No. 44842-4-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

vs.

RYAN DEE WHITAKER

Appellant

REPLY BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY

HON. ROBERT LEWIS, JUDGE

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I. INTRODUCTION

Ryan Dee Whitaker (Appellant) seeks reversal of his convictions at bench trial in Clark County Superior Court, cause number 11-1-01948-9, for the crimes of:

Count 3 – Child Molestation in the First Degree, RCW 9A.44.083

Count 4 – Child Molestation in the First Degree, RCW 9A.44.083.

Appellant also seeks vacation of a Sexual Assault Protection Order entered at sentencing.

This appeal has been consolidated with Mr. Whitaker's Personal Restraint Petition, filed as case # 45261-8-II.

II. REPLY TO RESPONSES TO ASSIGNMENTS OF ERROR

Assignments of Error Numbers 1, 2, and 3. Ineffective assistance of counsel for failure to interview and subpoena crucial defense witnesses.

These assignments of error dovetail with the Appellant's claims raised in the consolidated Personal Restraint Petition. Respondent addressed them in Part II of the Respondent's Brief.

After a two-page canned recital of general principles in PRP cases, Respondent spent all of three pages in argument, responding to a 28 page brief on the PRP.

At no time does Respondent argue that defense counsel

provided effective representation, nor that the ineffective representation can be characterized as a strategic decision.

Instead, Respondent argues that because the trial court found the Appellant guilty, the ineffective assistance was not prejudicial.

Under that curious analysis, there is no reversible error based upon ineffective assistance of counsel in any case.

Respondent spends nine pages (p. 22-30) of her Response setting out a summary of the adult defense witnesses' testimony at trial, while at the same time presenting arguments that the testimony was unreliable. This is the same approach taken at trial by the prosecutor's office. The trial prosecutor argued that the adult defense witnesses, who testified that the molestations could not have occurred under the peculiar circumstances of this case, were not in a position to see the alleged molestations, or were biased, or that their opinions as to "impossibility" of the molestations were not entitled to weight.

By making these arguments, Respondent on appeal makes the Appellant's case. Given the impeachability of the adult witnesses, who were not necessarily in a position to see the alleged molestations, or were only in the classroom for limited time

periods, it was absolutely imperative that effective counsel bring in the several child witnesses who were in such a close and proximate position for the entire eight month period of time, and who were not biased due to social friendship with the Appellant or his wife. These neglected child witnesses, clearly and unequivocally informed Detective Bull that they saw nothing over the eight month period which could be classified as molestation.

Detective Bull, in her zeal to make the State's case, declined to attach any significance to the fact that multiple children in the Sunday School class were present within a few feet of the Appellant and alleged victim, for the entire eight month period, and never observed anything claimed by the alleged victim:

> Q: Isn't it true officer that in at least three of the interviews that you conducted – H.C., J. and C., you received exculpatory information that you failed to put in your report?
> A: Could you define what – what you're defining as exculpatory because everything that's important was included. They did not define anything that was abuse related. They didn't see anything – (emphasis added)
> RP p. 782, p. 15-22.

The transcripts of the police interviews with the three of the uncalled children are presented to the appellate court to show what defense counsel was aware of, and not as an exhaustive or

complete statement of what the children should have been questioned about in court. That complete testimony was never developed by defense counsel.

The appellate court should not focus solely on what the children told Detective Bull. Her interview was designed (and failed miserably) to ferret out incriminating evidence. An effective trial attorney would have called these children as witnesses, and much more fully developed the total situation, the ability to observe, the proximity of each child over the eight month period, and the lack of bias or prejudice in the witnesses. In fact, these three missing witnesses also refuted significant claims by the alleged victim as to the actions of the Appellant in choosing whom to sit by, and in where he would tend to place his coat during the classroom sessions.

Counsel for Respondent, despite making no factual or legal response to the affidavit of Mark Muenster, attorney expert on ineffective assistance of counsel, presents an argument at page 33 of the Response that "no reasonable attorney would have called J.K. to testify, given the responses she gave to Detective Bull in that interview." How counsel arrived at that insight is not revealed.

