NO. 44177-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN L. HESSELGRAVE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper, Judge

No. 11-1-02300-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly excluded testimony concerning prior statements of the victim which were not inconsistent with her trial testimony and properly excluded documentary evidence which was impermissibly prejudicial, and thus, in so doing, did not violate Defendant's rights to present testimony or confront and cross-examine witnesses.

2. Whether Defendant failed to show ineffective assistance of counsel where he failed to show that his trial counsel's performance was deficient.

3. Whether the trial court properly found S.L. competent to testify and properly admitted her statements to others regarding the defendant's abuse.

4. Whether Defendant failed to meet his burden of showing prosecutorial misconduct by failing to show either improper conduct or prejudice.

5. Whether the trial court properly imposed the conditions of community custody, with the exception of the words "from a licensed physician" in Condition 13 of Appendix H, where the remaining portion of Condition 13 and the remaining conditions were statutorily authorized and constitutional.

B. STATEMENT OF THE CASE.

1. Procedure

On June 6, 2011, the State charged Steven L. Hesselgrave, hereinafter referred to as "Defendant," by information with first degree child rape of S.L., date of birth 07/11/2002. CP 1-3.

On July 27, 2012, the State filed an amended information, which changed the date of violation from "the period between the 11th day of July, 2008 and the 10th day of July, 2009," CP 1, to "the 11th day of July, 2008 and the 31st day of December, 2010," and added an allegation that the crime was "a domestic violence incident as defined in RCW 10.99.020." CP 46.

On August, 9, 2012, the court heard the parties' motions in limine. 08/09/2012 RP 82-120[1]. *See* RP 352-53.

The court also began to hear motions regarding the competency of S.L. to testify and the admissibility of hearsay statements made by her to (1) Cornelia Thomas, (2) P.S., D.O.B. 03/01/2001, (3) G.S., D.O.B. 04/16/2004, and (4) Christina Murillo. 08/09/2012 RP 5-81, 121, 08/22/2012 RP 100; CP 29-41, 171-74. The State called Cornelia Thomas, 08/09/2012 RP 10-81, and admitted and published a DVD recording of Thomas' interview of S.L. 08/09/2012 RP 31-35.

The hearing continued on August 21, 2012, 08/21/2012 RP 32, and the State called Child Protective Services (CPS) Social Worker Christina Murillo, 08/21/2012 RP 32-49, P.S., 08/21/2012 RP 53-62, G.S., 08/21/2012 RP 62-73, and their mother, Jane Soto. 08/21/2012 RP 73-78.

On August 22, 2012, the defendant called Mark Reinitz, Ph.D. 08/22/12 RP 4-66.

The State recalled Cornelia Thomas,08/22/2012 RP 74-84, 131, and then called Leona Ling, S.L.'s mother, 08/22/2012 RP 87-99.

On August 23, 2012, the State called S.L., 08/23/2012 RP 137-65.

The defendant argued that S.L. had not "show[n] any independent memory of the incident" and that she had difficulty distinguishing truth from lie because he contended she did not understand the concept of a mistake. 08/23/2012 RP 168-78. 186-87. *See* CP 48-157. He therefore asked the court to find her not competent to testify. 08/23/2012 RP 178.

The State argued that S.L. had demonstrated an ability to form and relate memories, but that, given the subject matter, did not always *want* to discuss them. 08/23/2012 RP 180-82. *See* CP 171-74. The State further argued that S.L. was not required to know what a mistake was, but simply required to understand that she has an obligation to speak the truth, and that she had shown she did. 08/23/2012 RP 182-86. The deputy prosecutor noted that telling people what they want to hear and telling them the truth may not be mutually exclusive concepts, particularly in the mind of a ten-year-old girl in a court of law. 08/23/2012 RP 184-85.

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[1] The seven consecutively-paginated volumes of the report of proceedings will be cited as RP [Page Number], and all other volumes as [Date of Proceeding] RP [Page Number].

The court first considered the timing of the incident to determine the time at which S.L. would have to be competent: 08/23/2012 RP 178-79. It then considered the ***Allen*** factors and found that the defendant had failed to overcome the presumption that S.L. was competent to testify. 08/23/2012 RP 189-90. *See* CP 251-52, 11/09/12 RP 11-12.

The court also held that P.S. and G.S. were competent to testify. RP 83-84; CP 247-50.

The State argued for admission of S.L.'s statements to G.S., P.S., Christina Murillo, and Cornelia Thomas. 08/22/2012 RP 116-35; 08/23/2012 RP 191-94, and the defendant argued against this. 08/23/2012 RP 195-97.

The court considered the relevant ***Ryan*** factors and held that S.L.'s statements to G.S., P.S., Murillo, and Thomas were admissible at trial under RCW 9A.44.120, provided that S.L. testified. 08/23/2012 RP 198-204; CP 253-54.

The State moved to exclude the testimony of Dr. Reinitz at trial, 08/22/2012 RP 101-15l; 08/23/2012 RP 205-06; CP 163-70. The defendant argued that Reinitz should be allowed to testify that S.L.'s memory was unreliable. 08/23/2012 RP 205-06. The court ruled that Reinitz could testify "about the kinds of things that can affect a person's

recalling of memory," but not about S.L.'s "veracity or her credibility or her memory." 08/23/2012 RP 206-08.

The court also conducted a Criminal Rule (CrR) 3.5 hearing on August 21, 2012, at which Tacoma Police Detective Jennifer Quilio, 08/21/2012 RP 6-20, and the defendant, 08/21/2012 RP 21-29, testified. 08/21/2012 RP 6-31. It ruled that the defendant's statements to detectives were admissible at trial. 08/21/2012 RP 30-31; CP 255-60. *See* 11/09/12 RP 11-12.

On August 9, 2012, the court and parties discussed the State's proposed jury questionnaire. 08/09/2012 RP 121-24. On September 10, 2012, the court gave introductory instructions and distributed the questionnaire to the venire. RP 16-27. The next morning, the parties conducted individual questioning of venire members who requested such questioning, RP 35-102, and the court excused venire members 5, 25, 32, 43, 48, and 49 for cause. RP 102. The parties then conducted *voir dire* of the remaining venire, RP 103-207, 212-34, and selected a jury. RP 234-39, 248-49. That jury was sworn in and given initial instructions. RP 239-48.

The court then heard the defendant's motions in *limine*. RP 272-85.

The parties gave their opening statements. RP 287-93 (State's opening statement); 293-302 (defendant's opening statement).

The State called S.L., RP 305-51, Leona Ling, RP 370-449, Christina Murillo, RP 450-72, Laurel Powell, RP 482-92, 519-23, P.S., RP 492-502, G.S., RP 503-12, Tanessa Starks, RP 523-28, Kara Ramn-Gramenz, RP 542-47, Tacoma Police Department Detective Jennifer Quilio, RP 547-78, Tacoma Police Officer John Walsh, RP 583-87, Anna Watson, RP 603-49, and Cornelia Anderson Thomas, RP 662-92.

The State rested. RP 693.

The defendant moved to dismiss for insufficient evidence, but that motion was denied. RP 693-95.

The defendant then called Jack Raymond Hesselgrave, RP 696-702,

The court conducted a hearing regarding the competency of J.H., DOB 05/01/2005, to testify, and found him competent. RP 712-29.

The defendant called J.H., DOB 05/01/2005, RP 729-36, Patrick J. Falta, RP 737-39, Julie Armijo, RP 739-59, 846-48, Debbie Hollins, RP 759-66, Dr. Mark Reinitz, RP 788-817, S.L. RP 817-25, and Lucy McAlister, RP 834-846. The defendant testified, RP 872-910, and the defense rested. RP 910.

The court discussed jury instructions with the parties, and the defense took no exception to the State's proposed instructions. RP 650-55,

865-67, 869, 916. *See* CP 180-200. The court then read the instructions to the jury. RP 921-22. *See* CP 203-19.

The parties gave their closing arguments. RP 923-48 (State's closing); RP 948-73 (Defendant's closing); RP 973-79 (State's rebuttal argument). The defendant made a motion for mistrial based on alleged prosecutorial misconduct during closing argument. RP 988-90. That motion was denied. RP 988-90.

On September 21, 2012, the jury returned a verdict of guilty as charged. RP 991-95; CP 220. It also returned a special verdict finding that the defendant and S.L. were "members of the same family or household." RP 991-95; CP 221.

On November 9, 2012, the court sentenced the defendant to an indeterminate term in total confinement of 110 months to life, lifetime community custody, no contact with S.L. or Leona Lang, and legal financial obligations totaling $2,300.00. 11/09/2012 RP 6-7; CP 225-44.

The defendant objected to community custody condition 24 of Appendix H, and the court struck that condition. 11/09/12 RP 8-9. The defendant had no objections to or questions regarding the remaining conditions. *See* 11/09/12 RP 9-10, CP 225-44.

On November 14, 2012, the defendant filed a timely notice of appeal. CP 264-85. *See* 11/09/12 RP 9-10; CP 261-63.

2. Facts

S.L. testified that she was ten years old, and that her birthday was July 11. RP 306. She identified the defendant as her ex-stepfather, and though she did not want to look at him in the courtroom, accurately described what he was then wearing. RP 309.

She also testified that the defendant made her "have sex." RP 325-26. It happened at night, when the defendant's father was not in the apartment. RP 312-13. The defendant woke her up and told her to come into his bedroom. RP 313-14, 327. He was clad only in underwear at the time, which she described as "boxers," but she was dressed. RP 313, 328.

When they got into the bedroom, the defendant removed her clothing and took off his underwear. RP 313. He sat on the bed, and then picked her up and put her on his stomach, while he laid down on his back. RP 314-15, 328. The defendant then "put his penis in [S.L.'s] vagina. RP 315, 328.

S.L. told him that she had to use the bathroom, and he apparently allowed her to do so. RP 315, 329. When she was done, the defendant entered the bathroom, placed his hands on her sides, and placed his penis inside her "butt." RP 315-16, 329-30. S.L. was standing up and the defendant was, as well. RP 316. She testified that the defendant "went back and forth" while his penis was inside of her. RP 316. *See* RP 330-31.

It hurt "[r]eally bad," RP 316, and she felt like crying. RP 331.

S.L. testified that the defendant then took her back to the bed, and again placed his penis inside her vagina. RP 316-17, 332. She said that the defendant "was going up and down," and that his back and "butt" were moving up and down while his penis was inside of her. RP 317.

S.L. told him that she was going to get a drink, but the defendant said, no. RP 318. The defendant then removed his penis from her vagina, placed it in her mouth, and "peed in [her] mouth." RP 318, 332-33. S.L. testified that he had his hands on her head at the time, and that he moved her head "forward to his penis" when he "peed" in her mouth. RP 319.

S.L. testified that the defendant's penis was hard when it was in her vagina and "butt," but that it became soft after he "peed" in her mouth. RP 319.

She "was going to spit it out," but that the defendant "said, no," and he told her "to drink it." RP 319, 333. She "drank it because he forced [her] to." RP 320. S.L. testified that she never saw what color it was, but that it did not seem like water. RP 333.

After he was done, the defendant told S.L. that it was going to be alright and that she should not tell anyone. RP 318.

