NO. 44453-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HOLLOWAY,

Appellant.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Constitutional Provisions

Statutes

Rules

Other Authorities

A. SUMMARY OF ARGUMENT

Brian Holloway received a fundamentally unfair trial. First, the trial court excluded evidence highly relevant to the complaining witness's credibility. In fact, the evidence the trial court held to be irrelevant and prejudicial was the complaining witness's prior similar accusation followed by a recantation. This error denied Mr. Holloway's constitutional rights to confront witnesses, to present a defense, and to due process.

Furthermore, two of the convictions should be reversed and dismissed because the State presented insufficient evidence. In addition, the trial was unconstitutional because the court's instruction and the prosecutor's argument diluted the State's burden of proof.

In the alternative, this Court should remand to correct an unauthorized sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Holloway's constitutional rights to a fair trial, to present a defense and to cross-examine witnesses when it excluded relevant evidence that was more probative than prejudicial.

2. In violation of Mr. Holloway's constitutional right to due process, the State failed to prove all the elements of rape of a child, counts four and eight, beyond a reasonable doubt.

3. Instruction 3, and the prosecutor's argument relying on it and telling the jurors to trust what was in their guts, hearts and minds, misstated the definition of proof beyond a reasonable doubt and diluted the State's burden of proof.

4. The sentencing court exceeded its statutory authority in imposing combined terms of confinement and community custody that exceed the statutory maximum.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee an accused the right to present a defense, to confront witnesses against him, and to a fair trial. Did the trial court deny these rights by excluding evidence that the complaining witness had recanted prior allegations of similar sexual abuse by a different individual, and does this error require reversal where the complaining witness's credibility was a central issue at trial?

2. Constitutional due process guarantees a defendant may not be convicted unless the State proves every element of the crime beyond

a reasonable doubt. To prove the crime of rape of a child, the State must prove beyond a reasonable doubt that the accused had sexual intercourse with the complaining witness. Sexual intercourse is defined as penetration of the vagina, however slight. Did the State fail to meet its burden on two counts where the evidence did not show penetration of the vagina?

3. The jury's role is to decide whether the prosecution met its burden of proof, not to search for the truth. The court instructed the jury that it could find the State met its burden of proof if it had an "abiding belief in the truth of the charge." The prosecutor emphasized this erroneous standard in argument and further diminished the burden of proof by telling the jury to rely on what was in their guts, their mind, their hearts. When it is not the jury's job to determine the truth, did the erroneous instruction and the prosecutor's reliance on it misstate and dilute the burden of proof in violation of due process by focusing the jury on whether it believed the charge was true?

4. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority for felony offenses. Under RCW 9.94A.701(9) the trial court must reduce the term of community custody where the combined terms of community custody and

confinement exceed the statutory maximum for an offense. Where the trial court imposed combined terms of incarceration and community custody that exceed the statutory maximum on three counts, must this Court order the trial court to correct the erroneous sentences?

D. STATEMENT OF THE CASE

Brian Holloway's oldest daughter has special needs, and he has provided for her and been her primary caretaker since she was an infant. RP 427, 437, 546-47, 558. His younger daughter, G.S.R., lived with her biological mother outside Washington until she was ten years old. RP 335-36., 370. G.S.R. was born in December 1996. RP 333-34.

While living with her mother, G.S.R. reported that an individual identified as "Uncle Mike" touched her private area, over her clothing, while she was asleep. CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)).[1] She reported the touching caused her to wake up. *Id.* During an ensuing investigation that was coordinated between law enforcement and child protective services in the state in which G.S.R. resided, G.S.R. admitted the allegation was

[1] A supplemental designation of clerk's papers has been filed designating the documents at subfolder 127 (sealing order), 127C (under seal) and 127D (under seal).

false and the case was closed. CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report).

Mr. Holloway assumed full custody of G.S.R when she was ten years old. RP 336, 428, 547. G.S.R. lived with him, his wife Stephanie Holloway, whom G.S.R. considered to be her mother, her older disabled sister and a younger step-brother. RP 335-36, 340-41, 424-25, 438-39. G.S.R. had a close relationship her father and his wife. RP 340-41, 354-55, 382-83, 428, 482.