The statement to detective Bull is set out as Exhibit D to the

Personal Restraint Petition, and includes the following:

Exhibit d, interview with J**** K*****.**

Petitioner was perceived as "an old grandpa type." J****** felt fine being around him. Exhibit d, transcript of J****** K***** interview, p. 6, l. 1-9.

J****** would sometimes sit by Petitioner. No student sat by him more than others. Exhibit d, transcript of J****** K***** interview, p. 9, l. 16-25.

Petitioner sometimes took his coat off and put it on the back of a chair, but never put it on anyone's lap. Exhibit d, transcript of J****** K***** interview, p. 10, l. 8-20.

J****** got along fine with Petitioner, he never had any special secrets with her, and he never did anything which made her feel uncomfortable. Exhibit d, transcript of J****** K***** interview, p. 11, l. 7-22.

Petitioner sometimes tickled M*** on the back, but not on the "butt." He never touched her anywhere else, and J****** never saw anything else that was "kind'a different." Exhibit d, transcript of J****** K***** interview, p. 14, l. 1-12; l. 13-19.

J****** never saw Petitioner tickle M*** anywhere but on the back, and didn't know if she ever saw him "like touching her leg, or

anything like that." Exhibit d, transcript of J****** K***** interview, p. 15, l. 17-20.

Petitioner gave gifts to everyone in the class. Exhibit d, transcript of J****** K***** interview, p. 18, l. 4-6.

Petitioner never touched J****** on the privates, and she would tell if he did. Petitioner never did anything like that to M***, and M*** never claimed that he did. Exhibit d, transcript of J****** K***** interview, p. 20, l. 3-7; l. 17-26.

Counsel for Respondent certainly has a more limited concept of "exculpatory evidence" than counsel for Appellant.

According to Detective Bull's testimony, in addition to the three named and now-transcribed children, it appears that there were at least three more potential exculpatory child witnesses whose interviews were not offered into evidence by defense counsel at trial:

> "Q: Oh yes, I do. Did you interview anyone else with regards to this case after M.?
> A: Many people.
> Q: And looking at your report, can you tell me which children you interviewed?
> A: It looks like "J. W.," "J. C.," A.S. – and you said just kids?
> Q: Yes.
> A: Let's see – K. O'C., K. C., "J. K."– I think – and I think that's it on kids." RP p. 230, l. 6-16.

At trial, defense counsel failed to subpoena and call as witnesses these three additional child witnesses, and further failed even to offer their taped interviews to the court.

We know from Detective Bull's testimony that these three additional child witnesses provided nothing of any import to her (because they could not incriminate the Appellant.)

> "Q: And in your interviews with these other children, did they ever raise any issues with you that caused you concern with regards to Mara's version of events?
> A: Not any concern, no.
> Q: Did the other children – were they able to substantiate or corroborate her version of events?
> A: They don't remember anything about it.
> Q: They don't remember anything about it?
> A: They don't remember a coat. They don't remember anything – they don't even necessarily remember where she sat other than she sat by him more often – so that's kind of a – a reader's digest version. None of them could corroborate or discount it." RP p. 230, l. 4-24; p. 231, l. 2-6.

Respondent focusses very narrowly on the content of the transcripts of the three recorded but uncalled child witnesses, seeking to argue that they have nothing to say of value. Respondent's analysis is completely wrong. The three uncalled witnesses, and no doubt the other three children as well have a wealth of information, all leading to a very likely conclusion that no such molestation occurred.

It is important to remember that the case presented by the prosecution was based entirely upon the uncorroborated testimony of the alleged victim, whose rendition of events can charitably be characterized as bizarre, and very difficult to imagine. That same characterization applies to Respondent's argument, that the failure to call three to six exculpatory eye witnesses was not prejudicial.

Respondent argues at page 34 of the Response that:

> "The trial court was very aware of the central issues in this case. They were: 1) Is M.S. Credible? 2) Is Whitaker credible? 3) Is it physically possible for Whitaker to have committed these acts in the manner described by M.S.?"

This over simplification of the issues fails to recognize that the trial court had serious doubts about the credibility of the alleged victim. The court acquitted the Defendant on counts 1 and 2, all of which were presented through testimony identical to that given in support of Count 3.

On the issue of whether or not it was physically possible for the Appellant to have done what he was accused of, the State's evidence consisted of some sort of demonstration, a "Comedy of Chairs," which the prosecutor failed to place into evidence.