The defendant then took S.L. back to her bed, and licked her vagina with his tongue, though she testified that he only licked the outside of her vagina. RP 320.

The defendant showed her magazines depicting naked women and "a video of this woman having sex with an elephant." RP 320. S.L. clarified that the elephant put "its tail in the woman's vagina." RP 320. She testified that the defendant got the magazines from the top of his bookshelf and that the video was shown on his computer. RP 320.

S.L. testified that the defendant then woke up her brother J.H., and told him to come to his room. RP 320. The defendant told her brother to pull down his pants and underwear, and to put his penis in S.L.'s mouth. RP 321. S.L. testified that the defendant told her to bite on her brother's penis, and that she did so. RP 321. The defendant then told her brother to pull up his underwear and pants and go back to bed. RP 321. The defendant then put on his underwear and to

S.L. testified that this only happened once. RP 321.

J.H., who was seven years old at the time he testified, testified that he did not know what year he was born, that he could not remember where he was living at the time, and that he did not remember ever living with S.L. RP 732-35. He went on to deny that he "ever s[aw] S[.L.] naked on [his] dad's bed," that his "dad ever t[old him] to get naked with S[.L.]," or that he was "ever naked with S[.L.] on [his] dad's bed" or while his dad was naked. RP 732-34. However, he then testified that he was never naked at own his house while he lived there, and that he did not know if S.L. or his dad were ever naked while they were there. RP 736.

S.L. also testified that her former baby-sitter, Kelvin Palfrey, had placed his penis inside her vagina and "butt," as well. RP 322. S.L. testified that he had also shown her "people having sex on TV" one time. RP 323. S.L. testified that she saw a counselor as a result of Palfrey's abuse. RP 323. When asked if she disclosed what the defendant had done to her, S.L. testified that she did not. RP 323. She explained that the counselor "only needed to talk about what Kelvin did, and she [i.e., the counselor] didn't know what [the defendant] did yet." RP 323.

On cross-examination, the defense attorney elicited that S.L. loved her brothers. RP 336. S.L. also agreed that she did not really like the defendant, and that if he went to jail, it would be easier for her to live with her brothers. RP 337. Although S.L. also told her mother that she missed her brothers, she did not tell her that she wanted to live with them. RP 339.

S.L. testified that she had last lived with the defendant when she was six years of age, that they lived in a one-bedroom apartment in Tacoma, Washington. RP 309-10. She indicated that she lived there with her brothers, the defendant's father, Jack Hesselgrave, and a cat named Stripe. RP 310-12, 404. S.L. testified that her brothers slept on the floor in a common room, that she slept on a mattress on the floor which was just outside the bedroom in that common room, and that the defendant slept in the bedroom. RP 311-12, 350. She clarified that she was actually sleeping in Jack Hesselgrave's bed, but that he was gone most nights. RP 350, 404. She never slept in the same bed with Jack Hesselgrave. RP 350.

Leona Ling testified that she was now married to Christopher Ling, and that they were married on April 1, 2011. She confirmed that she had three children, S.L., and her two brothers, J.H., who was seven years old, and J. H., who was five years old. RP 371.

Ling confirmed that S.L. lived with the defendant in his apartment in Tacoma, Washington when she was six years old. RP 376. She testified that this occurred from the end of December, 2008 until August or September of 2009. RP 375, 389-91. Ling testified that she had visited this apartment and confirmed that it was a one-bedroom apartment. 380-82. She confirmed that S.L.'s brothers slept in the living room, but that she believed S.L. slept on the ground somewhere. RP 382. Ling confirmed that the defendant kept a cat named Stripe in the apartment. RP 381-82. Ling testified that S.L. stayed at that apartment one other night sometime in late October, 2010 when she was at her bachelorette party. RP 382, 415.

She also confirmed that there was "an incident involved S[.L.] and the gentleman named Kelvin Palfrey." RP 382.

Ling testified that she had married the defendant on May 8, 2004, and had two children with him, who were S.L.'s brothers. RP 371-73. Ling testified that she separated from the defendant in the summer of 2008, and that they were divorced on February 16, 2010. RP 377. She testified that she retained custody of S.L. after the dissolution, but that she agreed to pay child support to the defendant. RP 377-79. She also testified that she was, despite the child support obligation, happy to be divorced

from the defendant, seeing her boys on a regular basis, and engaged to be married, and therefore, "a happy person" at the time. RP 413.

Ling did not tell S.L. what to say to police or investigators, RP 386-87, and, in fact, did not speak to S.L. about the investigation because CPS had instructed her to let S.L. tell her "on her own terms." RP 383, 442. On the day of S.L.'s interview, Ling advised her to tell the truth. TP 442-43.

P.S., date of birth 03/01/2001, testified that she and her sister, G.S., date of birth 04/16/2004, rode the same school bus with S.L. during the previous school year. RP 493-96, 506. At one point, she was sitting on the seat in front of G.S. and S.L. RP 496-97, 507-08.

While the two girls were talking behind her, P.S. heard S.L. say, that her stepdad told her, "to try his penis because it tasted like mint." RP 497-98; 08/21/2012 RP 58. P.S. told S.L. that that "wasn't appropriate," but otherwise didn't speak with S.L. about what she had said. RP 498, 500.

G.S. testified that S.L. had told her "[t]o taste her dad's private because it tastes like mint, or something." RP 507; 08/21/2012 RP 67-68.

According to P.S., the bus then stopped in front of S.L.'s residence, and as S.L. got off the bus, she told G.S. that her stepfather "also said that it tasted like chocolate chip cookies." RP 498; 08/12/2012 RP 58.

Both P.S. and G.S. later told their former babysitter, Tanessa Starks, what S.L. had said. RP 499, 509; 08/21/2012 RP 59. G.S. testified that she reported this to Starks despite S.L.'s request that she not tell anyone. RP 510-11.

Tanessa Starks testified that she used to baby-sit G.S. and P.S. after school. RP 524. One day, during the previous school year, G.S. and P.S. told her that, while on the school bus, S.L. had stated that her father or stepfater's "penis tasted like mint." RP 525. Starks then notified the children's mother and called the school counselor at Larchmont Elementary school. RP 526.

Laurell Powell, the school counselor at Larchmont Elementary school, testified that, towards the end of the school year, she received a telephone call from a daycare provider, who expressed a concern regarding sexual abuse of S.L. RP 483-88. Based on that call, Powell reported the matter to Child Protective Services (CPS). RP 487. Powell did not conduct any investigation of her own. RP 488.

Christine Murillo testified that she was a social worker for Child Protective Services (CPS), RP 450, and that she was involved in an investigation involving S.L. in May, 2011. RP 453. Murillo testified that the investigation was initiated by a report from S.L.'s school counselor. RP 454. Murillo conducted a audio-recorded safety interview of S.L. at her school on May 17, 2011. RP 455-58, 554; 08/21/2012 RP 35-37.

Murillo testified at the competency hearing that she asked S.L. if she had ever said anything to one of her friends, and S.L. replied "S-E-X – with her dad." 08/21/2012 RP 37. S.L. had spelled the word "sex." 08/21/2012 RP 37, 39. Murillo asked her what that was and S.L. replied "that's when a man's penis goes inside a girl's vagina." 08/21/2012 RP 39. Murillo further clarified that S.L. was referring to the defendant when she stated that she had sex with her dad. 08/21/2012 RP 37. Because she obtained a "clear disclosure" from S.L., Murillo did not question her further, as per CPS protocol. 08/21/2012 RP 40. The audio recording of Murillo's interview was admitted as exhibit 2 and published to the jury. RP 458-62.

Murillo testified at the competency hearing that S.L. appeared to understand her questions and to respond appropriately and from her memory, 08/21/2012 38-39.

Murillo did not inform Ling prior to beginning her investigation. RP 463. In fact, no one in law enforcement informed Ling of the investigation prior to this interview. RP 552-53.

Murillo testified that S.L. and her younger brothers were ultimately placed into protective custody. RP 468.

A forensic interview of S.L. was conducted on May 25, 2011, by forensic interviewer Cornelia Thomas. RP 466, 554, 674-75. Thomas testified that parents are not present when she interviews children. RP 672. She also testified that she has been trained to be alert for "coaching" in

interviewing children, or in other words, to discern when "a child has been told what to say." RP 673-74.

At the competency hearing, Thomas testified that S.L. told her that the defendant "put his penis in her vagina and her butt," and that he "peed in [her] mouth." 08/09/2012 RP 28-29. S.L. also told Thomas about being shown "some naked girls on a magazine and then seeing something involving a naked girl and an elephant online." 08/09/2012 RP 30.

At the competency hearing, Thomas indicated that S.L.'s disclosure to her was consistent with her statements to others and that she was not aware of any motive for S.L. to lie. 08/09/2012 RP 30-31, 36-37.

Thomas also testified at the competency hearing that S.L. had "sufficient memory to have an independent recollection of the occurrence," that S.L.'s statement describing the incident "was based on her perceptions" and 08/09/2012 RP 35, and that S.L. was able to understand questions about the incident. 08/09/2012 RP 35. Thomas testified that S.L. "communicated quite well," and that she was able to distinguish the concepts of truth from lie. RP 676-78. Thomas saw no indication that S.L. was "coached" or told what to say. 08/09/2012 RP 35-36, 76; RP 681-82.

Thomas identified a DVD recording of her interview of S.L., and that recording was admitted and published to the jury as exhibit 1. RP 679-80.

The case was assigned to Tacoma Police Department Detective Jennifer Quilio for investigation on May 20, 2011. RP 547-51, 554. Detectives Quilo and Brad Graham interviewed the defendant on June 2, 2011. RP 555-57.

The defendant stated that S.L. lived with him full time from March through September, 2009. RP 560. The defendant also indicated that S.L. had probably seen his penis while bathing, showering, or using the bathroom. RP 562. When Detective Quilio asked the defendant if he watched pornography, the defendant responded, "Oh, yeah." RP 562-63. He said that he lived in a small apartment and watched pornography at night in the living room where his children slept. RP 562. When asked if he masturbated while watching the pornography, the defendant replied, "for sure." RP 563. He testified that his back was to the children, such that S.L. had probably inadvertently seen him masturbating while watching the pornography. RP 562-63. The defendant stated that he did watch pornography involving sex between animals and women, but that he had not seen an elephant video. RP 564. The defendant denied performing any sexual acts on S.L. RP 564.

The day after the interview, after learning of the allegations in this case, the defendant told Ling that she would never see him again, and that he was "leaving for good" with their sons." RP 385, 422-23, 571. Ling called 911 to report what she believed to be an imminent kidnapping. RP 385-86.

The dispatcher called Detective Quilio, who responded to Ling's 911 call, by going to McCarver Elementary school to insure that J.H. was still in school. RP 567-68. Meanwhile, she had patrol officers go to the defendant's apartment to locate the younger brother. RP 568. When Detective Qulio arrived at McCarver, she took J.H. into protective custody and instructed the school to call 911 should the defendant show up. RP 569.

As Quilio was driving away from the school, J.H. told her that his grandfather's car had just pulled up to the school. RP 570.

Kara Ramn-Gramenz, the school counselor at McCarver Elementary school, testified that the defendant and his father came into the building to sign J.H. out of school. RP 544-46.