In July 2011, G.S.R. told Ms. Holloway that Mr. Holloway had inappropriately touched her on the Fourth of July. RP 431, 542-43. The State initially charged Mr. Holloway with one count of child molestation in the second degree, one count of third degree rape of a child, and two counts of incest. CP 3-4.

Over time, G.S.R.'s disclosed increasing occurrences of the alleged abuse. *See* RP 367, 417. The State later amended the information to include five counts of child molestation, four counts of rape of a child, and two counts of incest. CP 9-13 (amended information), 53-57 (second amended information).[2]

---

[2] A chart at Appendix A indicates the charges alleged in each count and the corresponding testimony of the complaining witness produced in support of each count. In response to a defense motion to dismiss and during closing

Mr. Holloway sought records of G.S.R.'s prior recantation and moved to admit the evidence at trial. *E.g.*, CP 16-19; RP 169-82. He obtained records, produced directly to the court, from several agencies, some of which showed that G.S.R. had reported being touched over her clothing while asleep by "Uncle Mike" and that she subsequently recanted the allegation. CP 29-31; CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)).; RP 124-39, 186, 188-92; *see* CP 32-35 (moving for additional discovery). The trial court reviewed the records in camera and kept them sealed from both parties. *E.g.*, RP 148-54, 195, 203. In support of introducing the evidence at trial, or at least viewing the records and cross-examining G.S.R. or other witnesses about the recanted allegations, Mr. Holloway argued the similarity of the allegations, as well as G.S.R.'s prior recantation, made the topic quite relevant to her veracity on the current charges. CP 41, 58-63; RP 91-119, 148-52. The State moved to exclude the evidence, and the trial court agreed, finding it subject to the rape shield statute, irrelevant (although it recognized the case was a

---

argument, the prosecutor indicated which evidence the State alleged in support of each count. Inclusion of the chart is not intended to admit the sufficiency of the State's evidence as to any particular charge.

credibility contest) and, if relevant, more prejudicial than probative. CP 20-25, 36-40; RP 153-54, 169, 216-17, 220-22, 225-31, 237, 512-16. The records were kept under seal except for use on appeal. CP __ (Sub #127 (order sealing)); RP 216-18 (ruling on in-camera review); RP 225-30 (renewed discussion, including that documents would be available for appeal); RP 265-66 (clarifying availability of documents for appeal).

At trial, G.S.R. testified to regular touching of her breasts (over clothing), buttocks, and genitalia that started in 2008. RP 337, 339, 341-64, 386-87. She testified she often cuddled with her father, and after falling asleep, would awaken to him touching her. *E.g.*, RP 339-46, 356-57. A clinical social worker who was treating G.S.R. testified once G.S.R. began disclosing, she disclosed some instances of digital penetration and some instances of rubbing outside her vagina. RP 419. Mr. Holloway testified in his defense and denied he had any sexual contact with G.S.R.. RP 554-55, 567.

Mr. Holloway was convicted as charged. CP 166-87; CP 198-214.

E. ARGUMENT

1. **Brian Holloway's constitutional rights to a fair trial, to present a defense, and to confront witnesses were denied by the court's exclusion of evidence highly probative of the complaining witness's credibility.**

a. An accused has a due process and Sixth Amendment right to confront the complaining witness on her credibility.

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). An accused's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Jones*, 168 Wn.2d at 720. "'The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22.

Denial of a defendant's right to adequately cross-examine an essential prosecution witness as to relevant matters tending to establish

motive or bias violates his Sixth Amendment right to confront the witnesses against him. *State v. Brooks*, 25 Wn. App. 550, 551-52, 611 P.2d 1274 (1980). "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980).