A deputy prosecutor named Probstfeld was employed as some sort of testifying exhibit, to supposedly demonstrate that a

person such as Mr. Whitaker could reach behind a chair, under a young girl's bottom, inside her tights and skirt, and fondle her, approximately thirty times, every Sunday over an eight month period, for 45 minutes at a time, without being seen by children a foot or two away.

The fiasco contributed no evidence of any significance to the trial. In fact the trial court advised trial counsel, with no apparent effect, that the odd display was creating no evidence.

> "Q: Well Ms. Probstfeld, please have a seat in the chair.
>
> Q: Lean back. Put your arm through the back of the chair next to you and reach all the way to the front of the chair – oh no, don't look down. Look straight ahead. Now reach all the way to –
>
> Judge: Now counsel could I point out to both of you that Ms. Probstfeld is not a demonstrative exhibit and that everything that you're asking her to do in silence is not in the record. So – if you're trying to get something on the record related to these – what she's doing, you're wasting your time. So – but go ahead.
>
> Q: - can you reach all the way to the front of that chair?
> A: (No oral response heard.)" RP p. 1077, l. 2-17.

This Honorable appellate court cannot possibly conclude that the addition of testimony of at least three, or possibly six

children, who would testify as to their actual observations (that no conduct even remotely resembling that claimed by M.S. occurred) and to their proximity, attendance, and ability to observe, would probably not have changed the verdict.

If the conviction is not reversed outright, at a minimum the matter should be remanded back for an evidentiary hearing, on the probable effect of such testimony, had it been presented properly. If that remedy is granted, Respondent suggests that the reference hearing should be before a judge other than the one who already found the Appellant guilty, for obvious reasons.

Assignment of Error Number 4: Admission of improper opinion testimony by alleged victim's counselor, Danielle Wilcox.

The Court erred in admitting the testimony of Danielle Wilcox, an unlicensed counselor who testified concerning common characteristics of abused children, that she believed the victim, and that the victim had suffered sexual abuse at the hands of the Appellant.

In response to this assignment of error, the State argues that such testimony is admissible, and that it was admitted without objection.

The State argues that "common characteristic" pseudo-scientific speculation (described in this case as "traumagenic dynamics") is just testimony about the general characteristics of abused children, ignoring the holding of State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993), which unequivocally refuted the proposition that such evidence is relevant in any particular case, and further ignoring the holding of State v. Maule, 35 Wn. App. 287, 667 P.2d 96 (1983) to the same effect. "Child Sexual Abuse Syndrome," by that or any other name is not recognized as relevant evidence in the courts of Washington.

Assignment of Error Number 5: Ineffective assistance of counsel by failing to expressly object to inadmissible opinion testimony of Danielle Wilcox.

The Appellant received ineffective assistance of counsel on Counts 3 and 4, Child Molestation in the First Degree, in violation of his constitutional right to counsel, because his trial attorney failed to object to the testimony of Danielle Wilcox, an unlicensed counselor who testified concerning common characteristics of abused children, that she believed the victim, and that the victim had suffered sexual abuse at the hands of the Appellant.

It is not necessary to repeat the arguments set out in the

Opening Brief of Appellant. A response to factual errors contained in the brief of Respondent is appropriate, however.

Danielle Wilcox testified that that M.S. was one of her clients who reported abuse, and that she believes all her clients:

> "I do know the general symptoms that present after someone has experienced abuse and when someone – a child comes to me and tells me they've been abused, I believe them." RP p. 732, l. 14-17.

Respondent argues that this testimony was presented in an "offer of proof," and therefore is not part of the record considered by the court. If this was a jury trial, and the offer of proof was made outside the presence of the jury, that argument would hold water.

Given that this was a bench trial, and ineffective trial counsel failed to move to strike the testimony, instead causes the Respondent's argument to leak, as from a sieve. Nothing in the record establishes the proposition that the trial court limited the use of the testimony in any way. Danielle Wilcox's trial testimony proceeded in a seamless progression, with the only limitation being that the court did not allow her to testify to statements by M.S. under the hearsay exception for me statements made for the purpose of medical diagnosis.

