatement about the law as to the presumption of innocence due a defendant - the “bedrock upon which [our] criminal justice system stands” - constitutes great prejudice because it reduces the state's burden and undermines a defendant's due process rights. *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

The prosecutor told the jury “this case largely comes down to the credibility of the witnesses.” RP 4B at 577. And it did. There was no physical evidence. It was just their word against their father’s word. The prosecutor’s misstatement of the law was so flagrant and ill-intentioned that no limiting instruction could cure the prejudice.

Sorenson’s convictions must be reversed.

**2. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO AMEND A SCRIVENER’S ERROR.**

Section 2.1 of Sorenson’s judgment and sentence contains a scrivener’s error requiring correction.

As to Count 2, the court found the date of the offense to be “12/9/2002 to 3/8/2008.” CP 122. Sorenson was tried on the Fifth Amended Information. CP 29-33. The information specifies that offense date for Count 2 is March 9, 2002 to March 8, 2004. CP 29.

As to Count 3, the court found the date of the offense to be “3/9/2004 to 3/9/2006.” CP 122. The Fifth Amended Information specifies the offense dates for Count 3 are March 9, 2003, to March 8, 2006. CP 29.

As to Count 9, the court found the date of the offense to be “8/23/2007 to 8/22/2009.” CP 122. The Fifth Amended Information

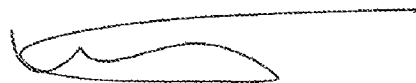
specifies that offense date for Count 3 is August 23, 2006, to August 22, 2009. CP 29.

This Court should therefore remand to correct the judgment and sentence. See *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence erroneously stating defendant stipulated to an exceptional sentence); *State v. Moten*, 95 Wn. App. 927, 929, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form.); see also *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (illegal or erroneous sentences may be challenged for the first time on appeal).

**E. CONCLUSION**

The prosecutor's flagrant misconduct in closing argument denied Sorenson a fair trial. His convictions must be reversed. Alternatively, the scrivener's errors at section 2.1 of the judgment and sentence must be corrected.

Respectfully submitted this 7th day of December 2012.



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Attorney for Ronald Lee Sorenson

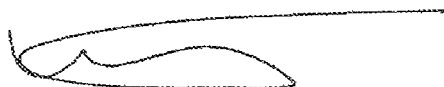
## **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed The Amended Brief of Appellant to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Ronald L. Sorenson/ DOC#355432, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 7, 2012, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Ronald Lee Sorenson

# COWLITZ COUNTY ASSIGNED COUNSEL

**December 07, 2012 - 2:21 PM**

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