Quilio took J.H. to the CPS office while patrol officers located and detained the defendant and his father. RP 570. The defendant was taken into custody. RP 571-72, 585.

The defendant testified that S.L. lived with him for three to five months in 2009 when she was six years old. RP 890. He confirmed that S.L. slept on his father's bed. RP 891. However, he testified that he and his father actually slept in a closet together, rather than a bedroom. RP 891-92.

The defendant admitted to watching pornography and masturbating next to the entry door in the apartment. RP 905-06. He also testified that S.L. may have seen his penis, and may have seen him masturbating while

watching pornography. RP 906. The defendant testified that he watched pornography involving animals. RP 907. However, he denied touching S.L. sexually, RP 893-94, and testified that he did not intend to kidnap the children and leave the State. RP 889. The defendant testified that he had a good relationship with S.L. RP 895-96.

Anna Watson, a mental health therapist, testified that children find sexual abuse "very, very hard to talk about," and indicated that, as a result, "it takes kids awhile to build up the courage to say everything that happened." RP 604, 613. Watson testified that if the abuser is a trusted, important person to the child, it is even harder for them to talk about the abuse. RP 622. She testified that S.L. was referred to her for counseling, and that she did "trauma focused counseling with her" regarding abuse by Kelvin Palfrey, who was later convicted of crimes relating to his contact with S.L. RP 614-16.

Watson testified that this counseling maintained its "focus on the specific trauma" which was inflicted by Palfrey, and that S.L. understood this. RP 630, 643. She testified that she believed children do not necessarily connect one incident of sexual abuse with another "as being sort of like the same thing" when disclosing. RP 644. Watson described S.L. as very uncomfortable and very fearful to talk about what happened to her. RP 624. However, Watson testified that S.L. was intelligent, capable of communicating details, and intellectually capable of talking about things that happened to her." RP 634.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY CONCERNING PRIOR STATEMENTS OF THE VICTIM WHICH WERE NOT INCONSISTENT WITH HER TRIAL TESTIMONY AND PROPERLY EXCLUDED DOCUMENTARY EVIDENCE WHICH WAS IMPERMISSIBLY PREJUDICIAL, AND THUS, IN SO DOING, DID NOT VIOLATE DEFENDANT'S RIGHTS TO PRESENT TESTIMONY OR CONFRONT AND CROSS-EXAMINE ADVERSE WITNESSES.

The sixth amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution "grant criminal defendants two separate rights: (1) the right to present testimony in one's defense, and (2) the right to confront and cross-examine adverse witnesses." ***State v. Hudlow***, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)(internal citations omitted). Although a defendant "does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." ***Aguirre***, 168 Wn.2d at 362-63.

In other words, "'[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible.'" ***State v. Rafay***, 168 Wn. App. 734, 795, 285 P.3d 83 (2012) (*quoting* ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)).

Hence, a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." ***State v. Mee Hui Kim***, 134 Wn. App. 27, 41, 139 P.3d 354 (2006)(*quoting* ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004)(*quoting* ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983))); ***Washington v. Texas***, 388 U.S. 14, 16, 87 S. Ct. 1920 (1967).

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Likewise, appellate courts "review a trial court's decision to limit cross-examination of a witness for impeachment purposes for abuse of discretion." *Id.* at 361-62.

However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Moreover, "[a]n erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial." ***Aguirre***, 168 Wn.2d at 361.

"The credibility of a witness may be attacked by any party, including the party calling the witness." Evidence Rule (ER) 607. "In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." ***State v. Newbern***, 95 Wn. App. 277 292, 975 P.2d 1041 (1999).

"[T]he purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times" and "[f]rom this, the jury may disbelieve the witness's trial testimony." *Id.* at 293.

"If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach," but "even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling." ***Newbern***, 95 Wn. App. at 293.

However, ER 613(b) provides, in relevant part, that

> [e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Moreover, "[i]t is well settled that neither party may impeach a witness on a collateral issue; that is, on facts not directly relevant to the trial issue." ***Aguirre***, 168 Wn.2d at 362. "Facts are relevant if they have a tendency to make the existence of any consequential fact more or less probable." *Id.*; ER 401.

"An issue is collateral if it is not admissible independently of the impeachment purpose" because "a witness may be impeached on only

those facts directly admissible as relevant to the trial issue." ***State v. Fankhouser***, 133 Wn. App. 689, 693, 138 P.3d 140 (2006).

In the present case, the defendant argues that his "rights to present a defense and to meaningful confrontation and cross-examination were violated" when the trial court precluded him from introducing what he terms "crucial impeachment of S.L." BOA, p. 17-24. He contends that the court erred in excluding his "inquirie[s] of S.L. about what she said during [his interview of her] which was inconsistent with her testimony at trial." BOA, p. 27. The record shows otherwise.

Although the defendant does not explicitly indicate which pieces of evidence were improperly excluded by the trial court, his trial attorney did indicate to the court below that he wanted to ask Armijo the following questions:

> [1] Did S[.L.] stay in bed? [2] Did you remember waking up? [3] Did you ever talk to anybody about being touched in a way you didn't like?
> No.
> Not at all?
> No.
> [4] Have you ever talked to anybody about the word "rape"?
> I don't know.
> [5] Do you remember talking about seeing any pictures of naked people?
> No.
> [6] How about any movies of naked people?
> No.
> [7] Did you tell the investigator anything about animals?

No.

[8] Did you ever talk about an elephant?
No.

[9] Did you talk to your mom about what would happen if you lied?
No.

[10] "Did your mom ever say anything like if you lied that your mom and" –this is Jack, but it's – oh. "That your mom and Jack – that Leona and Chris would get put in jail?"
No.

[11] Did you know if your dad ever had magazines with naked people in it?
No.

[12] Did you see a magazine with naked people in it?
No.

[13] Did you see a movie with naked women in it?
No.

[14] Did your dad ever wake you up?
Yes. He woke me up.

[15] And what would he do?
I do not know.

RP 751-53. The answers he provided are presumably those that S.L. provided to these questions during the defense interview. *See* RP 751-53.

The defendant's trial attorney also provided a "record of the questions that [he] wanted to ask S[.L.]," RP 851-65, which he here summarizes as follows:

> [16] that S.L. kept saying she did not remember what had happened, did not really know what it was, did not want to talk about it, [17] did not know if it happened by herself or not, [18] did not want to live with [the defendant] because he yells at her, [19] did not remember telling anyone at school anything, [20] did not talk to the woman at school

> about [the defendant], [21] does not remember ever seeing a movie with naked people, [22] could not remember what happened with Palfrey, [23] did not know if she talked to her mom about it, [24] never told anyone her daddy's penis tasted like mint, [25] had never talked to anyone about being touched in[an] improper way, [26] denied ever saying anything about animals or an elephant,... [27] never talked to her mom about what would happen if she lied.... [28] admitted that she really wanted to live with her brothers and Chris and Ling, [29] that it would be easier to do that if [the defendant] was not around, [30] that if he went to prison that was what would happen, and [31] that she was afraid that if she said something "different" than her claims of abuse to the interviewers that she could not live with Chris and Ling.

BOA, p. 23; *See* RP 851-56.

Question (1) whether S.L. stayed in bed, **question (2)** whether S.L. remembered waking up, and **question (14)**, whether her dad ever woke her up, are all quite similar, if not logically equivalent.

As part of his offer of proof, the defendant never explicitly disclosed S.L.'s answers to questions (1) and (2).

Because, under ER 103(a)(2), "[e]rror may not be predicated upon a ruling which... excludes evidence unless... the substance of the evidence was made known to the court by offer or was apparent from the context within which the questions were asked," the defendant may not be able to even raise the exclusion of questions (1) and (2) here.

However, the defendant's investigator, Armijo, did testify at trial that when she asked S.L. if she "ever g[o]t out of bed again that night,"

S.L. responded "I am not sure." RP 746. So, presumably this was S.L.'s response to questions (1) and (2).

At trial, S.L. testified on direct examination that she was sleeping in bed when the defendant "woke [her] up" and told her to come into his room. RP 313-14. She testified similarly on cross-examination. RP 327.

Thus, her testimony may be considered inconsistent with her prior response of "I am not sure." Nonetheless, the defendant was, as noted above, allowed to have Armijo testify to S.L.'s prior inconsistent statement in response to questions (1) and (2). RP 746. Therefore, he cannot now claim that the trial court improperly excluded that statement or otherwise infringed on his constitutional rights in this regard.

In **question (14)** the defendant's attorney asked whether the defendant ever woke S.L. up. RP 752. The defendant indicated that S.L.'s answer to this was "[y]es. He woke me up." RP 752-53.

Thus, not only was S.L.'s trial testimony that the defendant "woke me up," RP 313-14, consistent with the answer she gave in response to question (14), it was virtually identical to that answer.

As a result, extrinsic evidence of her answer to this question was not admissible because not inconsistent. *See* ER 613. Therefore, the court properly excluded such evidence. Moreover, because that evidence was not admissible, its exclusion could not have violated Defendant's rights to present testimony and confront and cross-examine adverse witnesses. *See. e.g.,* ***Rafay***, 168 Wn. App. at 795.

In **Question (3)**, the defense attorney asked S.L., "[d]id you ever talk to anybody about being touched in a way you didn't like," and S.L. responded, "[n]o." RP 751. **Question (25)** was virtually identical, in that S.L. stated she "had never talked to anyone about being touched in[an] improper way." BOA, p. 23, RP 851-56.

At trial, S.L. appears to offer inconsistent testimony, by agreeing that she spoke with a forensic interviewer about the incident involving the defendant. RP 335-36.

Assuming such testimony was inconsistent with her response to questions (3) and (25), the defendant may have had ground under ER 613(b) to introduce extrinsic evidence of S.L.'s answer to question (3), but the defendant was allowed to do just that through Armijo's testimony:

> Q If you turn to page 40[of the transcript of the defense interview], did you ask S[.L.], "Do you remember telling anybody about what happened with [the defendant]?
> A Yes.
> Q And what was her answer?
> A Line 4, her answer was, "No."

RP 748.

Therefore, the defendant cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

Questions (4), (22), and **(23)** all dealt with S.L.'s abuse by Kelvin Palfrey. Question (4) concerned whether S.L. had ever used the word

"rape" or stated that Palfrey raped her. RP 751-53. Question (22) evoked a response from S.L. that she "could not remember what happened with Palfrey," and question (23) evoked the response that she did not know if she talked to her mom about it. RP 851-56, BOA, p. 23.

All of these questions and responses concerned an unrelated sex offense with a third party who had no involvement in the case at bar. Whether S.L. had ever said Palfrey raped her, whether she remembered what Palfrey did to her, and whether she ever told her mom about it had no "tendency to make the existence of any consequential fact" in this case "more or less probable." ER 401. They were facts which were simply not relevant to the instant case.

Because "[i]t is well settled that neither party may impeach a witness on a collateral issue; that is, on facts not directly relevant to the trial issue," ***Aguirre***, 168 Wn.2d at 362, the defendant had no right to introduce evidence of S.L.'s pre-trial statements concerning Mr. Palfrey in response to questions (4), (22), and (23). Moreover, because that evidence was not admissible, its exclusion could not have violated Defendant's rights to present testimony and confront and cross-examine adverse witnesses. *See. e.g.,* ***Rafay***, 168 Wn. App. at 795.