If the evidence is relevant, the State has the burden to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. *Jones*, 168 Wn.2d at 720. The State's interest in excluding prejudicial evidence must "'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" *Id.* (quoting *Darden*, 145 Wn.2d at 622). The integrity of the fact-finding process and a defendant's right to a fair trial are important considerations. *Id.* at 720. Therefore, for evidence of high probative value, no state interest is compelling enough to preclude its introduction consistent with the Sixth Amendment and article I, section 22 of the Washington Constitution. *Id.*

b. The trial court violated Mr. Holloway's rights by excluding evidence that G.S.R. had previously reported and then recanted sexual abuse by another.

The trial court erroneously precluded Mr. Holloway from cross-examining G.S.R. on her recantation of a prior allegation of sexual abuse by a third party. RP 35-37, 153-54, 169, 216-17, 220-22, 230-31, 512-16. Mr. Holloway secured records that verified that G.S.R. had previously reported sexual abuse that was similar to the allegations here, that a law enforcement investigation ensued, and that G.S.R. subsequently recanted and the case was closed. RP 14-27, 91-119, 124-39, 148-52, 169-82, 186, 188-92, 195, 203; CP 29-35, 41-45, 58-63; CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report))..[3] The State objected to admission of the evidence and topic, and the court granted the State's motion to exclude, finding that the evidence was barred by the rape shield statute, was irrelevant, and was more prejudicial than probative. *E.g.*, CP 20-23, 36-39 (State's motions to exclude); RP 14-34, 114-15, 129, 215, 220-22, 225-31. All three bases are unfounded.

[3] Mr. Holloway learned of the recantation while investigating the case and after initial pretrial motions. RP 91-119. Thus, the initial motions and argument focused on the prior alleged abuse without discussion of any recantation or its implications for this trial. *See, e.g.*, CP 16-19.

This Court's case law unquestionably demonstrates that the rape shield statute is inapplicable to prior sexual abuse. *See* RCW 9A.44.020. "Courts should not use Washington's Rape Shield law to exclude evidence that an alleged child victim had previously been abused." *State v. Kilgore*, 107 Wn. App. 160, 177, 26 P.3d 308 (2001) (citing *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984)). The rape shield statute is not applicable to evidence of prior sexual abuse, as opposed to prior misconduct or consensual sexual history. *Carver*, 37 Wn. App. at 124. In such circumstances, the statute's purpose is not implicated because "the evidence is not prejudicial to the victims nor does it tend to discourage prosecution." *Id.*

"Instead," when evaluating the admissibility of prior sexual abuse, "courts should use the general evidentiary principles in ER 403 to balance the probative value of the evidence against the possible prejudice." *Kilgore*, 107 Wn. App. at 177 (citing *Carver*, 37 Wn. App. at 124). Here, reviewing the records in camera, the trial court found it related only to a prior accusation and a closed investigation and ruled the records would not be disclosed to Mr. Holloway as irrelevant to the charges. RP 35-37, 153-54; *see* RP 216-17. In fact, the evidence

established not simply that G.S.R. had previously reported sexual abuse, but that after reporting it and a coordinated investigation between Child Protective Services and law enforcement, G.S.R. recanted. CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)); CP 58-63. The prior allegations, in fact, mirrored those made here—G.S.R. was asleep and awoke to the accused touching her private areas. *E.g.*, CP 59.

The evidence was also highly relevant because the jury would have to decide ultimately whether it found G.S.R. credible. *E.g.*, RP 643, 650, 697 (State's closing and rebuttal argument, emphasizing centrality of G.S.R.'s credibility). "The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619. Nonetheless, the trial court excluded the evidence as irrelevant.

Finally, the court's ruling that the evidence was more prejudicial than probative was likewise erroneous. As noted, because relevance was satisfied, the State bore the burden of showing the evidence should be excluded. *Jones*, 168 Wn.2d at 720. This Court noted almost 30

years ago that evidence of prior sexual abuse is not prejudicial to the alleged victim. *Carver*, 37 Wn. App. at 124. Moreover, here the evidence Mr. Holloway sought to admit was not that G.S.R. had previously been abused but that she was not credible. The court cannot fairly shield a witness from evidence-based attacks on her credibility.

