NO. 30850-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State had two prior opportunities to convict Mr. Middleworth, but trial errors prevented a fair trial. In this third trial, the result was the same. Trial errors abounded: Mr. Middleworth was denied the right to be present at a pretrial hearing; the same hearing was held in chambers, violating the right to a public trial; Mr. Middleworth was twice placed in jeopardy for a single act; jury instructions and the deputy prosecuting attorney misstated the burden of proof; and the State failed to produce evidence tending to negate Mr. Middleworth's guilt. Each of these errors requires reversal of his convictions.

B. ASSIGNMENTS OF ERROR

1. Mr. Middleworth's constitutional right to be present under the Sixth Amendment, the Due Process Clause and article I, section 22 was violated when factual matters were discussed without him.

2. The right to a public trial was violated when the court heard factual and pretrial matters in chambers.

3. Mr. Middleworth was deprived of his Fifth Amendment right to be free from double jeopardy because the jury instructions did not make clear that a separate and distinct act was required for each count.

4. Instruction 4 misstated the definition of proof beyond a reasonable doubt and confused the State's burden of proof.

5. Prosecutorial misconduct denied Mr. Middleworth a fair trial.

6. The trial court abused its discretion by failing to dismiss the case as a result of the prosecution's discovery violation.

7. Mr. Middleworth was denied a fair trial when the prosecution was allowed to continue despite a prejudicial discovery violation.

8. Cumulative error denied Mr. Middleworth his due process right to a fair trial.

9. The trial court erred by imposing restitution to the Walla Walla County Prosecuting Attorney's Office for expert witness fees.

10. The trial court erred by imposing restitution to Molina Healthcare.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal constitution guarantees an accused the right to be present at all critical stages in his trial. This includes hearings where disputed factual matters are at issue. The Washington Constitution provides an even broader right to be present throughout trial. Was Mr. Middleworth's constitutional right to be present violated when the trial court held an in-chambers conference to discuss pretrial rulings and hear argument on issues involving disputed factual matters but specifically excluded him from the hearing?

2. An accused has a constitutional right to a trial that is open to the public. The public has a corresponding right to public trials. A proceeding must be open to the public if experience shows that type of proceeding is generally open to the public and logic dictates that public access plays a significant role in the functioning of the process in question. Did the trial court's in-chambers hearing violate the public trial right where historical practice and the court's own comments indicate the hearing would ordinarily be open to the public and public access would have enhanced fairness and the appearance of fairness?

3. The federal and state constitutions prohibit multiple convictions for the same act. Where multiple counts of sexual abuse are alleged, the court's instructions should make clear to the jury that a guilty verdict on each offense must be predicated on separate and distinct acts. If no such instruction is provided, a double jeopardy violation occurs if the record does not make the separate and distinct act requirement manifestly clear to an average juror or if the instructional error was not harmless beyond a reasonable doubt. Should one of Mr. Middleworth's convictions be vacated where the jury was not instructed as to the separate and distinct act requirement, the requirement was not otherwise made manifestly apparent, and the error was not harmless beyond a reasonable doubt?

4. The role of the jury is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." When it is not the jury's job to determine the truth, did the court misstate and dilute the burden of proof in violation of due process by focusing the jury on whether they believed the charge was true?

5. A prosecutor commits misconduct by telling the jury its role is to determine the truth. Was Mr. Middleworth denied a fair trial where the prosecutor repeatedly emphasized the jury's role was to find the truth and it could stop deliberating as soon as it found the charges were true?

6. The State has a continuing obligation to disclose information that tends to negate an accused's guilt as to the offense charged. If the State fails to fulfill its obligation and prejudice results that cannot be cured by a continuance, dismissal of the charge is an appropriate sanction. Did the trial court abuse its discretion and deny Mr. Middleworth a fair trial when it failed to dismiss the prosecution under the mistaken belief that the State's failure to disclose exculpatory information was unintentional and the trial continuance did not resolve the resulting prejudice to Mr. Middleworth?

7. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Middleworth denied a fundamentally fair trial?

8. A court may award restitution only for damages suffered by a "victim" of the crime. A "victim" must be a "person." Restitution may be awarded to a third party, but only to reimburse the third party for amounts spent on behalf of the direct victim of the crime. Did the trial court err in awarding $2,597.22 restitution to the Walla Walla County Prosecutor for "expert witness fees"?

9. An award of restitution must be based on evidence of loss. The evidence must provide the court a reasonable basis for estimating losses and require no speculation or conjecture. Did the trial court err in awarding restitution to the Walla Walla prosecutor and to Molina Healthcare where no evidence was presented supporting losses?

D. STATEMENT OF THE CASE

In August 2010, Robert Middleworth's girlfriend of one year, Kristina Davis, and her four-year-old daughter, B., moved in with him. IV

RP 546-49, 567-68; VII RP 939.[1] Ms. Davis and her daughter were very attached to each other and B. rarely left her mother's side. *E.g.*, VII RP 939. B. and Ms. Davis even shared a bedroom. IV RP 549-50. Though Mr. Middleworth worked long shifts driving a dairy truck, he spent time with B. and Ms. Davis together—taking B. to playgrounds and other activities, or watching movies and cartoons at their home. IV RP 556-57; VII RP 940. On one occasion Ms. Davis ran out for 10 to 15 minutes to purchase pet food at the local store; but otherwise, B. was never left in Mr. Middleworth's care. IV RP 555-56, 562-63, 566; VII RP 939.

Their home was located in the basement portion of a residence inhabited by Mr. Middleworth's mother and stepfather. IV RP 563-64; VII RP 934, 938-39. B. would visit with them on occasion. IV RP 557, 564; VI RP 935-36.

In late September, after B. had turned five years old, she began complaining of pain in her "potty." IV RP 552-53. Ms. Davis asked Mr. Middleworth for advice, and they examined B. together. IV RP 559-60; VII RP 941. With her mother watching, Mr. Middleworth touched B. lightly on her thighs in order to see the area around her vagina. IV RP 559-60, 569, 571-72. Mr. Middleworth told Ms. Davis she should take B.

[1] The seven consecutively paginated volumes of verbatim reports of proceedings are referred to herein by volume number, e.g. "II RP [page #]"; the separately paginated volume of voir dire and opening statements from April 2, 2012 is referred to as "4/2/12 RP [page #]."

to the emergency room. IV RP 553, 559-62. Ms. Davis elected to wait until the next day, September 21, to seek medical attention. IV RP 559-61; VII RP 941-42. In the meantime, Mr. Middleworth helped Ms. Davis minimize B.'s pain by providing her cold packs to put between her legs. IV RP 561, 569-70.

Rachel Marsh, a nurse practitioner, examined B. on September 21. V RP 743-44, 746. She noticed B. showed several signs of poor hygiene, including lice. V RP 750. Nurse Marsh believed B. had experienced some sort of vaginal trauma and asked B. how it happened. V RP 751-54. B. told the nurse that her mother's boyfriend had laid her down when she was watching television. V RP 754-55, 758. Ms. Davis told the nurse she wasn't sure how anything could have happened because B. was with her all the time. V RP 756. B. was referred to a pediatrician, Joseph Wren, and Child Protective Services (CPS) was contacted. V RP 671, 673, 756. Dr. Wren found trauma to B.'s vagina. V RP 677-85, 687-92, 698. He did not know the source of the trauma. V RP 698, 726, 729-30. He also noted B. was infested with head lice and had poor dental hygiene. V RP 677, 698.

Dr. Wren sent B. to Spokane for further medical attention. V RP 699, 726-27; VI RP 801-02. Dr. Joel Edminster also found trauma to her vaginal area. VI RP 804-06. She was diagnosed with herpes and bacterial

vaginosis, a bacterial infection that can be caused by recent antibiotics, another infection, or intercourse with a new partner. V RP 714-15; VI RP 806-09. Dr. Edminister did not test B. to determine what strain of the herpes virus she had. VI RP 810-11. He later testified that herpes is spread through direct contact that does not have to be sexual. VI RP 811-13; *accord* V RP 706.

CPS scheduled a forensic interview with one of its investigators, Brooke Martin, which took place a week after Ms. Davis took B. to the hospital. V RP 601, 626, 627, 634, 644, 647-48. Eventually, B. told Ms. Martin that Mr. Middleworth touched her on her "potty" on top of her clothes. Exhibit 1 at 21:37-24:44. She said it only happened once when she was four years old (which would have been before August 12), but was not clear whether it occurred in his bedroom or in the living room. Exhibit 1 at 21:37-22:35, 22:55-24:40; IV RP 547 (B. born Aug. 12, 2005); V RP 646-47. The interview was recorded. V RP 634; Exhibit 1. B. was subsequently placed in foster care. *E.g.*, VII RP 924.