The "offer of proof" designation was applied only for purposes

of determining whether or not Danielle Wilcox could testify as to the hearsay statements.

This is also true for the testimony by Danielle Wilcox that M.S. had been sexually abused, and that she had been abused by the Appellant.

> Q: And so what did come up repeatedly with regard to betrayal?
> A: The – the feeling or idea that someone that Mara felt she could trust or was put in a position of authority and a position that most children look up to – it being a teacher.
> And that that person violated her boundaries and was not – that's not the way you expect a teacher to treat you as a child and someone who she thought she could trust, so violated that trust by engaging in sexual abuse acts.
>
> And that is the form that betrayal took for Mara."
>
> RP p.774, l. 14-25; p. 775, l. 1-3.

This testimony was clearly unrelated to any "offer of proof."

Respondent further argues that Danielle Wilcox did not testify that she believed M.S. and that Danielle Wilcox did not testify that M.S. had been sexually abused, and that the abuse was perpetrated by Appellant. Respondent should re-read the testimony quoted above.

Respondent next argues that, essentially, reversible error cannot occur in a bench trial, citing State v. Read, 147 Wn.2d 238,

244-245, 53 P. 3d 236, (2002). In other words, there are no rules in a bench trial, a theory reminiscent to the classic adage that there are no rules in knife fight, *see* Butch Cassidy and the Sundance Kid, 20th Century Fox, 1969.

Respondent fails to point out that in the Read decision, the Supreme Court actually ruled that the trial court, in admitting the prosecutions' lay testimony about the unreasonableness of self defense in the case, committed harmless error, given the fact that the defense failed to present evidence sufficient to make a prima facie case of self defense in the first place.

Since, according to Respondent, a bench trial is some sort of lawless free-for-all, akin to a knife fight, one has to wonder why the Washington Supreme Court, in State v. Palomo, 113 Wn.2d, 789, 783 P.2d 575 (1989) (cited in the Read decision) repeated the rule that even in a bench trial, constitutional error is harmless only if the untainted evidence admitted by the court is overwhelming:

> "This court adopted the "overwhelming untainted evidence test" as the standard for harmless error. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Under that test, the court "looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt."

The "untainted" evidence in this trial consisted of the extremely suspect and underwhelming testimony of M.S., and nothing more.

The admission of Danielle Wilcox's gratuitous testimony that the Appellant was guilty of sex abuse upon the, to her, credible M.S., was so egregious that no lax standard of review can justify its admission.

Respondent cannot have it both ways. Respondent argues that the error was not preserved, and then argues that it was not ineffective assistance of counsel to fail to preserve the error. One way or the other, Appellant was deprived of a fair trial.

Assignment of Error Number 6: The trial court erred, and abused its discretion in refusing to conduct a view of the scene of the alleged crimes.

No further argument is necessary. The decision to conduct a view of the premises is discretionary. Given the unique and bizarre allegations made in this case, that discretion was abused.

Assignment of Error Number 7: The trial court erred in issuing a post-conviction Sexual Assault Protection Order with an effective life of one hundred years.

According to Respondent's argument on this issue, when

entering a Sexual Assault Protection Order under RCW 7.90.150(6), the issuing court may impose any arbitrary term of duration it wishes, for example, one hundred, one thousand, or one million years. It is surprising, therefore, that the legislature did not say that. Instead, the legislature provided that the order shall remain in effect for two years following a certain event, that is, the termination of confinement and any subsequent community supervision.

It is correct that under the current state of the law, community supervision of the Appellant may last his lifetime, however, that is no reason for the prosecutor and the superior court to issue nonsensical "hundred year" orders when the statutory language authorizing such orders is explicit. Respondent's argument advocates the acceptability of shoddy, inexact, lazy procedural practices. Appellant requests that the appellate court decline to condone such practices, and order the prosecutor and the trial courts in Clark County to comply with the law.

III. SUPPLEMENTAL COMMENTS ON APPELLANT'S PRO SE STATEMENT OF ADDITIONAL GROUNDS

Pursuant to RAP 10.10, Appellant has submitted a pro Se Statement of Additional Grounds for Review. Unlike many of such

statements received by the court, Appellant's pleading is succinct and well stated.