Questions (5) through (8), (11) through **(13), (21)**, and **(26)** all asked S.L. if she remembered the defendant showing her pornographic magazines or videos, including pornography involving animals. RP 751-

75, 851-56, BOA, p. 23. In response to these questions, S.L. indicated that she ***did not remember*** talking about seeing or actually seeing any pictures of naked people, any movies of naked people, anything involving animals or specifically, an elephant. RP 751-75, 851-56, BOA, p. 23.

At trial, S.L. testified that the defendant showed her "magazines with naked women and a video of this woman having sex with an elephant," RP 320, and denied telling the defense attorney that she didn't remember anything about watching naked people on TV, RP 349.

Assuming this testimony was inconsistent with her statements in response to questions (5) through (8), (11) through (13), (21), and (26), the defendant may have had ground under ER 613(b) to introduce extrinsic evidence of S.L.'s answers to these questions, but the defendant was allowed to do so through Armijo's testimony:

> Q ***Do you recall having S[.L.] – do you recall having asked S[.L.] a question about what happened with [the defendant]?***
> A I do recall asking a question like that.
> Q ***Do you recall what her answer was?***
> A Not off the top of my head, I do not at this time.
> Q If you take a look at page 19 of the transcript [of the defense interview], line 6.
> A Line 6 reads: "The witness: ***I forgot. It's been like a long time since that happened.***
> Q And if you turn to page 18, just prior to the previous page, line 23, what was the question?
> A The question was: "Okay. And do you remember, did anything happen while he

was baby-sitting you?"
Q And what was the answer?
A The answer, line 25, was: "Yes."
Q Then you asked a question?
A Line 1 is my question. It says: "Okay. Can you – can you explain that to me?"
....
Q And what was the witness's answer then?
A Line 6, "The witness: ***I forgot. It's been like a long time since that happened."***

RP 743-43. *See* RP 748.

Hence, the fact that S.L. had previously told the defense attorney that she did not remember "what happened with the defendant," RP 743-44, and hence, could not have remembered seeing any pictures of naked people, any movies of naked people, or anything involving animals or specifically, an elephant, RP 751-75, 851-56, BOA, p. 23, was before the jury.

Therefore, the defendant cannot now claim that the trial court improperly excluded S.L.'s statements or otherwise infringed on his constitutional rights in this regard.

Questions (9), (10), (27), and (31) were also similar. Questions (9) and (27) both dealt with whether S.L. talked to her mother about what would happen if she lied, and questions (10) and (31) dealt with whether her mom indicated to S.L. that if S.L. lied, her mom and her mom's husband would go to jail. RP 751-53, BOA, p. 23, 851-56.

Assuming *arguendo* that S.L. gave inconsistent testimony at trial, the defendant was allowed to introduce extrinsic evidence of S.L.'s prior inconsistent statements in answering questions (9), (10), (27), and (31) through the testimony of Detective Quilio:

> A S[.L.] didn't tell me anything. I watched the DVD of her interview with Cornelia Thomas.
> Q Was that statement on that interview?
> ***[DEPUTY PROSECUTOR]: Your Honor, I'm going to object at this point***
> ***[DEFENSE ATTORNEY]: Prior inconsistent statement.***
> ***THE COURT: Overruled.***
> If you can answer that – if you recall.
> Q... The second to the last sentence.
> A Yes. On the DVD that I watched, between the conversation – the conversation between Cornelia Thomas and ***S[.L.],*** she ***said that her mom didn't tell her what to say today. If she was lying, they will arrest the mom and her husband, I guess, and put them in jail.***
> ***Q Her husband is Chris Ling?***
> ***A Chris Ling, yes.***

RP 575 (emphasis added).

Therefore, the defendant cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

Questions (15) and **(16)** elicited statements from S.L. that she did not know what the defendant did after he woke her, that she did not

remember what had happened, and did not want to talk about it. RP 751-53, BOA, p. 23, 851-56.

However, S.L. testified at trial that after the defendant woke her, he engaged in sexual intercourse with her, showed her pornography, and had her brother engage in sexual intercourse with her. RP 313-21. She did not express any disinclination to describing the events at trial. *See* RP 313-21.

Assuming that such testimony was inconsistent with her prior statements in response to questions (15) and (16), the defendant may have had ground under ER 613(b) to introduce extrinsic evidence of these statements. However, the defendant was allowed to do just that through the testimony of Armijo:

> Q And then a little further down the page, "Did you ever get out of bed again that night"?
> A Correct.
> Q And what was her answer?
> A Line 3, her answer was, "I'm not sure."

RP 746.

As noted above, Armijo also testified that S.L. told her she did not remember what had happened:

> Q ***[D]o you recall having asked S[.L.] a question about what happened with [the defendant]?***
> A I do recall asking a question like that.
> Q ***Do you recall what her answer was?***
> ....
> A Line 6 reads: "The witness: ***I forgot. It's been like a long time since that happened.***

Q And if you turn to page 18, just prior to the previous page, line 23, what was the question?

A The question was: "Okay. And do you remember, did anything happen while he was baby-sitting you?"

....

A Line 6, "The witness: ***I forgot. It's been like a long time since that happened."***

RP 743-43.

Finally, Armijo testified that when she asked S.L. if "anything happen[ed] while [the defendant] was babysitting [her]," S.L. replied "that's a hard," and then paused, RP 742-43, thus clearly expressing as well as demonstrating that she "did not want to talk about it." *See* RP 751-53, BOA, p. 23, 851-56.

Therefore, the defendant cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

In **question (17)**, the defendant indicated that S.L. had previously stated that she "did not know if [the incident] happened by herself or not," BOA, p. 23, RP 851-56. S.L. testified at trial that the initial sex acts were done solely on her, RP 313-20, but that subsequent acts that same night involved her brother. RP 320-21.

Assuming that such testimony is inconsistent with S.L.'s prior response to question (17), the defendant may have had ground under ER

613(b) to introduce extrinsic evidence of S.L.'s answer to question (17). However, the defendant was allowed to introduce such extrinsic evidence through Armijo's testimony:

> Q Page 31. Take a look at line 15 [of the defense interview transcript]. You asked a question, "Did something happen with you by yourself?" And what was the answer? Line 16.
>
> A "I don't know if it happened by myself or not."

RP 747-48.

Therefore, he cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

In response to **Question (18),** S.L. indicated that she "did not want to live with [the defendant] because he yells at her." RP 851-56

At trial, S.L. never testified that she *wanted* to live with the defendant. *See* RP 305-51, 817-25. In fact, she testified that she "didn't really like [the defendant]," and that it would be easier for her to live with her brothers, whom she loved, if the defendant went to jail. RP 337-38.

Hence, S.L.'s testimony at trial was consistent with the answer she gave in response to question (18). As a result, extrinsic evidence of her answer to this question was not admissible under ER 613. Therefore, the court properly excluded such evidence. Moreover, because that evidence

was not admissible, its exclusion could not have violated Defendant's rights to present testimony and confront and cross-examine adverse witnesses. *See. e.g.,* ***Rafay***, 168 Wn. App. at 795.

In response to **question (19)**, the defendant contends that S.L. denied telling anyone at school anything about the incident. BOA, p. 23, *See* RP 851-56.

Assuming *arguendo* that S.L. gave inconsistent testimony at trial, the defendant may have had ground under ER 613(b) to introduce extrinsic evidence of S.L.'s answer to question (19), but he was allowed to do just that through Armijo's testimony:

> Q And then on line 5, did you ask, "Did you talk to any school friends or any other friends about what happened?" And what was her answer?"
> A I did ask that question, and on line 7 her answer is, "No."

RP 748.

Hence, he cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

The defendant claims that, in response to **question (20)**, S.L. stated that she did not talk to "the woman at school" about the defendant. BOA, p. 23, RP 851-56. Although the defendant does not specify to which "woman at school," he is referring, presumably it is Ms. Murillo, who

testified that she conducted a safety interview of S.L. at her school on May 17, 2011. RP 455-58, 554.

Although the State cannot find an inconsistent statement made by S.L. at trial, *see* RP 305-51, 817-25, assuming she made one, the defendant was allowed to introduce extrinsic evidence of S.L.'s answer to question (20) through Armijo's testimony:

> Q If you turn to page 40, did you ask S[.L.], "Do you remember telling anybody about what happened with [the defendant]?"
> A Yes.
> Q And what was her answer?
> A Line 4, her answer was, "No."

RP 748.

The defendant claims that S.L. responded to **question (24)** stating that she "never told anyone her daddy's penis tasted like mint." BOA, p. 23, RP 851-56.

Assuming *arguendo* that S.L. gave inconsistent testimony at trial, the defendant may have had ground under ER 613(b) to introduce extrinsic evidence of S.L.'s answer to question (24). However, the defendant was allowed to introduce such evidence through Armijo's testimony:

> Q At this point I was asking questions, is that correct, and I asked a question, page 44, line 18, "Did you ever say to anybody that your daddy's penis tasted like mint? And what was her answer?

A Line 20, her answer was: "No. I never told anyone that."

RP 748.

Therefore, he cannot now claim that the trial court improperly excluded S.L.'s statement or otherwise infringed on his constitutional rights in this regard.

Finally, according to the defendant here, related **questions (28)**, **(29)**, and **(30)** elicited the following response: that S.L. "really wanted to live with her brothers," (question 28), "that it would be easier to do that if [the defendant] was not around," (question 29), and "that if he went to prison that was what would happen." (question 30). BOA, p. 23, RP 851-59.

However, S.L.'s testimony at trial was entirely consistent with her answers to questions (28), (29), and (30):

Q Now, I want to talk to you a little bit about your brothers, J[.H.] and J[.H]. You love your brothers?
A Yes.
Q And you are living with them now?
A Yes.
Q ***You like living with them?***
A ***Yes.***
....
Q ***And you want to be with your brothers, right?***
A ***Yes.***
Q And you don't really like [the defendant], do you?
A No.

Q ***If he goes away to jail or something like that, it will be easier for you to live with your brothers, right?***

A ***Yes.***

RP 335-37 (emphasis added).

Because S.L.'s testimony was consistent with the answers she gave in response to questions (28), (29), and (30), extrinsic evidence of her answers to these questions was not admissible because her prior answer were not inconsistent. *See* ER 613.

Thus, although the defendant now cites a total of 31 pieces of testimony that he argues the court improperly excluded, the record shows otherwise. The court either properly admitted extrinsic evidence of S.L.'s prior inconsistent statements under ER 613 or properly excluded prior statements because not inconsistent under ER 613. Thus, it did not abuse its discretion in excluding statements which were not inconsistent with S.L.'s trial testimony.

Moreover, because these statements were not admissible, their exclusion could not have violated Defendant's rights to present testimony and confront and cross-examine adverse witnesses. *See. e.g.,* ***Rafay***, 168 Wn. App. at 795.

Therefore, the defendant's conviction should be affirmed.

The defendant next argues that "[r]egardless of whether evidence would be excluded under an evidentiary rule, when the defendant's

constitutional rights are implicated by that exclusion, the evidentiary ruling alone does not dispose of the issue." BOA, p. 27-31. The law demands otherwise.