Blood tests showed that Mr. Middleworth had herpes simplex one (generally found orally) and two (generally found genitally), and his initial exposure had not occurred recently. Exhibit 3; V RP 708-12, 717, 720-21; VI RP 779-81. The test did not show if Mr. Middleworth had a recent outbreak. V RP 719-21. At least 80 percent of the general population has

herpes simplex one, a somewhat lower percentage might have simplex two. V RP 721; VI RP 811. Apparently no one else who had contact with B. was tested for herpes. V RP 723; VI RP 813. However, Ms. Davis testified she has experienced cold sores on her mouth, with the most recent outbreak arising before she dated Mr. Middleworth. III RP 437.

The State charged Mr. Middleworth with rape of a child in the first degree (RCW 9A.44.073) and child molestation in the first degree (RCW 9A.44.083). CP 10. A trial was held in February 2011. At this trial, B. testified simply that Mr. Middleworth touched her in her private area, but otherwise lacked any relevant recollection. I RP 87-89. A new trial was ordered on Mr. Middleworth's post-trial motion, which was brought by new defense counsel. CP 679-980. Mr. Middleworth had been removed from the trial at the outset for asserting his desire to fire his attorney; he never was advised of his right to testify or provided the opportunity to testify in his own behalf. *Id.*; I RP 36-53.

The State sought to try Mr. Middleworth again in January 2012. *See* III RP 310. Mr. Middleworth was represented by yet a different attorney. At this trial, B. testified that while clothed and seated in Mr. Middleworth's lap, Mr. Middleworth touched her with his finger under her clothing. III RP 387-401. B. testified she was telling people what they wanted to hear. III RP 403-05, 409-10. Because the State failed to fully

redact a recording of B.'s forensic interview before playing for the jury, a mistrial was declared during the State's case-in-chief. IV RP 509-35; *see* CP 1045 (order granting motion in limine excluding evidence that was not properly redacted).

A third trial was held in April 2012. *E.g.*, 4/2/12 RP 1. This time, B. testified that her mother told her that Mr. Middleworth had sex with her by putting his fingers in her "private spots." IV RP 583-84, 588. She also said he removed her clothes and she saw his private parts, which she had never stated before. IV RP 584-85, 589-90, 597-98; V RP 647; *see* III RP 400-01. On cross-examination, defense counsel pointed out the inconsistencies in B.'s story over time. IV RP 587-90, 592, 594, 596-98; *accord* 4/2/12 RP 99 (defense opening statement discussing inconsistencies). Ms. Davis and other witnesses concurred that Mr. Middleworth and B. were left alone together on only a single occasion for 10 to 15 minutes while Ms. Davis ran an errand. IV RP 555-56, 562-63, 566; VII RP 935-36, 939. No one could recall when that took place. *Id.* Mr. Middleworth testified in his own defense. VII RP 938. His testimony was consistent with the other witnesses at trial, except he denied he touched B. on her private parts or exposed himself to her. VII RP 938-48.

Well into the State's case-in-chief, it was revealed to the defense that B. made comments to a Department of Social and Health Services

employee and her foster mother that potentially identified her step-grandfather, Brian Paulson, as the source of her trauma. V RP 638-39; VI RP 766-70; VII RP 900-03; VII RP 906-12; *cf.* VII RP 898-99 (B. stayed overnight at her grandparents after moving in with Mr. Middleworth). At the time, the State responded by conducting a second interview of B., which was also recorded. V RP 589-90. Mr. Middleworth was not provided with the recording of that interview until the middle of the third trial. V RP 638-39; VI RP 824.

A jury ultimately convicted Mr. Middleworth on both counts, and he appeals. CP 1087-88. Additional facts are discussed in the relevant argument sections below.

E. ARGUMENT

1. The trial court violated Mr. Middleworth's right to be present by holding hearings on evidentiary matters in chambers and without him.

Mr. Middleworth's state and federal right to be present were violated when the court held an in-chambers hearing to discuss factual matters in his absence. As with all allegations of constitutional violations, "[w]hether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review." *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); *accord State v. Vance*, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

a. The Sixth Amendment and Due Process Clause guarantee a right to be present at all critical stages.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Under the federal constitution, the right derives both from the Sixth Amendment and from the Due Process Clause. U.S. Const. amends. VI, XIV; *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). These provisions protect a defendant's right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

b. The in-chambers, fact-based hearing was a proceeding at which Mr. Middleworth had a right to be present.

A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998); *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987). While in-chambers conferences between the court and counsel on legal matters are not generally critical stages, when the issues raised involve disputed facts the right to be present does apply. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835

(1994) (citing *United States v. Williams*, 455 F.2d 361 (9th Cir. 1972); *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992)).

In *Lord*, our Supreme Court considered the defendant's right to be present at pretrial hearings, unspecified in-chambers hearings and sidebar conferences. 123 Wn.2d at 305-06. The court noted that a defendant does not have a right to be present on purely legal matters that do not require resolution of disputed facts. *Id.* at 306. The court found that all the proceedings from which the defendant was excluded involved legal or ministerial issues only. No issues of disputed fact were considered. *Id.* For example, the court considered defense counsel's motion for funds for a haircut and clothing for trial, finalized wording for jury questionnaires and pretrial instructions, and announced rulings on previously argued motions (at which the defendant was present). *Id.* Because these matters concerned only legal or ministerial matters that did not involve disputed facts, the defendant did not have a right to be present. Further, the court noted the defendant was unable to explain how his presence would have altered the outcome of the proceedings from which he was excluded. *Id.* at 307.

Unlike in *Lord*, the in-chambers hearing held in this case reached disputed factual matters critical to Mr. Middleworth's case and about

which he had exclusive knowledge. *See Dokes*, 79 N.Y.2d at 660-61 ("In determining whether a defendant has a right to be present during a particular proceeding, a key factor is whether the proceeding involved factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position.") In particular, the court and counsel discussed an issue of two different reports deriving from a doctor on the defense witness list. III RP 367-71. The first report defense counsel received from Mr. Middleworth; a second report was later sent directly by the doctor. III RP 367-69. The State was concerned about the propriety of the first report, and there was general concern about the witness' attendance at trial. III RP 368-71. Mr. Middleworth would have been able to provide his attorney with additional information regarding the first report, as he was the one who provided it to counsel, but he was prevented from being present. This part of the hearing clearly involved factual matters about which the defendant would have been able to contribute personally had he not been excluded.

Further, the trial court amended an earlier ruling that excluded testimony or evidence relating to B.'s placement in foster care. III RP 354, 372-73. Mr. Middleworth was denied any opportunity to apprise counsel of a basis for objecting to the court's revision to its initial exclusion. The court's refinement allowed in evidence that would have

been excluded under the letter of the court's prior ruling because the court did not think this evidence regarding B.'s placement violated the spirit of that ruling. But Mr. Middleworth should have had the opportunity to assist counsel in convincing the court otherwise.

Thirdly, counsel and the court discussed the blood tests related to the presence of herpes simplex virus in Mr. Middleworth. III RP 373-76. This issue was critical to the case against Mr. Middleworth. *E.g.*, 4/2/12 RP 94 (State focuses on herpes evidence in opening statement); VII RP 973-74 (State relies on herpes evidence in closing). As defense counsel pointed out, B.'s testimony had varied significantly regarding any sexual contact by Mr. Middleworth. Moreover, other suspect evidence was revealed during the trial, and the jury was particularly interested in it. *E.g.*, V RP 638-39; VI RP 766-70; VII RP 900-03; VII RP 906-12; CP 1086 (jury inquiry focused on testimony of and related to other suspect). The blood test tended to confirm the identity of the perpetrator as well as the nature of the assault, under the State's theory. Mr. Middleworth was acutely interested and involved in this particular matter throughout his prosecution. *E.g.*, CP 414 (asserting through affidavit he has never had herpes virus or outbreak), 416 (affidavit of Middleworth's mother as to same), 427 (response in which Middleworth discusses B.'s medical history), 430 (response in which Middleworth discusses blood test); VII

RP 1007 (at sentencing, Middleworth remains concerned about herpes evidence).[2]

Significantly, Mr. Middleworth was in the courthouse at the time of the closed proceeding, and he specifically requested to attend the hearing. III RP 365. The court told defense counsel and the prosecutor,

> I do not allow that. As I indicated he's not present. He is apparently here at the courthouse on the third floor. This is not a closed hearing by any means. The door happens to be shut, but if we were having a typical pretrial discussion with the other cases that were also set for trial next week, there would be other attorneys here on those particular cases, so I do not restrict who can come in except I don't allow any of the parties or witnesses to come into this discussion.