Further, the evidence was unlikely to cause confusion or waste time. Under ER 608, Mr. Holloway would have been limited to cross-examining G.S.R. or other witnesses on the topic of her prior allegation and recantation. But he likely would not have been permitted to admit extrinsic evidence in support.[4] Accordingly, allowing Mr. Holloway to pursue this highly probative evidence would have occupied only minutes in the trial testimony.

In sum, the trial court erred in excluding all reference to G.S.R.'s prior allegations and recantation, and denying Mr. Holloway access to the documents that supported it.

c. The State cannot show exclusion of the evidence was harmless beyond a reasonable doubt.

"Because suppressing this evidence denied [Mr. Holloway] his constitutional right to confront a witness, this error must be harmless

[4] *But see* CP 62 (defense counsel argument that court should use discretion to allow admission of extrinsic evidence for impeachment).

beyond a reasonable doubt to avoid reversal." *Kilgore*, 107 Wn. App. at 178; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (denial of opportunity to fully and effectively cross-examine deprives defendant of constitutional right to confront witnesses).

The State cannot satisfy its burden here. In *Kilgore*, the suppression of evidence that impugned the complaining witness's credibility was not harmless beyond a reasonable doubt despite this Court's acknowledgment that the evidence at trial did not turn on a mere credibility contest between the complaining witness and the accused. 107 Wn. App. at 178-79. Here, on the other hand, the State's case depended on "the jury's belief or disbelief of essentially one witness." *Roberts*, 25 Wn. App. at 834. G.S.R.'s credibility was subject to close scrutiny. RP 237 (court recognize case comes down to he said, she said). The exclusion of evidence that demonstrated her propensity for untruthfulness on the very subject of the charges here was not harmless beyond a reasonable doubt.

2. Counts four and eight should be reversed and dismissed with prejudice because the State failed to prove the essential element of sexual intercourse.

a. Due process requires the State prove each element of the crime beyond a reasonable doubt.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 225 P.3d 237 (2010).

b. Sexual intercourse is an essential element of rape of a child.

To satisfy its burden on rape of a child in the second or third degree, the State must prove that the accused had "sexual intercourse

with another." RCW 9A.44.076(1); RCW 9A.44.079(1).[5] In relevant part, the statute states

> (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes . . . .

RCW 9A.44.010(1)(a).[6] Mr. Holloway's jury was instructed it must find the sexual intercourse element for counts four (rape of a child two) and eight (rape of a child three) and was provided the above definition. CP 114-15 (definitional instructions for rape of a child charges); CP 119 (defining sexual intercourse); CP 125, 129 (to-convict instructions for counts four and eight). With regard to the definition of sexual intercourse, the jury was instructed, "Sexual intercourse means any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another,

---

[5] The degree of the offense depends upon the age of the alleged victim and his or her age relative to the accused. RCW 9A.44.076(1); RCW 9A.44.079(1). The elements are otherwise identical.

[6] The definition of sexual intercourse also includes "sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex." RCW 9A.44.010. But that definition is not at issue in this case as there was no evidence of oral sexual contact.

whether such persons are of the same of opposite sex." CP 119. Mr. Holloway does not contest the validity of this instruction.

The sexual intercourse, or penetration, element of child rape is critical: sexual contact without penetration of the vagina or anus constitutes the separate crime of child molestation, not child rape. RCW 9A.44.086(1); RCW 9A.44.089(1); RCW 9A.44.010(2) ("'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); *State v. Weaville*, 162 Wn. App. 801, 806, 812, 256 P.3d 426 (2011) (reversing rape conviction where jury instructed that contact between sex organs constituted penetration).