The defendant relies on ***State v. Baird***, 83 Wn. App. 477, 922 P.2d 157 (1996), for the proposition that the Court must examine the reasons underlying the evidentiary rule, BOA, p. 27-28, but ***Baird*** is inapposite.

Baird dealt solely with a defendant's right to testify under the Fifth, Sixth, and Fourteenth Amendments. ***Baird***, 83 Wn. App. at 481-83. The defendant here is not claiming that he was deprived of his right to testify. BOA, p. 1-59. He is arguing that his rights to confront and cross-examine witnesses and to present testimony in the form of extrinsic evidence of prior statements under the sixth amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution were violated.

It is well established that "[a] defendant in a criminal case has a constitutional right to present a defense consisting of ***relevant evidence that is not otherwise inadmissible.***'" ***State v. Rafay***, 168 Wn. App. 734, 795, 285 P.3d 83 (2012) (*quoting* ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)) (emphasis added); ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983))); ***Washington v. Texas***, 388 U.S. 14, 16, 87 S. Ct. 1920 (1967).

Because, as described above, the excluded statements Defendant sought to admit here were inadmissible under ER 613, the defendant had

no right to present them as evidence. Hence, his constitutional rights to present testimony and confront and cross-examine adverse witnesses were not violated, and his conviction should be affirmed.

Finally, the defendant argues that the court "violated [his] rights to confrontation and to present a defense by excluding the parenting plan, order of child support, findings and conclusions and other documents regarding [his] divorce" from Leona Ling. BOA, p. 33-36. The record shows otherwise.

Under ER 402, "[e]vidence which is not relevant is not admissible." "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Under ER 403,

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Under ER 404,

> Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
> ...
> (3) *Character of Witness*. Evidence of the character of a witness, as provided in rules 607, 608, and 609
> (b) Other Crimes, Wrongs, or Acts. Evidence of other

> crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"For evidence of drug use to be admissible to impeach, there must be a reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial." ***State v. Tigano***, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991). *See* ***State v. Powell***, 166 Wn.2d 73, 81-82, 206 P.3d 321 (2009) (*citing* ***State v. Lord***, 117 Wn.2d 829, 872-73, 822 P.2d 177 (1991)).

However, "[e]vidence of drug use on other occasions, or of drug addiction, is generally inadmissible on the ground that it is impermissibly prejudicial." *Id.* at 344-45, or "not probative of truthfulness because [it] ha[s] little to do with [the] witness's credibility." ***State v. Stockton***, 91 Wn. App. 35, 42, 955 P.2d 805 (1998).

In the present case, the defendant sought to admit evidence of "[t]he Parenting Plan, the Order of Child Support, and the Findings of Fact and Conclusions of Law" related to his divorce from Leona Ling. RP 360- The defendant indicated that these documents included references to Ling's alleged "long-term emotional impairment which interferes with the performance of parenting functions and long-term substance abuse that interferes with the performance of parenting functions," and that they

indicated that "a parent has withheld from the other parent access to the child for a protracted period without good cause." RP 360-62.

The court noted that the documents the defendant sought to admit were "often presented *ex parte*, with just one party there," and that Ling did not sign the parenting plan, though she had signed an earlier joinder. RP 364-65.

The court nevertheless allowed the defendant "to ask [Ling] if she agreed with the Parenting Plan" and about her child support obligations, but held that the remaining information in the documents was inadmissible under ER 404(b). RP 367-68, 387.

Here, the defendant argues that the parenting plan, child support order, and findings of fact and conclusions of law should have been admitted in their entirety, including their references to Ling's alleged drug use, "emotional impairment," and alleged act of withholding access to the defendant's sons because they were evidence of Ling's motives. BOA, p. 34-36. The record shows otherwise.

First, Ling's motives were largely irrelevant because Ling is not the one who made the initial allegations in this case; S.L. did. *See* RP 455-58, 554. In fact, the undisputed evidence showed that Ling did not even know investigators were speaking to S.L. until after S.L. made these allegations. RP 463; RP 552-53. Hence, it would have been difficult for Ling to have influenced the nature of those disclosures, and her motives to do so would be unlikely to have "any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Conceding *arguendo* that Ling could have influenced the nature of S.L.'s disclosures, and therefore, that her motives to do so were sufficiently relevant, the defendant was allowed to explore them without introducing the whole of the dissolution pleadings he sought to admit. The court allowed the defendant "to ask [Ling] if she agreed with the Parenting Plan" and about her child support obligations. RP 367-68, 387.

The defendant did just that, asking Ling an extensive series of questions regarding the parenting plan and her child support obligations. RP 388-412. During his cross-examination of Ling, the defendant secured an admission that he had primary custody of their sons, RP 392, 398-99, 404, that Ling was required "to make arrangements for supervised visitation," RP 397-98, 403, that Ling wanted to change the parenting plan, RP 389, that Ling, who was unemployed, was ordered to pay $415 in child support per month, and that she had moved to reduce her support obligation RP 406-12. Hence, there was sufficient evidence before the jury of Ling's motives to induce S.L. to fabricate allegations in order to secure a modification of the parenting plan and her child support obligations.

Admitting the pleadings themselves would have done little to add to this. It would only have placed before the jury possibly unsubstantiated allegations that Ling abused drugs and suffered an emotional impairment.

Because evidence of general drug possession and use "is generally inadmissible on the ground that it is impermissibly prejudicial." ***Tigano***, 63 Wn. App. at 344-45, and "ha[s] little to do with [the] witness's credibility," ***Stockton***, 91 Wn. App. at 42, such evidence was properly excluded here.

Hence, the trial court did not abuse its discretion in excluding such evidence. Moreover, because this evidence was not admissible, its exclusion could not have violated Defendant's rights to present testimony and confront and cross-examine adverse witnesses. *See. e.g.,* ***Rafay***, 168 Wn. App. at 795.

Therefore, the defendant's conviction should be affirmed.

2. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE WAS DEFICIENT.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); ***State v. Johnston***, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective assistance of counsel claim." ***Riofta v. State***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. Specifically, "[t]o establish deficient performance, the defendant must

show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838, 15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***Yarbrough***, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." ***Rice***, 118 Wn.2d at 888-89. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." ***Yarbrough***, 151 Wn. App. at 90 (*citing* ***State v. McNeal***, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to "function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve."

Harrington v. Richter, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* (*Quoting* ***Strickland***, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (*Quoting* ***Strickland***, 466 U.S. at 690).

This Court "defer[s] to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances." ***Riofta***, 134 Wn. App. at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ." *Id.*

With respect to the second prong, "[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, the defendant argues that "[i]f this Court finds that [his trial] counsel failed to present sufficient foundation to introduce... evidence [of S.L.'s prior inconsistent statements], that failure should be deemed prejudicially ineffective." BOA, p. 31-33. As demonstrated above, the record shows that counsel was not ineffective.

In fact, as described in section I above, he actually gained admission of each of the prior inconsistent statements he sought to introduce. The only statements he failed to introduce were inadmissible because S.L. had given consistent testimony.

Hence, trial counsel was successful in the introduction of prior inconsistent statements, and his performance cannot be considered deficient.

As a result, the defendant has failed to should ineffective assistance of counsel, and his conviction should be affirmed.

3. THE TRIAL COURT PROPERLY FOUND S.L. COMPETENT TO TESTIFY AND PROPERLY ADMITTED HER STATEMENTS TO OTHERS REGARDING THE DEFENDANT'S ABUSE.

"Due process protects a criminal defendant against a conviction based on incompetent evidence." ***State v. Brousseau***, 172 Wn.2d 331, 259 P.3d 209 (2011).

"[A]ll witnesses—children and adults alike—are presumed competent until proved otherwise by a preponderance of evidence." ***Brousseau***, 172 Wn.2d at 341; ***State v. S.J.W.***, 170 Wn.2d 92, 102, 239 P.3d 568 (2010); ER 601 ("[e]very person is competent to be a witness except as otherwise provided by statute or by court rule.").

However, RCW 5.60.050 provides

> The following persons shall not be competent to testify:
> (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
> (2) Those who appear incapable of receiving just impressions of the fact, respecting which they are examined, or of relating them truly.

"A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly." ***S.J.W.***, 170 Wn.2d at 102.

Moreover, "a witness is not required to testify at a pretrial competency hearing absent a threshold showing of incompetency." ***Brousseau***, 172 Wn.2d at 344-45.

In ***State v. Allen***, 70 Wn.2d 690, 424 P.2d 1021 (1967), the Washington State Supreme Court set out a five-part test for determination whether a child witness is competent to testify in a criminal trial:

> The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692. The Supreme Court has more recently held that "[t]he ***Allen*** factors continue to be a guide when competency is challenged." ***S.J.W.***, 170 Wn.2d at 102. However, the mere "recitation of the ***Allen*** factors, without more, d[oes] not constitute a sufficient offer of incompetency." ***Brousseau***, 172 Wn.2d at 345.

"[T]he bar to competency is low," *Id.* at 347, and appellate courts "afford significant deference to the trial judge's competency determination." ***State v. Brousseau***, 172 Wn.2d 331, 340, 259 P.3d 209 (2011). "An appellate court will not disturb a trial court's conclusion as to the competency of a witness to testify except for abuse of discretion." ***State v. S.J.W.***, 170 Wn.2d 92, 97, 239 P.3d 568 (2010) (*citing* ***Faust v. Albertson***. 167 Wn.2d 531, 545-46, 222 P.3d 1208 (2009)); ***Brousseau***, 172 Wn.2d at 340. "In making this determination, [courts] may examine the entire record." ***Brousseau***, 172 Wn.2d at 340. "[E]ven where the court is reviewing a pretrial competency determination, the inquiry is always whether the child is competent to testify at trial," and hence, "it is always appropriate to examine the child's trial testimony in making this determination." ***Brousseau***, 172 Wn.2d at 341, fn 5.

Indeed, there is "no reversible error where a child's testimony at trial showed that the child was competent, notwithstanding any failure to assess competency beforehand." *Id.* at 350.

In the present case, after reviewing the parties' briefing, hearing testimony, and considering arguments, the court outlined its analysis of the ***Allen*** factors and issued its ruling as follows:

> The factors that have to be shown here is, does she understand the obligation to tell the truth. I find that she does. She apparently did not articulate much of a difference between a lie and a mistake. There are obviously differences between lies and mistakes. She didn't articulate that very well. That doesn't mean she doesn't understand the obligation to tell the truth. It may mean she doesn't know the definition of a mistake, so I don't think it means too much.
>
> ***She has to have the capacity at the time, which was some years ago, to receive accurate impressions of what was happening. I don't see any reason to doubt that. She may not have a great ability to express it, and some of her statements appear to be somewhat inconsistent with each other. That doesn't mean she couldn't understand what was happening to her.*** A six-year-old is old enough. A two-year-old, perhaps not. Probably not a two-year-old.
>
> She has to have a sufficient memory to retain some independent recollection, and this is certainly going to be subject to cross-examination, but in the first interview especially with Ms. Thomas she certainly had expressed enough details of the incident. She didn't mention J[.], or J[.], her brother, but she wasn't specifically asked about that. I think there was some question about others, but that's good grist for cross-examination. I think she does have a sufficient memory to retain an independent recollection. Today she said "he had sex with me" or something.
>
> She, I think, does have the capacity to express in words or [her] memory. She's also got some reluctant[ance] to express in words or [her] memory, no question about that. I find that to be absolutely predictable and what one would expect someone, now ten, to talk become sexual abuse by a stepfather when she was six. Of course she's reluctant to talk about it, but she certainly has the capacity to express her memory. She seems to have a fairly good vocabulary.