II RP 365. In other words, the court simply treated the defendant as he would any other party. Moreover, if the court had not elected to hold the proceedings in his chambers, he still would have excluded the defendant

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[2] The issue whether Mr. Middleworth would be allowed to seek substitute counsel was the first matter discussed, but this was then also discussed in open court with Mr. Middleworth present. III RP 364-66, 378-79. Once his presence was permitted, Mr. Middleworth informed the court he was not moving for substitute counsel. III RP 379. The exclusion of Mr. Middleworth from the first portion of the proceedings at least unnecessarily delayed resolution of the matter.

In Mr. Middleworth's absence, the court also discussed the parties' readiness for trial and ruled on the admissibility of child hearsay previously argued. III RP 371, 372-73, 376-77. Discussions of these issues do not implicate the federal right to be present, but did contribute to the violation under the broader state provision. *See* section E.1.c, *infra*.

while attorneys on other cases would have been allowed to be present at his hearing.[3]

The court's in-chambers hearing occurred prior the second trial, in which a mistrial was declared. However, the court's pretrial rulings from the second trial were adopted wholesale and without additional argument for the third trial, currently on review. IV RP 541.

c. The right of a criminal defendant to be present during proceedings against him is even broader under article I, section 22 of our state constitution.

The Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. *State v. Ahren*, 64 Wn. App. 731, 735 n.4, 826 P.2d 1086 (1992). Article I, section 22 explicitly guarantees,

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf,[and] to meet the witnesses against him face to face [and] . . . to have a speedy public trial . . . .

Const. art. I, § 22. Thus, our Supreme Court recently held that the right to "appear and defend in person" under article I, section 22, is interpreted independently of the corollary federal right. *Irby*, 170 Wn.2d at 884.

[3] The court also had the hearing recorded only for purposes of appeal; the record was otherwise sealed. III RP 364-65.

Because the Court has already determined our state constitution provides broader protection than the federal constitution, a comprehensive *Gunwall* analysis need not be conducted here. *E.g.*, *State v. Williams-Walker*, 167 Wn.2d 889, 896 n.2, 225 P.3d 913 (2010); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1996). However, undertaking the *Gunwall* process demonstrates the accuracy of holding the state constitution provides broader protection here.[4] Notably, the finding in *Irby* is also consistent with findings that article I, section 22 provides broader rights than the Sixth Amendment in other contexts. *State v. Martin*, 171 Wn.2d 521, 528 & n.2, 533, 252 P.3d 872 (2011) (holding independent state constitutional analysis applies to prosecutor's questioning of the defendant that allegedly violated his constitutional rights to appear and defend, to testify, and to meet witnesses face to face; and reciting cases finding independent state constitutional analysis appropriate in other article I, section 22 contexts).

[4] The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 61-62.

i. Textual Language and Texts of Parallel Provisions of State and Federal Constitutions (factors one and two).

The difference in textual language demonstrates the State Framers' intent to provide greater protection for the right to be present at trial than the federal constitution. The right to appear in person is not expressly mandated in the federal constitution; however, the state constitution forthrightly declares the "accused shall have the right to appear and defend in person." Const. art. I, § 22. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998) (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984); Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)). In addition, article I, section 22 lists several rights personally accorded an accused person and not included in the Sixth Amendment, such as the right to meet witnesses face to face, to have a copy of the charge, to testify on one's own behalf, and to appeal. *Id.* at 485-86.

ii. State constitutional and common law (factor three).

The Constitutional Convention of 1889 provides no additional evidence of the framers' intent. *Martin*, 171 Wn.2d at 531. In particular, little is known about the history of the drafting of article I, section 22. *Foster*, 135 Wn.2d at 722, 734-35; *State v. Silva*, 107 Wn. App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend article I, section 22 to be interpreted identically to the federal Bill of Rights, because they used different language and the federal Bill of Rights did not then apply to the states. *Martin*, 171 Wn.2d at 531; Utter, *supra*, at 496-97; *Silva*, 107 Wn. App. at 619 ("The decision to use other states' constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution."). As noted in *Martin*, our Supreme Court acknowledged the right to confront witnesses face to face and to cross-examine those witnesses in open court shortly after statehood and before such rights were found to be embodied in the Sixth Amendment. *Martin*, 171 Wn.2d at 531 (citing *State v. Stentz*, 30 Wash. 134, 142, 70 P. 241 (1902), *abrogated on other grounds by State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218 (2001)).

Additionally, Washington's criminal rules state that "[t]he defendant shall be present . . . at every stage of the trial . . . except . . . for good cause shown." Criminal Rule (CrR) 3.4(a).

iii. Preexisting state law (factor four).

Preexisting law mandated a defendant's presence as a necessary requirement before commencing trial. An 1854 territorial law provided, "No person prosecuted for an offense punishable by death or by confinement or in the county jail, shall be tried unless personally present during the trial." Laws 1854, p. 412, § 109. Another territorial law provided, "On the trial of any indictment the party shall have the right . . . to meet witnesses produced against him face to face." Laws 1854, p. 371, § 2. These preexisting laws demonstrate a desire at the time of the framing to expressly protect a defendant's personal right to be present throughout all material aspects of the trial upon its commencement, and these laws were strictly enforced. In the 1914 case *State v. Shutzler*, the court emphasized that any violation of the right to be present cannot be tolerated, because "[t]he wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel." 82 Wash. 365, 367, 144 P. 284 (1914) (state constitution guarantees accused person "right to be present at every stage of the trial when his substantial rights may be affected").

iv. Differences in structure between state and federal constitutional provisions (factor five).

The United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. *Foster*, 135 Wn.2d at 458-59; *Gunwall*, 106 Wn.2d at 61. This factor supports an independent analysis of the right to be present, just as it does the right to self-representation and the right to face-to-face confrontation. *Id.* at 458-59; *Silva*, 107 Wn. App. at 619. Because article I, section 22 expressly grants the right to appear and defend in person, and the federal constitution does not, the state constitution embodies an intent to mandate such presence during any substantive legal proceedings unless expressly waived.

v. Matters of particular state or local concern (factor six).

The regulation of criminal trials in Washington is a matter of particular state concern. *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990); *Gunwall*, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the right to confront witnesses and throughout proceedings that may affect the substantial rights of the accused. *Foster*, 135 Wn.2d at 494; *Shutzler*, 82 Wash. at 367.

d. Mr. Middleworth's broad state constitutional right to be present was violated, requiring reversal.

The greater protection afforded by the Washington Constitution means courts may not deny a defendant the opportunity to participate in a substantive stage of proceedings without an express waiver. As articulated in *Shutzler*, a violation of the right to be present is "conclusively presumed to be prejudicial." 82 Wash. at 367. It is a right that cannot be waived without being afforded the opportunity to do so. *See State v. Duckett*, 141 Wn. App. 797, 806-07, 173 P.3d 948 (2007).

> Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68; *see also State v. Beaudin*, 76 Wash. 306, 308, 136 P. 137 (1913); *Linbeck v. State*, 1 Wash. 336, 339, 25 P. 452 (1890).

In sum, under either the federal constitution or the more protective state constitution, Mr. Middleworth's right to be present was violated. This Court should reverse and remand for a new trial.

2. The in-chambers hearing also violated the right to a public trial.

The right to a public trial was also violated by the same in-chambers hearing discussed above.

a. An accused has a constitutional right to public court proceedings.

Article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution also guarantee the right to a public criminal trial. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Sublett*, No. 84856-4, __ Wn.2d __, 2012 WL 5870484, *4 (Nov. 21, 2012). Additionally, article I, section 10 of our state constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10. This provision gives the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *see In re Detention of D.F.F.*, 172 Wn.2d 37, 39-40, 256 P.3d 357 (2011) (individual has standing to raise art. I, § 10 claim regarding own commitment proceeding); *id.* at 47-49 (J.M. Johnson, J., concurring).

It is strongly presumed that courts are to be open at all stages of the trial. *Sublett*, 2012 WL 5870484, at *4. The presumption may only be

overcome "to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve higher values." *Id.* at *4.

The right to a public trial ensures a fair trial, reminds the prosecutor and judge of their responsibility to the accused and the importance of their functions, encourages witnesses to come forward, and discourages perjury. *Sublett*, 2012 WL 5870484, at *5 (citing *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). Our Supreme Court recently held the experience and logic test applies to determine whether the particular interaction between the court, counsel and defendants implicates the right to a public trial. *Id.* at 4, 5.

The experience and logic test was initially set forth by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press II*). Under the "experience" step, the test asks "whether the place and process have historically been open to the press and general public." *Sublett*, 2012 WL 5870484, at *5 (quoting *Press II*, 478 U.S. at 8). The "logic" step asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both steps is yes, the proceeding should be held in open court unless an overriding interest warrants closure under the requirements of *State v. Bone–Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

This Court reviews de novo the existence of a violation of the right to a public trial. *Sublett*, 2012 WL 5870484, at *4. The issue is one of constitutional magnitude that may be raised for the first time on appeal. *State v. Wise*, No. 82802-4, __ Wn.2d __, 2012 WL 5870396; *2 (Nov. 21, 2012); *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009).

b. The place and process at issue here have historically been open to the general public and press.