The Brief of Respondent does not address any of the pro se arguments. This failure should be construed as a concession on the merits.

Ground number 3 argues the issue that the Indeterminate Sentence Review Board is no longer in effect, because a statute, SB 6151, passed in 2001, and which purported to repeal a termination clause of the legislation creating the ISRB, RCW 9.95.0011, is unconstitutional, because the subject of the bill (repeal of the termination clause) was not adequately expressed in the title of SB 6151, as required by the Washington Constitution, Article II, Section 19. Appellant's pro se arguments are cogent and well researched, and should be given due consideration by the court.

Ground number 4 of the Pro Se Statement of Additional Grounds is exactly on point and correct. The sentencing court imposed a plethora of conditions of community supervision, from pre-printed form, "Appendix A" to the Judgment and Sentence, (CP 208) with no discretion exercised as to the propriety, legality, not constitutionality of such conditions.

As condition number 15, the court ordered "plethysmograph testing" at the whim of the assigned community corrections officer, in direct violation of State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013). Such testing is invasive, degrading, and amounts to supervision by the "thought police."

Having more closely reviewed the Judgment and Sentence and its Appendix A, and after having the benefit of appellant's Pro Se Statement of Additional Grounds, it is apparent that other blatantly illegal and unconstitutional conditions were imposed by the sentencing court.

Condition number 10 of Appendix A to the Judgment and Sentence is the requirement that:

> "You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631."

Even though parolees and probationers and the like have a diminished expectation of privacy while on supervision, the condition quoted above, and imposed by the sentencing court fails even to comply with the statute it cites:

> RCW 9.94A.631(1)...If there is reasonable cause to

> believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

The general warrantless search condition, not predicated upon judicial process, probable cause, nor reasonable grounds violates the Fourth amendment to the United States Constitution and Article I, section 7 of the Washington State Constitution.

Recognizing that this issue, relating to an invalid search condition under the Judgment and sentence, was not raised in the appeal and PRP, nor directly in the Pro Se Statement of Additional Grounds, the court may certainly decline to address the issue, however, it is just another example of sloppy work by the prosecution and trial court which impinges on the rights of the Appellant in this case.

IV. CONCLUSION

Appellant was convicted of disturbing and heinous crimes, based upon the uncorroborated testimony of a ten year old girl, who had made numerous prior inconsistent statements, and had been hounded into making unreliable accusations by a bishop, physician and aspiring therapist.

The trial court found her testimony about dozens of incidents of sexual penetration to be insufficient evidence to convict on the charge of Rape.

Defense counsel unfortunately dropped the ball by failing to secure and present testimony which could probably have changed the result, and by failing to object to patently inadmissible and prejudicial pseudoscientific gibberish from an unqualified counselor.

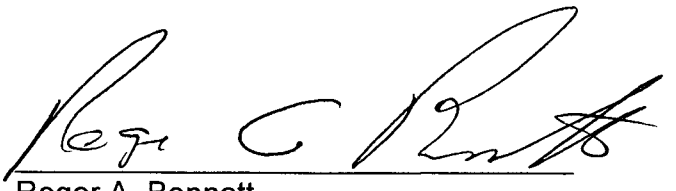
The trial court erred in failing to view the scene, to clarify the confusion created by conflicting witnesses, and further erred by issuing a protection order with no relation to the statutory mandate as to calculation of duration.

The vigilant Appellant, acting pro se, has raised further meritorious issues upon which relief should be granted.

Appellant requests that the appellate court reverse both convictions and judgments.

DATED the 31 day of December, 2013

Respectfully submitted



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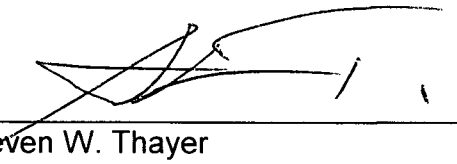

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. RYAN DEE WHITAKER, Appellant	No. 44842-4-II PROOF OF SERVICE OF REPLY BRIEF OF APPELLANT

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on the date set out below, I caused a true and accurate copy of the REPLY BRIEF OF APPELLANT to be served on opposing counsel listed below, by personal service upon her place of business:

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And upon Appellant by U.S. mail, postage prepaid, to:

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