> And I think she has the capacity to understand simple questions about the incident. A couple of the questions she didn't answer particularly well today and that may have been that she didn't understand the question. The best thing to do, of course, is to ask her simple questions.
>
> Anyway, I find ultimately that competency is established, the presumption of competency applies, and I do not find it has been overcome by the evidence at the hearing.

08/23/2012 RP 189-90 (emphasis added). It later reduced these findings to a more abbreviated written order. CP 251-52. *See* 11/09/12 RP 11-12.

The defendant now argues that the trial court erred in finding S.L. competent to testify for two reasons.

First, he contends the second ***Allen*** factor was not satisfied because the trial court "glossed over" S.L.'s mental capacity at the time of the occurrence by failing to properly consider whether the incident occurred when S.L. was living with him in 2009 or when her mother was at a bachelorette party in October, 2010. BOA, p. 36-41. The record shows otherwise.

The Washington State Supreme Court has held that where there is ***nothing*** in the record "establishing the date or time period of the alleged sexual abuse," the trial court cannot "determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it." ***Matter of Dependency of A.E.P.***, 135 Wn.2d 208, 223-25, 956 P.2d 297 (1998).

However, that was not the case here. Here, there was evidence that the alleged abuse occurred on one night from late December, 2008 until September of 2009, *or* on the night of Ling's late October, 2010 party. RP 335. *See* 08/23/2012 154-55, 08/22/2012 RP 90-92; RP 375-76, 380-82, 389-91, RP 382, 415.

Thus, contrary to defendant's contention, the trial court could not improperly "lump" the time at which S.L. was living with the defendant together with the time at which she stayed the night in 2010, in determining competency. Rather, the court was required to determine whether S.L. was competent to testify regarding events during the full length of the July 11, 2008 to December 31, 2010 charging period, *see* CP 46, or at least on the dates S.L. had alleged that the incident may have occurred.

The trial court here took pains to determine when the incident was alleged to have occurred. RP 178-79.

Most important, the Supreme Court in ***A.E.P.*** noted that "a child must be able to demonstrate, at least, the ability 'to receive just impressions of and accurately relate events which occurred at least contemporaneously with the incidents at issue .'" *Id.* at 225 (*quoting* ***State v. Przybylski***, 48 Wn. App. 661, 665, 739 P.2d 1203 (1987)). Hence, "[i]f the child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well." *Id.*

Here, there was ample evidence in the record that S.L. had "the ability 'to receive just impressions of and accurately relate events which occurred at least contemporaneously with," ***A.E.P.***, 135 Wn.2d at 225, both (1) the time at which she lived with the defendant, and (2) that at which she stayed the night because of her mother's party. Therefore, regardless of when the incident occurred, there was evidence from which the court could properly "infer [that S.L. wa]s competent to testify about the abuse incidents." *Id.*

Specifically, S.L. testified that she was born on July 11 and that she has two brothers, 08/23/2012 RP 139-40.

S.L.'s mother, Leona Ling, confirmed that S.L. was born on July 11, 2002, and that S.L. has two brothers. 08/22/2012 RP 88.

S.L. described a cross-country trip to Wisconsin and New York that she took with her mother and mother's now-husband, Chris. 08/23/2012 RP 147-48, 152.

Ling confirmed that she, Chris, and S.L. went on a cross-country trip from July 4 through the middle of August, 2007, during which they visited Wisconsin and New York. 08/22/2012 RP 93.

With respect to the period during which she lived with the defendant, S.L. testified that she had last resided with the defendant when she was six years of age, and that they lived in a one-bedroom, one bath apartment in Tacoma, Washington. 08/22/2012 RP 145; RP 309-10.

Ling confirmed that S.L. lived with the defendant in a one-bedroom, one bath apartment in Tacoma, Washington from the end of December, 2008 until August or September of 2009. 08/22/2012 RP 90-92; RP 375-76, 380-82, 389-91. S.L. would have been six years of age for most of this time. *See* 08/22/2012 RP 88.

The defendant also confirmed that S.L. lived with him in 2009 when she was six years old. RP 890, 895.

S.L. testified that she lived there with her two brothers, the defendant's father, Jack Hesselgrave, and a cat named Stripe. 08/22/2012 RP 145; RP 310-12, 381-82, 404.

Ling confirmed that S.L. lived in that apartment with her two brothers, the defendant's father, Jack Hesselgrave, and a cat named Stripe. 08/22/2012 RP 94-95.

S.L. testified that, while living in the defendant's apartment, she slept in what had been the defendant's father's bed. RP 350, 404. She clarified that she never slept in the same bed with the defendant's father. RP 350.

The defendant confirmed that S.L. slept in his father's bed. RP 891.

S.L. testified that, after moving out of the defendant's apartment, she lived in a motel named the "Best Nights Inn" with her mother. 08/23/2012 RP 148; RP 308, 321-22.

Ling confirmed that, after S.L. left the defendant's apartment, she and S.L. stayed in a motel called the Best Night Inn. 08/22/2012 RP 95; RP 376-77.

S.L. told the forensic interviewer that the incident at issue occurred while she lived with the defendant, but she testified that it occurred after she moved out, while the defendant babysat her one night during her mother's bachelorette party. RP 335. *See* 08/23/2012 154-55.

Ling confirmed that S.L. did stay with the defendant at his apartment one night after she moved out, sometime in late October, 2010, while Ling was at her bachelorette party. RP 382, 415.

S.L. testified that on the night of the incident in question, after engaging in multiple acts of sexual intercourse with her, the defendant showed her "a video of this woman having sex with an elephant." on his computer. RP 320.

The defendant confirmed that he watched pornography and masturbated in his apartment in the same area in which S.L. slept. RP 905-06. He also confirmed that he watched pornography involving animals. RP 907.

S.L. testified that her mother, Leona Ling, married Chris Ling on April 1 in a little church in Lakewood, Washington, though she did not recall the year in which they married. RP 308.

Ling confirmed that she married Christopher Ling on April 1, 2011. RP 371.

Hence, there was ample evidence in the record that S.L. had "the ability 'to receive just impressions of and accurately relate events which occurred at least contemporaneously with," ***A.E.P.***, 135 Wn.2d at 225, the acts at issue here, whether those acts occurred when she lived with the defendant or in October, 2010.

Because where a "child can relate contemporaneous events, the court can infer the child is competent to testify about the abuse incidents as well," ***A.E.P.***, 135 Wn.2d at 225, and S.L. was able to relate events contemporaneous to the July 11, 2008 to December 31, 2010 time period, she was competent to testify about the abuse that occurred during this time period.

Hence, the court did not err in so finding, and the defendant's conviction should be affirmed.

The defendant next argues that "there is a serious question about the potential impact of the therapy and interrogation S.L. underwent as a result of the abuse by Palfrey," and seems to imply that this question should have negated the court's affirmative finding of the third ***Allen*** factor, BOA, p. 41-42, but the defendant fails to show why.

In ***A.E.P.***, the Supreme Court did hold that

> a defendant can argue memory taint at the time of the child's competency hearing. ***If a defendant can establish a child's memory of events has been corrupted by improper interviews***, it is possible the third Allen factor, "a memory sufficient to retain an independent recollection of the

> occurrence [,]" may not be satisfied. ***Allen***, 70 Wash.2d at 692, 424 P.2d 1021

Matter of Dependency of A.E.P., 135 Wn.2d 208, 230, 956 P.2d 297 (1998) (emphasis added).

In this case, however, the defendant has made no showing that S.L.'s memory was corrupted by improper interviews. *See* BOA, p. 1-59. While he notes that S.L. was in therapy with Anna Watson, a mental health therapist, and that Watson, in his words, "admitted giving positive reinforcement when S.L. made disclosures," BOA, p. 42-43, Watson also testified that her work with S.L. was entirely focused on the incident involving Palfrey, and that neither the defendant nor his abuse was never discussed. RP 620. *See* RP 614-16, 630, 643.

Because the defendant has not shown that such therapy regarding an unrelated incident actually corrupted S.L.'s memory regarding the present incident, the defendant has failed to "establish" that S.L.'s "memory of events has been corrupted by improper interviews." ***A.E.P.***, 135 Wn.2d at 230.

Moreover, given the above-described testimony of S.L. regarding events contemporaneous to the incident, and its corroboration by other witnesses, there was ample testimony in the record to support the trial court's finding that "S.L. has sufficient memory to retain an independent recollection of the incident." CP 252; ***Allen***, 70 Wn.2d at 692.

Hence, the third ***Allen*** factor was established, and the court did not err in finding S.L. competent to testify.

Finally, the defendant argues that S.L.'s statements were improperly admitted under RCW 9A.44.120 because, he contends, that S.L. was not competent to testify "and there was insufficient corroboration to support entry of her hearsay statements." BOA, p. 36-37, 43-44. The record demonstrates otherwise.

RCW 9A.44.120 provides:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another . . . is admissible in evidence in . . . criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120.

In ***State v. Ryan***, 103 Wn.2d 165, 691 P.2d 197 (1984), the Washington Supreme Court established nine factors for the trial courts to consider when making the determination of whether a child's out-of-court statements are reliable:

1. Whether there is an apparent motive to lie;
2. The general character of the declarant;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously; and
5. The timing of the declaration and the relationship between the declarant and the witness.
6. The statement contains no express assertions about past facts;
7. Cross-examination could not show the declarant's lack of knowledge;
8. The possibility of the declarant's faulty recollection is remote; and
9. The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at 175-76 (adopting the first five factors from ***State v. Parris***, 98 Wn.2d 140, 654 P.2d 77 (1982) and the last four factors from ***Dutton v. Evans***, 400 U.S. 74, 27 L.Ed.2d 213, 91 S. Ct. 210 (1970)).

Hence, under RCW 9A.44.120(2), "corroborative evidence of the act" is only necessary to the admissibility of a child's statements if the child "[i]s unavailable as a witness." Where the court finds "that the time, content, and circumstances of the statement[s] provide sufficient indicia of reliability" and the child.... [t]estifies at the proceedings," the statements

are properly admissible at trial regardless of whether there is any "corroborative evidence of the act." RCW 9A.44.120(2).

In this case, as described above, the court properly found S.L. competent to testify, CP 251-52, and found her statements to be reliable, CP 253-54. Moreover, S.L. did, in fact, testify at trial. Therefore, under RCW 9A.44.120(2), her statements were properly admissible at trial regardless of whether there was any "corroborative evidence of the act." RCW 9A.44.120(2).

As a result, the defendant's argument "that there was insufficient corroboration to support entry of her hearsay statements," BOA, p. 44, is irrelevant to the admissibility of those statements.

Because the court properly found S.L. competent to testify, CP 251-52, found her statements to be reliable, CP 253-54, and, S.L. in fact testified at trial, the court properly admitted her statements.

Therefore, the defendant's conviction should be affirmed.