The first step in determining whether a proceeding is subject to the public trial right asks whether the process has historically been open to the general public and press. In *Sublett*, the court looked to court decisions and rules in deciding this step. 2012 WL 5870484, at *6.

In *Easterling*, the court held that the public trial right extends to pretrial proceedings. 157 Wn.2d at 174. Notably, the trial court here indicated it generally holds these specific proceedings in an open courtroom. To that end, the court stated,

> This is not a closed hearing by any means. The door happens to be shut, but if we were having a typical pretrial discussion with the other cases that were also set for trial next week, there would be other attorneys here on those particular cases, so I do not restrict who can come in except I don't allow any of the parties or witnesses to come into this discussion. That would just prolong the discussion, in my opinion.

III RP 365. These comments tend to show that such hearings on pretrial matters and motions in limine are traditionally open to the public, including other attorneys and the press.

The court rules also indicate the hearing is traditionally held in open court. CrR 3.4 requires the defendant to be present at every stage of the trial, unless otherwise provided by the rules. Motions in criminal trials are governed by CrR 3.5 and 3.6 as well as Civil Rule 7. CrR 8.2. None of these rules provide for factual issues to be explored or discussion had in chambers or otherwise out of the view of the public.

This is in contrast to the proceeding on review in *Sublett*, responding to a jury inquiry. 2012 WL 5870484, at *4, 6. There, the court noted that CrR 6.15 provides for jury instructions to be submitted in writing and discussed informally with only objections put on the record to preserve review. *Id.* at *6. The same rule also permits discussions regarding responses to a jury inquiry to be held off the record, while the question itself, any objections, and the court's response must be made a part of the record. *Id.* (citing CrR 6.15(f)).

The hearing at issue here is more akin to the severance proceeding reviewed in *Easterling*. There our Supreme Court remanded for a new trial where the court closed the courtroom and excluded the defendant from a hearing on a co-defendant's motion to sever. 157 Wn.2d 167. The

closed proceedings concerned only argument from the parties regarding factual and legal issues. *Id.* at 172. Moreover, the court did not make any rulings during the closed hearing. *Id.* at 172-73. Nonetheless, the State agreed the courtroom should have been open to the public. *Id.* at 171, 175-76 (State argued that closed proceedings affected co-defendant's trial only). The court agreed and reversed. As the court explained in a subsequent case, "the closure affected the fairness of Easterling's trial because the court did not seek or receive input or objection from Easterling, and it prevented him from being present during a portion of his own proceedings." *State v. Momah*, 167 Wn.2d 140, 150, 217 P.3d 321 (2009). The same occurred here; the exclusion of Mr. Middleworth and the public from the pretrial hearing undermined the fairness of the process.

In *State v. Heath*, this Court held a public trial violation occurred where the trial court held hearings on motions in limine as well as a portion of voir dire in chambers. 150 Wn. App. 121, 123, 125-29, 206 P.3d 712 (2009). The court presumed the defendant had a right to open proceedings on motions in limine, further supporting the historical openness of such proceedings. *Accord In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 149-51, 196 P.3d 672 (2008) (Sanders, J. dissenting) (finding violation of public trial right where argument heard in chambers on pretrial evidentiary matters; majority did not reach public trial issue). In

fact, even the dissenting opinion in *Heath* believed the defendant had a right to a public hearing on the pretrial evidentiary matters. 150 Wn. App. at 129-30 (Hunt, J. dissenting) (but reasoning public was not precluded from attending motion in limine hearing).[5]

In light of this trial court's statements, the case law and the court rules, pretrial motion in limine hearings where factual matters are heard fall within the ambit of the public trial right.

c. Public access plays a significant positive role in the process at issue.

Under the second step, this Court considers whether an open proceeding would enhance basic fairness and the appearance of fairness that is essential to public confidence in the system. *Sublett*, 2012 WL 5870484, at *5.

"[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press II*, 478 U.S. at 13 (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (*Press I*)). Public proceedings provide assurance that the proceedings are conducted fairly to all concerned and discourage perjury,

[5] Decisions that analyzed the right to a public trial under the ministerial/purely legal test used by many courts prior to adoption of the experience and logic test in *Sublett* are not controlling here. *See e.g.*, *State v. Castro*, 159 Wn. App. 340, 246 P.3d 228 (2011); *In re Detention of Morgan*, 161 Wn. App. 66, 253 P.3d 394 (2011).

misconduct, and decisions based on secret bias or partiality. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

Like in the pretrial hearing at issue in *Press II*, here there was no jury present to serve as a check on a "corrupt or overzealous prosecutor [or a] compliant, biased or eccentric judge." 478 U.S. at 12. Moreover, like in *Easterling*, the exclusion of Mr. Middleworth affected the fairness of the proceedings because he was prevented from contributing to his counsel's argument. Equally significant, the exclusion of Mr. Middleworth and the public affected the appearance of fairness inherent in proceedings in open court.

Though the closed proceeding was recorded, creating a record for subsequent review and appeal have traditionally been considered insufficient substitutes for the right of public access at the proceeding in the first instance. *Id.* (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)); *D.F.F.*, 172 Wn.2d at 46-47; *id.* at 48-49 (Johnson, J. concurring).

Evaluation of the logic step demonstrates the impropriety of closing the pretrial hearing.

d. Though the proceeding should have been open to the public, it was held in chambers without considering the *Bone-Club* factors, requiring reversal as structural error.

Both the experience and logic elements weigh in favor of the pretrial hearing being conducted in open court. This is particularly true where the presumption favors public trials. *See Sublett*, 2012 WL 5870484, at *4. The courts of this state have an "interest in protecting the transparency and fairness of criminal trials by ensuring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure." *Easterling*, 157 Wn.2d at 179. "The open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary." *D.F.F.*, 172 Wn.2d at 40. The closed chambers proceedings conducted without any analysis under *Bone-Club* violated Mr. Middleworth's right to a public trial.

"[O]ne of the important means of assuring a fair trial is that the process be open to neutral observers." *Press II*, 478 U.S. at 7. When the right to a public trial is violated, prejudice is presumed and reversal and remand for a new trial required. *E.g.*, *Wise*, 2012 WL 5870396, at *5-8; *State v. Paumier*, No. 84585–9, __ Wn.2d __, 2012 WL 5870479, *3 (Nov. 21, 2012).

3. The jury instructions violated Mr. Middleworth's Fifth Amendment right to be free from double jeopardy because they allowed the jury to convict him of multiple counts for the same act.

Mr. Middleworth was convicted of one count of rape of a child in the first degree and one count of child molestation in the first degree, which involved the same victim during the same time period. The jury was provided a unanimity instruction, but was never informed that it must base its convictions for the two offenses upon separate and distinct acts. The evidence presented at trial, the arguments of counsel, and the jury instructions did not make it manifestly apparent to the jury that it could not base convictions for both rape of a child and child molestation of B. upon the same conduct. Mr. Middleworth's constitutional right to double jeopardy was thus violated.

a. The failure to properly instruct the jury may result in convictions that violate the constitutional protection against double jeopardy.

The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amends. V, XIV.[6] Similarly, article I, section 9 of our state constitution states, "No person shall be ... twice put in jeopardy for the same offense." Const. art. I, § 9. Washington gives its

[6] The Fifth Amendment's double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

constitutional provision against double jeopardy the same interpretation that the United States Supreme Court gives to the Fifth Amendment. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). The double jeopardy clause protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011).

A defendant's right to be free from double jeopardy is violated if he is convicted of offenses that are identical both in fact and in law. *State v. Freeman*, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). The double jeopardy clause bars multiple convictions arising out of the same act even if concurrent sentences have been imposed. *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

Because of the constitutional right to be free from double jeopardy, a court's instructions must clearly inform the jury that each crime requires proof of a different act. *Mutch*, 171 Wn.2d at 663 (citing *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). Where multiple counts are alleged, the jury must be provided "sufficiently distinctive 'to convict' instructions or an instruction that each count must be based on a separate and distinct criminal act." *Id.* at 662 (citing *State v. Carter*, 156

Wn. App. 561, 567, 234 P.3d 275 (2010); *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008)).

To prevent multiple convictions from violating double jeopardy, the jury must unanimously agree that at least one separate act constitutes a particular charged offense. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Borsheim*, 140 Wn. App. at 367. "[I]n sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the trial court must instruct the jury that they are to find "separate and distinct acts" for each count.'" *Borsheim*, 140 Wn. App. at 367 (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996); *Noltie*, 116 Wn.2d at 848-49)). Where the jury is not instructed that it must find each count represents a separate and distinct act from all other counts, double jeopardy may be violated. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 568 (reversing three counts of rape in same charging period due to lack of "separate and distinct" jury finding); *Berg*, 147 Wn. App. at 934-37 (same holding for two counts of rape); *Borsheim*, 140 Wn. App. at 370-71 (same holding for multiple counts of rape of a child in same charging period but only one "to convict" instruction); *State v. Holland*, 77 Wn. App. 420, 425, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995) (reversing convictions for two counts of child molestation

where it was impossible to conclude that all twelve jurors agreed on same act to support convictions on each count).

In the absence of proper jury instructions, reversal is required unless it was "manifestly apparent" that the conviction for each count was based on a separate act. *Mutch*, 171 Wn.2d at 664 (emphasis in original). Review is "rigorous" and it will be "a rare circumstance" where the appellate court should affirm despite deficient jury instructions. *Id.* at 664-665.

Here, Mr. Middleworth objected and excepted to the jury instructions provided by the trial court in lieu of his proposed "separate and distinct act" instructions. VII RP 951-59; CP 1009, 1011, 1013-16; *cf. Mutch*, 171 Wn.2d at 661 (alleged violation of double jeopardy prohibition may be raised for first time on appeal). This Court reviews challenges to jury instructions de novo. *Berg*, 147 Wn. App. at 931.

b. The court's instructions to the jury failed to require that a separate and distinct act form the basis for each count.

The jury instructions in Mr. Middleworth's case were similar to those found lacking in *Mutch*, *Carter*, and *Borsheim*. Child molestation includes the same acts as could constitute rape, although the two offenses have different mental elements. *See State v. French*, 157 Wn.2d 593, 610, 141 P.3d 54 (2006). Thus, absent clear jury instructions the jury may have

convicted Mr. Middleworth of two offenses based on a single act. *State v. Land*, No. 67262-2-I, __ Wn. App. __, Slip Op. at 4-6 (Jan. 7, 2013) (finding potential for double jeopardy violation where convicted of child molestation and child rape). Here, a jury instruction provided:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

CP 1073 (instruction # 5). The same instruction was provided to the juries in *Mutch*, *Carter* and *Borsheim*. *Mutch*, 171 Wn.2d at 662-63; *Carter*, 156 Wn. App. at 564-65 & n.4; *Borsheim*, 140 Wn. App. at 364.

The court's instructions also included a somewhat confusing anonymity instruction:

> The State alleges that defendant committed acts of rape of a Child in the First Degree and Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the First Degree or Child Molestation in the First Degree, one particular act of Rape of a Child in the First Degree or Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a Child in the First Degree and Child Molestation in the First Degree.

CP 1081 (instruction # 13). While this instruction arguably protects against a non-unanimous verdict, it does not provide direction that each offense must be based on separate and distinct acts. *See Borsheim*, 140 Wn. App. at 366 & n.2 (describing distinction between unanimity

requirement and prohibition against double jeopardy). A similar instruction was provided to the juries in *Mutch*, *Carter* and *Borsheim*. *Mutch*, 171 Wn.2d at 663; *Carter*, 156 Wn. App. at 564 & n.3; *Borsheim*, 140 Wn. App. at 364.

Finally, Mr. Middleworth proposed to-convict instructions that required a finding of a separate and distinct act on each count as well as the elements of the crime. CP 1063-64. The proposed instructions provided in part the following first element:

> That between the first day of August, 2010, and the 21st day of September, 2010, the defendant had sexual [intercourse or contact, respectively] with [B.] and that such act was separate and distinct from the act alleged in Count No. [1 or 2, respectively].

CP 1063-64. Mr. Middleworth explained the proposed language was necessary under *Borsheim* and in accordance with the Washington Pattern Jury Instructions Criminal (WPIC). CP 1063-64; VII RP 951-54; WPIC 44.21 Note on Use (referencing WPIC 4.25) & Comment; WPIC 4.25 Comment. But the court rejected Mr. Middleworth's proposal. VII RP 957-59.

Consequently, the to-convict instructions provided to the jury did not instruct that each offense must be based on separate and distinct acts. Rather, the to-convict instructions contained identical charging periods and victim, and listed the elements of each offense. CP 1077, 1080. Thus

the instruction on count one and count two each stated that, to convict, the jury must find "(1) That between the 1st day of August, 2010, and the 21st day of September, 2010, the defendant had sexual [intercourse or contact] with" B. CP 1077, 1080. The to-convict instructions were comparable to those provided in *Mutch*, *Carter*, and *Borsheim*. *Mutch*, 171 Wn.2d at 662; *Carter*, 156 Wn. App. at 564 & n.2; *Borsheim*, 140 Wn. App. at 364-65. Like in those cases, Mr. Middleworth's jury was never instructed that it was required to use separate and distinct acts to convict Mr. Middleworth of each offense. *See* CP 1065-85.

In *Borsheim*, the defendant was convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 362. Like here, the jury instructions in *Borsheim* included a unanimity instruction and an instruction that each count must be decided separately. *Id.* at 364 (instructions stated that to convict, "one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt" and a "separate crime is charged in each count. You must decide each count separately."). Also like in this case, the *Borsheim* to-convict instructions did not specify that each count needed to be decided on separate and distinct acts. *Id.* In fact, the jury was provided with a single to-convict instruction for all for counts. *Id.* This Court found that "multiple acts of

sexual abuse were alleged to have occurred within the same charging period." *Borsheim*, 140 Wn. App. at 367. Accordingly, "an instruction that the jury must find 'separate and distinct' acts for convictions on each count was required." *Id.* No instruction standing alone or read together "made the need for a finding of 'separate and distinct acts' manifestly apparent to the average juror." *Id.* at 368; *accord id.* at 370. The court reversed three of the convictions as violating the prohibition against double jeopardy. *Id.* at 370-71.

In *Carter*, the complainant testified she was raped 40 to 50 times over a certain time period and Carter was charged with four counts of rape of a child. 156 Wn. App. at 562. The court gave a unanimity instruction but no instruction on the requirement of separate and distinct acts. Following *Berg*, this Court held that the instructions "exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts." *Id.* at 568.

As set forth, the same omission occurred in Mr. Middleworth's case—no instruction informed the jury that a separate and distinct act must be found for each count. The instructions were deficient.

c. The deficient jury instruction caused a double jeopardy violation here.

The *Mutch* Court did not establish the standard of review for double jeopardy claims arising from inadequate jury instructions. The court suggested two possible standards of review: (1) rigorous review of the entire record to determine whether absent a proper jury instruction it is clear that it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense, or (2) presuming a double jeopardy violation unless the State convinces the court beyond a reasonable doubt that the instructional error did not affect the result. *Mutch*, 171 Wn.2d at 664-65 & n.6. Utilizing either standard of review leads to the conclusion that Mr. Middleworth's conviction for child molestation must be dismissed.

i. The record shows it was not manifestly apparent to the jury that each count had to be based upon a separate and distinct act.

A review of the record fails to reveal a clear requirement or finding of at least two separate and distinct acts. Rather, the evidence was ambiguous as to details of time, place, opportunity and specific acts of sexual contact. At the third trial, B. testified that sexual abuse happened "more than one time," but as to the act(s) she only specified that "he had sex with me." IV RP 583, 584-85. B. also said she told the truth during

her interview with Brooke Martin. IV RP 588, 591. In that interview, which the jury viewed, B. stated the sexual contact happened only once when her mother was at the store, she was four years old at the time, she was touched on the outside of her clothing, and the touching happened on the outside of her "potty". Exhibit 1 at 20:00-20, 21:37-27:12, 27:30-40; V RP 646. The record also showed that B. was left alone with Mr. Middleworth on only one occasion for about 10 to 15 minutes. IV RP 555-56, 562-63, 566; VII RP 935-36, 939-40. Thus there was not substantial occasion for Mr. Middleworth to perpetrate two separate and distinct acts of sexual abuse upon B.

Furthermore, in its closing argument, the State largely grouped the two offenses together. The State argued the jury heard the crimes happened between August 1st and September 21st, B. was five years old, and Mr. Middleworth was more than 24 months older than her. VII RP 972-73. "The only element in dispute" on either count, the State argued, "is whether or not the Defendant was the person who committed this act." VII RP 973. In fact, the State argued a single "act." *Id.*; *see also* VII RP 974, 976, 977, 991-92, 995 (describing offense generically as child having been "sexually assaulted" or "sexual contact"). The prosecutor did not describe the difference between sexual contact and sexual intercourse, or otherwise argue the distinction between the two offenses charged. *See*

generally VII RP 972-77. The prosecutor never explained the jury had to find two different acts to convict of both offenses. Defense counsel alluded to the separate and distinct requirement, but it was far from sufficient to make it "manifestly apparent" to the jury. VII RP 988.[7] Moreover, the jury was instructed that the lawyers' remarks are not evidence and the only evidence in the case was witness testimony, stipulations and exhibits. CP 1066, 1068.