4. THE DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT BY FAILING TO SHOW EITHER IMPROPER CONDUCT OR PREJUDICE.

"Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have

corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011); ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (*citing* ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (*quoting* ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (emphasis in original).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); ***State v. Fisher***, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); ***State v. McKenzie***, 157 Wn.2d 44, 134 P.3d 221 (2006) (*quoting* ***State v. Brown***, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor's comments were improper. ***Anderson***, 153 Wn. App. at 427. "The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." ***Anderson***, 153 Wn. App. at 427-28, 220 P.3d 1273. It is not misconduct for a prosecutor to argue that the evidence does not support a

defense theory, ***State v. Russell***, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." ***Russell***, 125 Wn.2d at 87. Moreover, "[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Id.* at 86.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (*quoting* ***Brown***, 132 Wn.2d at 561, 940 P.2d 546; ***Fisher***, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (*quoting* ***Brown***, 132 Wn.2d at 561; ***State v. Johnson***, 158 Wn. App. 677, 683, 243 P.3d 936 (2010). "[R]emarks must be read in context." ***State v. Pastrana***, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); ***Larios-Lopez***, 156 Wn. App. at 261.

Prosecutorial misconduct may be neutralized by a curative jury instruction, ***Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court's instructions. ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

In the present case, the defendant argues that the deputy prosecutor presented an improper "false choice" in closing argument, by contending that, in order to acquit the defendant, the jury must find that "someone coached S.L." or that "she made it up on her own." BOA, p. 44-52. The record demonstrates otherwise.

"[I]t is misconduct for a prosecutor to argue that ***in order to acquit*** a defendant, the jury must find that the State's witnesses are either lying or mistaken," ***State v. Fleming***, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018, 936 P.2d 417 (1997) (emphasis added). *See* ***State v. Lewis***, 156 Wn. App. 230, 241, 233 P.3d 891 (2010); ***State v. Miles***, 139 Wn. App. 879, 162 P.3d 1169 (2007). Such an argument "misstate[s] the law and misrepresent[s] both the role of the jury and the burden of proof" because "[t]he jury would not have had to find that [the State's witness] was mistaken or lying in order to acquit; instead, it was required to acquit unless it had an abiding conviction in the truth of her testimony." ***Fleming***, 83 Wn. App. at 213.

However, "[i]n closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of witnesses and arguing inferences about credibility based on evidence in the record." ***State v. Millante***, 80 Wn. App. 237, 250-51, 908 P.2d 374 (1995).

Here, the deputy prosecutor made the following remarks during closing argument:

> All right. So here's what ***it*** really comes down to in this case. There's three possibilities for what happened: Someone coached S[.L.]; S[.L.] made it up on her own, or she is telling the truth. That's it.
>
> [Defense Attorney]: Objection. That's improper argument.
>
> THE COURT: Overruled.

RP 938 (emphasis added). The prosecutor also projected a PowerPoint slide listing these three possibilities, *see* Exhibit 25, before discussing each in turn and ultimately arguing that the evidence supported the conclusion that S.L. was telling the truth in her accusation of sexual intercourse. RP 938-47; Exhibit 25.

However, the prosecutor here, unlike that in ***Fleming***, never argued that the jury had to find anything "in order to acquit [the] defendant." ***State v. Fleming***, 83 Wn. App. 209, 213. *See* RP 923-48, 973-79.

In fact, just prior to the challenged comments quoted above, he told the jury that it was the State which must prove the elements of the charged

crime beyond a reasonable doubt, *see* RP 925-26, 927-29, and he concluded his closing by reminding the jury of this burden of proof and exhorting it to "evaluate the evidence, and follow the law." RP 947-48.

The challenged comments themselves were made as part of an extended discussion of the concept of witness credibility. *See* RP 929-46. In this context, when the deputy prosecutor referred to "what ***it*** really comes down to in this case," the "***it***" to which he was referring was the victim's credibility, not the defendant's guilt. The prosecutor reminded the jurors that they were "the sole judges of credibility," RP 943, and argued that S.L. was credible. RP 945-46; Exhibit 25.

Never did the prosecutor here, like that in ***Fleming***, state or imply that, in order to acquit the defendant, the jury must find that the victim was coached or otherwise "making up" her version of events. *See* RP 923-48, 973-79. Never did the prosecutor here tell the jury that it must find anything to find the defendant not guilty. *See* RP 923-48, 973-79.

Instead, he repeatedly told the jury that the State bore the burden of proving the elements of the charged crime, and that the jury had a duty to evaluate the evidence and follow the law. RP 947-48.

Thus, the prosecutor here did not present an improper "false choice." He simply argued that the evidence showed that S.L.'s testimony was credible. Because a prosecutor may "argu[e] inferences about

credibility based on evidence in the record," ***Millante***, 80 Wn. App. at 250-51, the prosecutor's argument here was proper, and the defendant's conviction should be affirmed.

The defendant also seems to argue that the following statements in the prosecutor's rebuttal argument created an improper false choice:

> So go back to that jury room. Review the evidence, and, remember how she [i.e., S.L.] was on the stand when she described it and ask yourself, is that ten-year-old girl pulling the wool over my eyes or is that a ten-year-old girl describing something no ten-year-old girl should ever have to? Find him guilty.

RP 978-79. *See* BOA, p. 50-51.

Here, the prosecutor simply asked the jury to "[r]eview the evidence" in the record, and using that evidence, to evaluate the credibility of S.L. "on the stand." RP 978. While he did ask the jury to find the defendant guilty, he never told the jury that it had to find anything to find him not guilty. Thus, the prosecutor never presented the jury with an improper false choice.

Rather, he seems to have urged the jury to return a verdict of guilty based on the evidence in the record and the credibility of S.L. which that evidence established. Given that a prosecutor may "argu[e] inferences about credibility based on evidence in the record," ***Millante***, 80 Wn. App.

at 250-51, the prosecutor's argument here was proper, and the defendant's conviction should be affirmed.

Even were it assumed *arguendo* that the prosecutor's argument in closing or rebuttal was improper, the defendant has not shown prejudice.

Even had the deputy prosecutor somehow implied that the jury must find something to find the defendant not guilty, he explicitly told the jury the opposite. In his closing argument, before making the challenged comments, he referred the jury to the court's "to-convict" instruction, calling it "the road map instruction." RP 925-26. That instruction specifically told the jury that each of the elements of the charged crime "must be proved beyond a reasonable doubt" in order to find the defendant guilty, and that "if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your ***duty*** to return a verdict of not guilty." CP 203-19 (instruction no. 6) (emphasis added).

After the challenged comments in his closing argument, the deputy prosecutor again reminded the jury of the burden of proof beyond a reasonable doubt by drawing the jury's attention to the court's instruction defining reasonable doubt. RP 946. *See* CP 203-19 (instruction no. 2).

The deputy prosecutor then concluded his closing argument by arguing to the jury that it should convict the defendant only if it found that the State had proven the charge beyond a reasonable doubt:

> As I said, the jury has faced this burden every day, beyond a reasonable doubt. It's a high burden, but jurors face it every day. ***You have a duty, a responsibility, to evaluate this case, evaluate the evidence, and follow the law. Make sure that you evaluate it, but if you find that the State has proved its case beyond a reasonable doubt, your job is to return a verdict of guilty.***

RP 947-48 (emphasis added).

Thus, the deputy prosecutor explicitly told the jury that the State bore the burden of proving the elements of the charged crime beyond a reasonable doubt, that it had a duty to "evaluate the evidence, and follow the law," and asked the jury to return a verdict of guilty only if it "f[ou]nd that the State has proved its case beyond a reasonable doubt." RP 947-48. The court also instructed the jury that it had a duty to acquit if the jury had "a reasonable doubt as to any one of these elements," and properly defined "reasonable doubt" for the jury. CP 203-19 (instruction no. 6, 2).

Hence, even were the challenged comments to be construed as an implied argument that the jury must find something to find the defendant not guilty, the jury was explicitly told just the opposite by the prosecutor, RP 925-26, 946-48, the court, RP 921-22, CP 203-19, and the defense attorney. RP 948, 966.

In this context, there can be no "substantial likelihood" that any "misconduct affected the jury's verdict," ***Yates***, 161 Wn.2d at 774, and thus, any such misconduct cannot be considered prejudicial.

As a result, the defendant has failed to meet his burden of showing prosecutorial misconduct by failing to show either improper conduct or prejudice.

Therefore, his conviction should be affirmed.

5. THE COURT PROPERLY IMPOSED THE CONDITIONS OF COMMUNITY CUSTODY WITH THE EXCEPTION OF THE WORDS "FROM A LICENSED PHYSICIAN" IN CONDITION 13 OF APPENDIX H, BECAUSE THE REMAINING PORTIONS OF CONDITION 13 AND THE REMAINING CONDITIONS WERE STATUTORILY AUTHORIZED AND CONSTITUTIONAL.

For a community custody condition to be proper, it "must be authorized by the legislature because it is solely the legislature's province to fix legal punishments." ***State v. Kolesnik***, 146 Wn. App. 790, 192 P.3d 937 (2008).

When a court sentences a person to a term of community custody, it must impose the mandatory conditions listed in RCW 9.94A.703(1), and, unless waived by the court, the conditions listed in RCW 9.94A.703(2). The court may also impose certain discretionary conditions, RCW 9.94A.703(3), including ordering the offender to "[p]articipate in crime-related treatment or counseling services," and to

"[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(c) & (f).

"Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable." ***State v. Bahl***, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); ***State v. C.D.C.***, 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). "Imposition of an unconstitutional condition would... be manifestly unreasonable." ***Bahl***, 164 Wn.2d at 753. Likewise, a sentencing court abuses its discretion when it exceeds its sentencing authority. ***C.D.C.***, 145 Wn. App. at 625. When a sentencing court imposes an unauthorized condition of community custody, appellate courts remedy the error by remanding the matter with instructions to strike the unauthorized condition. ***State v. O'Cain***, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

In the present case, the court imposed conditions of community custody, including conditions 13, 16, and 25 of appendix H, CP 225-41, 242-44, which are now challenged by the defendant "not statutorily authorized or... unconstitutional." Brief of Appellant, p. 53-59.

Although the defendant did not object to these conditions during his sentencing hearing, 11/09/12 RP 9-10, this does not necessarily

preclude his challenge here. *See. e.g.,* ***State v. Jones***, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (a sentence imposed without statutory authority may be raised for the first time on appeal).

Condition 13 provides that the defendant "shall not possess or consume any controlled substances without a valid prescription ***from a licensed physician***." CP 243.

RCW 9.94A.703(2)(c) provides that "[u]nless waived by the court, as part of any term of community custody, the court shall order an offender to: (c) Refrain from possessing or consuming controlled substances ***except pursuant to lawfully issued prescriptions.***" (emphasis added).

Prescriptions, however, can be lawfully issued by, among others, registered nurses, advanced nurse practitioners, osteopathic physicians, and physician assistants, RCW 69.41.030, in addition to licensed physicians. Because RCW 9.94A.703(2)(c) only allows the court to order an offender to "[r]efrain from possessing or consuming controlled substances ***except pursuant to lawfully issued prescriptions***," and lawfully issued prescriptions may be issued by people other than licensed physicians, it does not appear that the court here had statutory authority to limit the controlled substances the defendant may possess or consume to those prescribed by "a licensed physician" only.