This record is quite different from that reviewed by the *Mutch* court, which ultimately found no violation. There, the information charged five counts of rape based on allegations that constituted five separate units of prosecution, the victim testified to five different episodes of rape, a detective testified the defendant admitted engaging in multiple sexual acts with the victim, the State discussed all five episodes in closing argument, and the defense did not argue or cross-examine on the

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[7] Defense counsel argued,

> The other thing that you need to look at is how many times did it happen? You got two counts. You can't just throw in the towel and say, well, two counts, you know. That takes two separate distinct things. Each crime has to be decided separately. That is what your instructions are. You don't do one thing and get convicted of two crimes. You have to prove beyond a reasonable doubt to you that this happened twice based on what? Not the evidence that you have heard. You know, it's just not there.

VII RP 988.

insufficiency of evidence for each count but argued instead that the victim consented and was not credible. *Mutch*, 171 Wn.2d at 665.

Reviewing the record here in total, it is far from clear that it would have been manifestly apparent to an average juror that separate and distinct acts had to form the basis of a guilty verdict on each count (and, separately, that each act had to be agreed upon unanimously). This is not the "rare circumstance" presented in *Mutch*.

ii. The State cannot show beyond a reasonable doubt that the instructional error did not affect the result.

The State also cannot show beyond a reasonable doubt that the lack of a "separate and distinct act" instruction did not affect the verdict. In addition to the evidence that Mr. Middleworth was alone with B. on only one occasion and for a short time, no one could recall when those 10 to 15 minutes occurred. IV RP 565. Thus, it was far from clear that it was within the timeframe that would support B.'s pain in late September. Also, the jury heard evidence that B's grandfather might have been the perpetrator of any sexual assault. The jury was clearly concerned with this other suspect evidence because its sole inquiry sought to review transcripts of testimony from and related to the other suspect. CP 1086. Further demonstrating that the evidence of multiple acts of sexual assault was not

conclusive, the jury heard that B.'s retelling regarding the degree and amount of assault varied. IV RP 587-94, 598 (cross-examination of B.).

In sum, the instructional error was not harmless beyond a reasonable doubt because the evidence was far from clear the Mr. Middleworth perpetrated two separate and distinct acts of sexual contact, at least one of which involved penetration.

d. Mr. Middleworth's conviction for child molestation must be dismissed because the conviction violates double jeopardy.

Under either of the standards proposed in *Mutch*, Mr. Middleworth's right to be free from double jeopardy was violated. A double jeopardy violation results in the dismissal of any conviction that violates the constitution. *See State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007); *Orange*, 152 Wn.2d at 820, 822. Thus the remedy for submitting various allegations to the jury that could constitute the basis for a charge and failing to insist that the jury unanimously agree to an act separate and distinct from the act underlying another count is reversal with an order to vacate one of the convictions. *Berg*, 147 Wn. App. at 935; *Borsheim*, 140 Wn. App. at 371. The child molestation conviction must be reversed and vacated due to the double jeopardy violation. *See Womac*, 160 Wn.2d at 657.

4. The court's instruction equating the reasonable doubt standard with an abiding belief diluted the State's burden in violation of Mr. Middleworth's due process right to a fair trial.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, __ Wn. App. __, 286 P.3d 402, 411 (2012); *State v. McCreven*, __ Wn. App. __, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence. *Id.* "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice. *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an

abiding belief in the truth of the charge." CP 4 (instruction # 4); VII RP 965.[8] The prosecutor seized on the instruction, arguing the beyond a reasonable doubt standard means an "abiding belief in the truth of the charge." VII RP 977.

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d 741.

In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of

[8] Though Mr. Middleworth did not object to this language, his constitutional due process claim is subject to review on appeal under RAP 2.5(a)(3).

> proving that a reasonable doubt exists *[as to these elements]*.
>
> 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.*]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent cases demonstrate the problematic nature of such language. In *Emery*, the prosecution told the jury that "your verdict should speak the truth," and "the truth of the matter is, the truth of these charges, are that" the defendants are guilty. 174 Wn.2d at 751. Our Supreme Court clearly held these remarks misstated the jury's role. *Id.* at 764. However, the error was harmless because the "belief in the truth" theme was not part of the court's instructions and because the evidence was overwhelming. *Id.* at 764 n.14.

The Supreme Court reviewed the "belief in the truth" language almost twenty years ago in *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in *Pirtle* the issue before the court was whether the phrase "abiding belief" differed from proof beyond a reasonable doubt. 127 Wn.2d at 657-58. Thus the court did not consider the issue raised here: whether the "belief in the truth" phrase minimizes the State's burden and suggests to the jury that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt. Without addressing this issue, the court found the "[a]ddition of the last sentence [regarding having an abiding belief in the truth] was unnecessary but was not an error." *Id.* at 658.

Emery demonstrates the danger of injecting a search for the truth into the definition of the State's burden of proof. Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge," misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions. U.S. amends. VI, XIV; Const. art. I, §§ 21, 22.

5. The prosecutor committed misconduct by diluting the burden when she told the jury it need only have an abiding belief in the charge and to find the charge true.

As discussed in Section E.4, a jury's job is to determine whether the State has proved the elements of the alleged offenses beyond a reasonable doubt and not to determine the truth. *Emery*, 174 Wn.2d at 760.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty to seek verdicts free from prejudice, and "to act impartially in the interest only of justice." *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); *accord State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor's obligation to ensure an accused person receives a fair and impartial trial. *E.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); U.S. Const. amends. V, XIV; Const. art. I, §§ 3, 22. "The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger*, 295 U.S. at 88.

A prosecutor commits misconduct when he or she mischaracterizes the role of the jury. "[W]hile [a prosecutor] may strike hard blows, [he or she] is not at liberty to strike foul ones." *Id.* "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

In *Anderson*, the prosecutor stated, "by your verdict in this case, you will declare the truth about what happened." 153 Wn. App. at 424. He later argued, "Folks, the truth of what happened is the only thing that really matters in this case." *Id.* at 425. This Court held, "The prosecutor's repeated requests that the jury 'declare the truth' . . . were improper" because the "jury's job is not to 'solve' a case," but "to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." *Id.* at 429.

A defendant who does not object to an improper remark may assert prosecutorial misconduct where the prosecutor's argument was so "'flagrant and ill intentioned' that it causes enduring and resulting prejudice that a curative instruction could not have remedied." *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)); *accord State v. Fleming*, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996).

It is not the jury's job to ascertain the truth. *State v. Walker*, 164 Wn. App. 724, 732-33, 265 P.3d 191 (2011). Finding the truth is not synonymous with determining whether the State proved its allegations beyond a reasonable doubt. *Emery*, 278 P.3d at 664; *Anderson*, 153 Wn. App. at 429. Nonetheless, Deputy Prosecuting Attorney Michelle Mulhern repeatedly sought to replace the beyond a reasonable doubt standard with a search for the truth in voir dire. During jury selection, the prosecutor told the venire that "an abiding belief in the truth of the charge" is a working definition of proof beyond a reasonable doubt and asked how the panel members would interpret it. 4/2/12 RP 43. The prosecutor repeated, "Abiding belief in the truth of the charge, what does that mean to you when you are examining evidence and what would you need to be satisfied to that standard?" 4/2/12 RP 43. However, the court sustained Mr. Middleworth's objection. *Id.* Thus the State was unable to put any additional such argument before the jury pool in voir dire.

The prosecutor revived the issue in closing argument. There, the prosecutor told the jury that "beyond a reasonable doubt . . . means an abiding belief in the truth of the charge." VII RP 977. She continued, "when you start with that blank page, once you believe the charges to be true, you are satisfied beyond a reasonable doubt." *Id.*

The prosecutor's truth-seeking argument was not only improper; it was flagrant and ill-intentioned requiring a new trial. Misconduct is flagrant and ill-intentioned where it contravenes rules enunciated in published decisions. *Fleming*, 83 Wn. App. at 214 (prosecutorial misconduct flagrant and ill-intentioned where error set forth in prior decision). The trial below occurred in April 2012. At that time, *Emery* had been argued before the Supreme Court and three published Court of Appeals decisions held such argument was error. *Anderson*, 153 Wn. App. at 429; *State v. Emery*, 161 Wn. App. 172, 193-94, 253 P.3d 413 (2011), *review granted* 172 Wn.2d 1014, 262 P.3d 63 (2011) (argued Feb. 28, 2012); *State v. Evans*, 163 Wn. App. 635, 645, 260 P.3d 934 (2011). *State v. Curtiss* was the only case holding a declare-the-truth argument to be acceptable. *State v. Curtiss*, 161 Wn. App. 673, 701-02, 250 P.3d 496 (2011). This Court should presume that prosecutors are aware of case law interpreting their duties. *See Fleming*, 83 Wn. App. at 214; *cf. State v. Laramie*, 141 Wn. App. 332, 340, n.2, 169 P.3d 859 (2007) (prosecutors presumed to be aware of case law affecting charging requirements). Moreover, as a representative of the State and a quasi-judicial officer, the prosecutor can surely be held to know that the jury's role is to ensure the State has proved its case beyond a reasonable doubt, and not to declare the truth. Washington courts have long held that a prosecutor commits

misconduct by misstating the burden of proof. *E.g.*, *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008); *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006) (arguments that shift the burden of proof to the defense constitute misconduct); *Fleming*, 83 Wn. App. at 213-14.

Even more critically, the court had sustained Mr. Middleworth's objection to the State's similar truth-seeking theme in voir dire. 4/2/12 RP 43. Nonetheless, the State continued to misstate the jury's role and dilute the burden of proof. Thus, from the start of the case to the end, the prosecutor told the jury merely to determine the truth. A limiting instruction could not have cured the prosecutor's ill-intentioned and erroneous argument that the jury's role was to determine the truth and then stop deliberating.

The misconduct was prejudicial not only because it carried from voir dire through the end of trial, but also because the evidence against Mr. Middleworth was not overwhelming. Through late discovered evidence, the jury learned B. accused her step-grandfather of hurting her and seemed in fear of him. Evidence also showed B. spent the night at her step-grandfather's during the alleged period of abuse. Further, no one saw Mr. Middleworth harm B., he was left alone with her on only one occasion and for less than 15 minutes, and B.'s own account of the assault was vastly inconsistent.

In sum, the improper diluting of the State's burden of proof and ascribing the incorrect role to the jury denied Mr. Middleworth a fair trial. The convictions should be reversed and remanded for a new trial.

6. The trial court manifestly abused its discretion when it failed to dismiss the prosecution due to governmental misconduct.

a. The State has a continuing obligation to disclose information that tends to negate an accused's guilt, the violation of which can result in dismissal of the charge.

The prosecuting attorney has an obligation to "disclose to defendant's counsel any material or information within [her] knowledge which tends to negate the defendant's guilt as to the offense charged." CrR 4.7(a)(3). A prosecuting attorney's knowledge extends to information within her knowledge, possession or control or within the knowledge, possession of control of her staff. CrR 4.7(a)(4). This duty to disclose is a continuing one. CrR 4.7(h)(2); *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000); *see State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988) ("In order to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protections of persons, effective law enforcement, the adversary system, and national

security.") (quoting Criminal Rules Task Force, Wash. Proposed Rules of Crim. P. 77 (West ed. 1971)).

The Criminal Rules authorize the imposition of serious sanctions for discovery violations. Where the State violates its discovery obligations, the trial court may impose sanctions to include discovery of undisclosed information, a continuance, dismissal, or other action the court deems necessary. CrR 4.7(h)(7). In addition, under CrR 8.3(b), the trial court may dismiss a criminal prosecution for governmental misconduct "when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

Because the trial court has discretion as to which, if any, sanctions to impose, this Court reviews a trial court's failure to impose requested sanctions for an abuse of discretion. *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010). Dismissal should not be lightly granted and should be imposed only as a last resort. *Id.* Dismissal is justified, however, if the accused can show actual prejudice arising from the State's discovery violation. *Id.*

b. The State failed to disclose exculpatory statements by and a second interview with the complaining witness, causing Mr. Middleworth to move for dismissal.

Mr. Middleworth moved to dismiss the prosecution after the State disclosed it conducted a second interview of B. to clarify statements she

made to her foster mother and the woman who transported her to her foster home. VI RP 834; VII RP 864; *see* VII RP 851-52. B. apparently told the transporter that her step-grandfather, Papa Brian, woke her up and hurt her. VII RP 854, 901-02. Additionally, when B.'s foster mother asked her why she was crying with pain, B. repeated "Brian, Brian" and gave the impression at other times that she was afraid to see Papa Brian. VII RP 866, 906-11, 925-28. In response to these statements, Brooke Martin, the CPS investigator, interviewed B. for a second time. V RP 627; VI RP 834-38.

However, Mr. Middleworth was not informed of B.'s statements or the second interview until the prosecuting attorney looked into them during its case-in-chief (in the third trial) when she claimed to be surprised by Ms. Martin's testimony that she had interviewed B. a second time. V RP 638-41 (Martin testimony she talked with B. a second time, the recording of which was never requested); VI RP 766-70, 772-75, 824; VII RP 851-52. Ms. Martin had recorded the second interview and was able to produce a copy to Mr. Middleworth. V RP 638-41; VI RP 766. But the evidence was not "discovered" until after the State had called Ms. Davis (B.'s mother), B. and the CPS supervisor, Jennifer Cooper. And Mr. Middleworth did not have an opportunity to listen to the tape until after the State had called three more witnesses (the doctors and nurse that

examined B.), leaving only two remaining witnesses before the State rested its case-in-chief.

This tangible evidence—the tape—and knowledge about B.'s statements implicating Papa Brian were within the State's knowledge, possession and control as they were known to and held by CPS. *See* CrR 4.7(a)(3), (a)(4); *State v. Brooks*, 149 Wn. App. 373, 385-86, 203 P.3d 397 (2009) (State has obligation to seek timely disclosure of material information from departments within its control); *State v. Wright*, 87 Wn.2d 783, 790 n.4, 557 P.2d 1 (1976) (duty applies equally to investigatory agencies and persons who handle evidence with the consent of police or prosecuting attorney), *overruled in part on other grounds by State v. Straka*, 116 Wn.2d 859, 810 P.2d 888 (1991). Moreover, at the first trial, Ms. Martin specifically testified that B. made subsequent statements that caused a need for a second interview, which she held on September 30th. II RP 166.[9] At least as of that time, the information was within the prosecuting attorney's knowledge. Due at least to government mismanagement, the State failed to produce the recording of this interview, its basis, or other related information to Mr. Middleworth. *See* CrR 4.7(a)(3), (a)(4), (h)(2); CrR 8.3(b); *State v. Blackwell*, 120 Wn.2d

[9] As set forth previously, Mr. Middleworth was not present during this first trial, and he had new counsel for the second and third trials.

822, 831, 845 P.2d 1017 (1993) (mismanagement is sufficient to amount to government misconduct under CrR 8.3(b)).

c. Dismissal was the proper remedy for the otherwise incurable discovery violation, and the trial court abused its discretion in failing to impose it.

Agreeing that the issues raised by the newly-disclosed information were important, the court granted Mr. Middleworth a brief trial continuance to interview Papa Brian, Ms. Adams, Ms. Zamora and to conduct further investigation. VI RP 838-41. The court also allowed Mr. Middleworth to add these witnesses at trial and to recall other witnesses. VII RP 883-86. However, these accommodations failed to cure the prejudice resulting from the State's failure to disclose B.'s statements or the second interview.

Mr. Middleworth was prejudiced by the State's discovery violation in several regards. First, by the time Mr. Middelworth learned of B.'s statements and interviewed Ms. Zamora, a year-and-a-half had elapsed since Ms. Zamora transported B. to foster care. During testimony on Mr. Middleworth's offer of proof, Ms. Zamora stated too much time had passed since she transported B. and she therefore could not be sure about what B. told her. VII RP 901-02. All she was willing to testify to at this late time was that B. had mentioned Papa Brian in an unknown context. VII RP 901-03. Due to her lack of recollection, Mr. Middleworth did not

call Ms. Zamora. Had the State timely fulfilled its duty to disclose, Mr. Middleworth would have been able to call Ms. Zamora as a witness. *Cf. State v. Frederick*, 32 Wn. App. 624, 628, 648 P.2d 925 (1982) (finding no prejudice where accused in same position after late disclosure as would have been in had State's disclosure been timely).

Second, Mr. Middleworth was deprived of the opportunity to interview B. with regard to her statements about Papa Brian in a timely manner both for trial and investigatory purposes. As trial counsel indicated, based on the information before him (the first interview of B.), he decided not to interview B. himself in advance of trial. VII RP 870-71. However, trial counsel informed the court that he would have elected differently if he had been aware of B.'s subsequent statements suggesting another suspect. *Id.*

If the evidence had been disclosed in advance of trial, Mr. Middleworth also would have had the opportunity to investigate Papa Brian, including his background and opportunity. Though Mr. Middleworth was provided a continuance to interview Mr. Paulson, this mid-trial break did not provide trial counsel with an opportunity equivalent to pretrial investigation.

Trial counsel also would have cross-examined virtually every State witness differently had he been aware of the subsequent statements and

interview. VII RP 866-70. In short, the entire presentation of the defense case was based around a false understanding of the evidence.