Therefore, the court should remand to strike the words "from a licensed physician" from the otherwise valid condition 13 so that condition 13 reads: "You shall not possess or consume any controlled substances without a valid prescription." *See* CP 243.

Condition 16 provides

> Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason, unless approved as per #14 above. Do not have any contact with physically or mentally vulnerable individuals.

CP 243.

Condition 14 indicated that contact "will need to be supervised, and will require prior approval by the Sexual Deviancy Treatment Provided and the [Community Corrections Officer, or] CCO." CP 243.

The defendant argues that condition 16 was not statutorily authorized, BOA, p. 56-57. Specifically, he contends that the condition was improper because "[t]here is no evidence that the case involved 'physically or mentally vulnerable individuals.'" BOA, p. 56. The record shows otherwise.

"As part of any term of community custody, the court may order an offender to:... (b) [r]efrain from direct or indirect contact with the victim of the crime ***or a specified class of individuals***." RCW 9.94A.703(3)(b) (emphasis added).

The Supreme Court has indicated that the provision allowing no contact with a "' specified class of individuals' seems in context to require some relationship to the crime," and that "[i]t is not reasonable... to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime," ***State v. Riles***, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled in part on other grounds by* ***State v. Valencia***, 169 Wn.2d 782, 239 (2010).

Here, however, contrary to the defendant's assertion, there is clear "evidence that the case involved [a] 'physically or mentally vulnerable individual[].'" BOA, p. 56. It involved S.L., a 6-year-old girl who was, at the time of the offense, entirely dependent on the defendant for her care and shelter. In fact, the defendant testified that he had essentially been the man who raised her. RP 896. Because the victim was a little girl who saw the defendant as a father figure, and depended on him for everything at the time of the event, she was the quintessential "physically [and] mentally vulnerable individual." Hence, the "class of individuals" specified in condition 16 as "physically or mentally vulnerable individuals," CP 243, bore a strong "relationship to the crime," ***Riles***, 135 Wn.2d at 350, which the defendant committed against a physically and mentally vulnerable individual named S.L.

Thus, that condition was authorized by RCW 9.94A.703(3)(b), and reasonable under ***Riles***, 135 Wn.2d 326, 350. It should therefore, be affirmed here.

Condition 25 provides

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 244.

Although the defendant argues that this condition "exceeds statutory authority" and "violates [his] due process right," BOA. P. 57-59, the record shows otherwise.

First, the condition was statutorily authorized. "As part of any term of community custody, the court may order an offender to:... (f) [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f).

"A 'crime-related prohibition' is an order prohibiting conduct that directly relates to the circumstances of the crime." ***State v. Zimmer***, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Community custody prohibitions need not be "causally related to the crime," just "directly related." ***State v. Letourneau***, 100 Wn. App. 424, 432, 997 P.2d 436 (2000). A sentencing court has broad discretion to impose reasonably

crime-related conditions on community custody under RCW 9.94A.703; ***O'Cain***, 144 Wn. App. at 775.

Here, S.L. testified at trial that after the defendant woke her, he engaged in sexual intercourse with her, showed her pornography in both print and video format, and had her brother engage in sexual intercourse with her. RP 313-21. The defendant himself admitted to watching pornography and masturbating in the apartment where his children slept. RP 905-06. He also testified that S.L. may have seen him masturbating while watching pornography. RP 906.

Hence the portion of condition 25 prohibiting the defendant from "possess[ing] or perus[ing] sexually explicit material in any medium," CP 244, directly relates to the defendant's crime, which involved him possessing and perusing sexually explicit materials in two different mediums with the victim. *See* RP 313-21. Hence it is statutorily authorized by RCW 9.94A.703(3)(f).

One may also infer from the record that the sexually explicit materials used by the defendant in this crime were produced and/or sold by "establishments that promote the commercialization of sex." *See* RP 905-06. After all, the pornographic magazine in the defendant's possession was produced and sold by some entity. The same is probably true of the video. Given that many "establishments that promote the

commercialization of sex" do so by selling magazines and videos of the type used by the defendant in this crime, the portion of condition 25 prohibiting him from "patronizing... establishments that promote the commercialization of sex" also "directly relates to the circumstances of the crime," ***Zimmer***, 146 Wn. App. at 413. It is therefore, statutorily authorized by RCW 9.94A.703(3)(f).

Finally, while the underlying crime did not involve the defendant patronizing a prostitute, it did involve illicit sexual intercourse between the defendant and an underage girl. Because the essence of the service exchanged in an act of prostitution is typically sexual intercourse, condition 25's prohibition on patronizing prostitutes also "directly relates to the circumstances of th[is] crime," ***Zimmer***, 146 Wn. App. at 413, which involved sexual intercourse.

Moreover, patronizing a prostitute is a crime. RCW 9A.88.110. Hence, a condition requiring the defendant not to patronize prostitutes is a condition requiring the defendant to engage in law-abiding behavior. Because trial courts are allowed to impose conditions requiring offenders to engage in law-abiding behavior, ***Jones***, 118 Wn. App. at 205-06, the trial court here did not err by imposing this condition.

Therefore, condition 25 was statutorily authorized by RCW 9.94A.703(3)(f) and ***Jones***, 118 Wn. App. at 205-06.

Although the defendant also argues that condition 25 is "unconstitutionally vague" because "there is no definition of what places exactly promote the 'commercialization of sex,'" BOA, p. 57-58, the record shows otherwise.

Under the due process clause of the Fourteenth Amendment to the federal constitution and Article I, section 3 of the Washington State constitution, "a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement." ***State v. Sansone***, 127 Wn. App. 630, 111 P.3d 1251 (2005); ***Bahl***, 1164 Wn.2d at 752-53.

Moreover, "'[v]agueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and precision is demanded of criminal statutes because their consequences are more severe.'" ***Bahl***, 164 Wn.2d at 753 (*quoting* ***United States v. Williams***, 444 F.3d 1286, 1306 (11th Cir.2006), *rev'd on other grounds*, 553 U.S. 285, 128 S. Ct. 1830, 170 L.Ed.2d 650 (2008)).

However, "[i]n deciding whether a term is unconstitutionally vague, the terms are not considered in a "vacuum," rather, they are considered in the context in which they are used." ***Bahl***, 164 Wn.2d at

754. "When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary." *Id.* Moreover, "[i]f 'persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.'" *Id.* (*quoting* ***City of Spokane v. Douglas***, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). "'[I]mpossible standards of specificity' 'are not required since language always involves some degree of vagueness." *Id.* at 759 (*citing* ***State v. Halstien***, 122 Wn.2d 109, 118, 857 P.2d 270 (1993) (*quoting* ***City of Seattle v. Eze***, 111 Wn.2d 22, 26, 759 P.2d 366 (1988))).

In this case, the challenged provision of condition 25 provides: "[d]o not patronize... establishments that promote the commercialization of sex." CP 244. While the defendant argues that the term "commercialization of sex" is unconstitutionally vague, the "the plain and ordinary meaning as set forth in a standard dictionary" shows otherwise. ***Bahl***, 164 Wn.2d at 754. The dictionary definition of commercialization" is "to subject to the condition of commerce: ***make into a form of trade***." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (emphasis added). When this definition is read into condition 25, it is clear that this condition prohibits the defendant from patronizing businesses that trade in sex or sexual materials. Hence, as the Court in ***Bahl*** held when

analyzing a similar provision, "the condition is sufficiently clear: in that 'i[t] restricts [the defendant] from patronizing adult bookstores, adult dance clubs, and the like.'" ***Bahl***, 164 Wn.2d at 759. Because persons of ordinary intelligence could understand what the condition 25 proscribes, notwithstanding some possible areas of disagreement, it is sufficiently definite, and not unconstitutionally vague.

Although the defendant also contends that the provision of condition 25 prohibiting him from patronizing establishments that promote the commercialization of sex violates the First Amendment, the record shows otherwise.

The Supreme Court has held that restrictions implicating First Amendment rights "must be reasonably necessary to accomplish essential state needs and public order." ***Bahl***, 164 Wn.2d at 759.

Here, the defendant committed his crime, in part using materials produced by businesses that promote the commercialization of sex: he showed his 6-year-old victim print and video pornography immediately after engaging in sexual intercourse with her. If the defendant had been prohibited from patronizing establishments that promote the commercialization of sex, he could not have done so. Thus, prohibiting him from doing so in the future may be considered reasonably necessary to prevent him from re-offending. Moreover, such a requirement could

very well also be a requirement of his court-ordered sexual deviancy treatment program. *See* CP 243 (condition 11). Hence, this condition is "reasonably necessary to accomplish essential state needs and public order," ***Bahl***, 164 Wn.2d at 759, and does not violate the First Amendment.

Finally, the defendant argues that the portion of Condition 25 prohibiting him from "possess[ing] or us[ing] any cell phone that may provide access to the Internet," CP 244, should be stricken because it violates the First Amendment. BOA, p. 58-59. The record shows otherwise.

As the defendant admits, his crime involved "using the Internet to view pornography." BOA, p. 58-59. In fact, he showed that pornography to his underage victim. RP 313-21. Therefore, this requirement is reasonably necessary to accomplish the essential state need of crime prevention. Although the defendant claims that "it is likely that every cell phone 'may' provide Internet access," he provides no support for this proposition, and therefore, no support for the idea that condition 25 would prevent him from owning a cellular phone. *See* BOA, p. 59.

Rather, this requirement is reasonably necessary to prevent him from re-offending and likely, to successfully completing treatment. Therefore, it does not violate the First Amendment.

Hence, community custody conditions 16 and 25 were entirely statutorily authorized and constitutional. They should therefore be affirmed.

Condition 13 is also statutorily authorized and valid, with the exception of the final phrase: "from a licensed physician." Therefore, the Court should remand only to strike that phrase from that otherwise valid condition such that condition 13 reads: "You shall not possess or consume any controlled substances without a valid prescription."

D. CONCLUSION.

The trial court properly excluded testimony concerning prior statements of the victim which were not inconsistent with her trial testimony and properly excluded documentary evidence which was impermissibly prejudicial. Therefore, it did not violate Defendant's rights to present testimony or confront and cross-examine adverse witnesses.

The defendant failed to show ineffective assistance of counsel because he failed to show that his counsel's performance was deficient.

The trial court properly found S.L. competent and properly admitted her statements to others regarding the defendant's abuse.

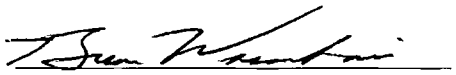
The defendant failed to meet his burden of showing prosecutorial misconduct by failing to show either improper conduct or prejudice.

Finally, the trial court properly imposed the conditions of community custody, with the exception of the words "from a licensed physician" in Condition 13 of Appendix H, because the remaining portion of Condition 13 and the remaining conditions were statutorily authorized and constitutional.

Therefore, the Court should affirm the defendant's conviction, but remand only to strike the words "from a licensed physician" from Condition 13 so that this condition reads: "You shall not possess or consume any controlled substances without a valid prescription."

DATED: December 20, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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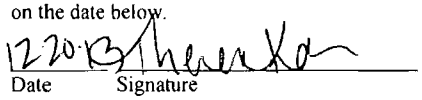
12-20-13 
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