Moreover, it is clear that the jury was concerned with the limited amount of other suspect evidence it received as its sole inquiry sought to review transcripts of testimony from and related to Papa Brian. CP 1086

Nonetheless, the trial court declined to dismiss the prosecution because it believed the State had had not intentionally violated its discovery obligations. VII RP 883-84. The deputy prosecuting attorney, Michelle Mulhern, told the court she had not learned of the second interview of B. or of B.'s statements about Papa Brian until Ms. Mulhern asked Ms. Martin in this third trial whether she had spoken to B. at all after the first interview. VII RP 851-52. But Ms. Mulhern provided incorrect information.

In fact, Ms. Martin testified as to the general fact that B. made subsequent statements that led to an additional interview at Mr. Middleworth's first trial. II RP 166. Ms. Mulhern herself was the deputy prosecutor who questioned Ms. Martin to that effect. *Id.* After questioning Ms. Martin about her first forensic interview of B., Ms. Mulhern asked "Did you do any other work with the family aside from this forensic interview?" Ms. Martin responded,

> On the – When [B.] was transported back to the foster home that day, she – We had the forensic interview and then she had a visit with her family and then she was transported back to the foster home.
>
> During that time she had commented on one of the things that was in the worker's car at that time and so we did another follow-up interview on the 30th to talk to [B.] about some of the things that she had said on that. And that was my last contact with the family.

II RP 166. Thus, Ms. Mulhern learned during the first trial that B. made some noteworthy comments and was subsequently re-interviewed. The prosecutor had a continuing discovery obligation to produce the tape from this second interview at the time she discovered it. CrR 4.7(h)(2). Moreover, she incorrectly informed the trial court when Mr. Middleworth learned of the second interview tape during his third trial that it was the first she had learned of it as well. In light of the transcript from the first trial, this is patently false.

The prosecuting attorney violated her discovery obligations when she failed to provide information regarding B.'s statements implicating Papa Brian and the second forensic interview prior to the first trial and again subsequent to Ms. Martin's testimony in the first trial. The trial court failed to resolve the prejudice to Mr. Middleworth by granting a continuance and allowing additional witness testimony during the third trial. Moreover, the trial court's denial of Mr. Middleworth's motion to

dismiss was based on false information from the prosecuting attorney, who became personally aware of the discovery information during the first trial. Consequently, this Court should reverse the denial of Mr. Middleworth's motion to dismiss under CrR 4.7 and CrR 8.3(b).

7. Cumulative trial errors denied Mr. Middleworth his constitutional right to a fair trial.

Each of the above trial errors requires reversal. But if this Court disagrees, then certainly the aggregate effect of these trial court errors denied Mr. Middleworth a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine

mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. As previously discussed, the evidence against Mr. Middleworth was not overwhelming and the jury received other suspect evidence. In light of the cumulative effect of the trial errors, Mr. Middleworth's convictions should be reversed.

8. The unlawful and unsupported award of restitution should be vacated.

a. A trial court's authority to impose restitution is limited.

The authority of a court to order restitution following a criminal conviction is governed by statute. RCW 9.94A.753(3); *State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012). RCW 9.94A.753(3) provides in relevant part, "restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment or injury to persons, and lost wages resulting from injury." *State v. Hennings*, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). "A restitution order must be based

on the existence of a causal relationship between the crime charged and proved and the victim's damages." *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998) (quoting *State v. Blair*, 56 Wn. App. 209, 214-15, 783 P.2d 102 (1989)). Moreover, a court's restitution order must be based on actual compensation for loss caused by the offense of conviction, not upon speculative claims, general equity concerns that apply in civil courts, or intangible loss. *See State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

The State bears the burden of proving the loss by a preponderance of the evidence. *E.g.*, *State v. Acevedo*, 159 Wn. App. 221, 229-30, 248 P.3d 526 (2011); *State v. Kinneman*, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004).

Whether the court exceeded its statutory authority in imposing restitution is an issue of law reviewed de novo. *State v. Burns*, 159 Wn. App. 74, 78, 244 P.3d 988 (2010).

b. The restitution order is unlawful to the extent it orders $2,597.22 to be paid to the Walla Walla Prosecutor for expert witness fees.

"A restitution recipient must be a 'victim'" of the crime. *State v. Kisor*, 82 Wn. App. 175, 183, 916 P.2d 978 (1996), *abrogated on other grounds by State v. Enstone*, 137 Wn.2d 675, 974 P.2d 828 (1999). A "victim" is "any person who has sustained emotional, psychological,

physical, or financial injury to person or property as a direct result of the crime charged." RCW 9.94A.030(53). A third-party entity or agency may qualify for restitution, but only to cover costs incurred on behalf of the direct victim of the crime. *E.g.*, *State v. Davison*, 116 Wn.2d 917, 921, 809 P.2d 1374 (1991) (restitution was authorized to cover wages paid by City of Seattle to direct "victim" for amount of time that victim was unable to work as fire fighter while recovering from injuries resulting from assault); *State v. Hahn*, 100 Wn. App. 391, 398, 996 P.2d 1125 (2000) (Department of Social and Health Services qualified as "victim" for purposes of restitution because agency paid for direct victim's medical treatment and property loss); *State v. Jeffries*, 42 Wn. App. 142, 144-45, 709 P.2d 819 (1985) (reimbursement to Labor and Industries for disability and medical expenses of assault victim). Under similar principles, restitution may be ordered to an insurance company that paid claims to an insured because of loss suffered from the offense. *E.g.*, *State v. Ewing*, 102 Wn. App. 349, 352-57, 7 P.3d 835 (2000); *State v. Barnett*, 36 Wn. App. 560, 563, 675 P.2d 626, *review denied*, 101 Wn.2d 1011 (1984).

Here the restitution amount of $2,597.22 was awarded to an agency of the State—the Walla Walla Prosecutor—not for costs incurred on behalf of the direct victim of the crime, B., but for expert witness fees presumably incurred as part of the cost of trial. The Walla Walla

Prosecutor was not the victim of the offenses at issue here. There is no basis in law for awarding expert witness fees to the State through restitution.

c. The ordered restitution to both the Walla Walla Prosecutor and Molina Healthcare is unsupported by the record.

Even if there was a basis in law for ordering restitution for expert witness fees, the evidence of the "loss" incurred is speculative at best. Evidence of damages is sufficient only if it provides the trial court with a reasonable basis for estimating losses and requires no speculation or conjecture. RCW 9.94A.753(3); *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005); *State v. Fleming*, 75 Wn. App. 270, 274-75, 877 P.2d 243 (1994); *State v. Pollard*, 66 Wn. App. 779, 784-85, 834 P.2d 51, *review denied*, 120 Wn.2d 1015 (1992). The State presented no evidence or argument supporting the $2,597.22 in expert witness fees. *See* CP 1129-42 (presentence report and supplemental presentence report); VII RP 1007, 1013. In fact, the witness record reports no costs incurred or fees paid for the State's two expert witnesses. CP 1143. The court did not provide any basis as to why it imposed the $2,597.22.

Likewise, no evidence supports the unspecified restitution award to Molina Healthcare. CP 1113. Though the amount is "TBD," the award is only justified if Molina Healthcare qualifies as a "victim" who sustained a

loss or a third-party that covered costs incurred on behalf of B. Without any record, this part of the restitution award is also speculative and unsupported.

d. On these bases, this Court should reverse the restitution order.

An order imposing restitution is void and subject to reversal if it is contrary to the statutory provisions. *State v. Lewis*, 57 Wn. App. 921, 924, 791 P.2d 250 (1990). Because the court was not authorized to award restitution to cover the expert witness fees incurred by the prosecuting attorney's office and because no documentation supports the amount of restitution awarded, the restitution order should be reversed.

F. CONCLUSION

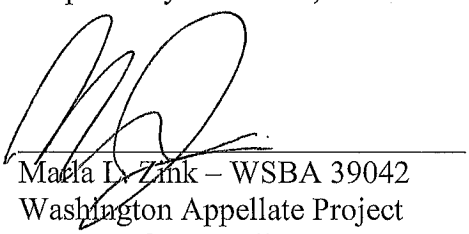
This Court should reverse Mr. Middleworth's convictions on several independent grounds: Mr. Middleworth's right to be present and the right to a public trial were violated when the court held an in-chambers conference regarding disputed factual issues and other pretrial matters. The jury instructions violated his right to be free from double jeopardy because they allowed the jury to convict him of multiple counts for the same act. The court's instructions and statements by the deputy prosecuting attorney diluted the burden of proof. Also, a mistrial should have been granted for the State's failure to produce evidence that tended to

negate Mr. Middleworth's guilt. Finally, cumulative error denied Mr. Middleworth a fair trial.

If the convictions are not reversed, this Court should vacate the restitution award.

DATED this 7th day of January, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. ROBERT MIDDLEWORTH, JR., Appellant.	)))))))))	NO. 30850-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JANUARY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2013.

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