The rape of a child statute specifically requires penetration of the "vagina" to constitute sexual intercourse. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998) (an undefined word in a statute should be given its plain, ordinary meaning absent any contrary legislative intent). Notably, the words "vagina" and "anus" were added to the statute, which previously stated only that any "sexual penetration" was sufficient. *See State v. Snyder*, 199 Wash. 298, 299, 91 P.2d 570 (1939); 1975 1st ex. s. ch. 14 § 1 (adding new section to ch. 9.79 RCW).. The vagina is "a canal that leads from

the uterus of a female mammal to the external orifice of the genital canal." *Webster's Third New Int'l Dictionary* 2528 (1993). The vagina is an internal organ of the female reproductive system. Web MD, "Your Guide to the Female Reproductive System," http://www.webmd.com/sex-relationships /guide/your-guide-female-reproductive-system (last visited Sept. 27, 2013); "Human female reproductive system," Wikipedia, http://en.wikipedia.org/wiki/Human_female_reproductive_system#Vagina (updated Sept. 24, 2013).[7] The labia majora and labia minora are a part of the vulva, which is external to the vaginal canal. Web MD, "Your Guide to the Female Reproductive System"; Web MD, "Picture of the Vagina," http://women.webmd. com/picture-of-the-vagina (last visited Sept. 27, 2013); "The Vulva," http://www.3dvulva.com/ (2006).

c. The State failed to prove sexual intercourse on counts four and eight.

In relation to counts four and eight, G.S.R. testified that Mr. Holloway's hand was in between her "creases" or the "folds." RP 347-49, 360, 362.[8] Regarding count four, G.S.R. testified:

A. I remember . . . he was touching my vagina.

---

[7] Copies of the webpages cited herein are attached as Appendix B.

[8] The State contended this testimony from G.S.R. supported counts four and eight. RP 519, 524, 634-35, 637.

Q. How was he touching your vagina?

A. He was rubbing it.

. . .

Q. Was his hand on the skin of your vagina?

A. Yeah, it was in between it. Yes, on my skin.

Q. And when you say in between it, what do you mean?

A. I don't want to say it.

Q. Did his finger go inside you?

A. Not that I recall, but it was almost.

Q. And so when you say in between it, do you mean in between—

A. **In the—**

Q. –the folds of your vagina?

A. Yes.

...

Q. Was his hand moving **on** your vagina?

A. Yes.

RP 347-48 (emphasis added). G.S.R. similarly described the acts allegedly comprising count eight:

A. . . . I remember it was on my day bed [when I had the lava lamp], and he was touching the inside – the – **touching the in-crease** of my vagina and rubbing it.

. . .

A. When I had the lava lamp, . . . He was touching my – my vagina and like – like he was **touching the in-crease** of my vagina, bare skin . . .

RP 360, 362 (emphasis added). In this testimony, G.S.R. did not distinguish between the creases of the labia majora and the creases of the labia minora and the State did not present other evidence to make that distinction on these counts. Under either meaning, however, the evidence was insufficient. The creases of the labia majora and labia minora are external features of the female sexual reproductive organ and not a part of the vagina. Web MD, "Your Guide to the Female Reproductive System"; Web MD, "Picture of the Vagina," http://women.webmd. com/picture-of-the-vagina (last visited Sept. 27, 2013); "The Vulva," http://www.3dvulva.com/.

Notably, the State's proof on the other two counts of rape—counts five and nine, was significantly different. With regard to those counts, G.S.R. testified that Mr. Holloway "fingered" her and that his

hands went inside her like a tampon. RP 350-53, 357, 635, 647; *see* RP 419 (clinical social worker distinguished between G.S.R.'s disclosures of "digital penetration" and "rubbing"). This evidence was distinct from the "creases" evidence set forth above, and the sufficiency of the penetration evidence on counts five and nine is not challenged here.

This Court's decision in *State v. A.M.* further demonstrates that the evidence here as to counts four and eight was insufficient. *State v. A.M.* 163 Wn. App. 414, 260 P.3d 229 (2012). In *A.M.*, this Court similarly reviewed the sufficiency of the evidence under the child rape statute. *Id.* at 416. At issue there, however, was anal, not vaginal, penetration. *Id.* The evidence showed penetration of the buttocks, but did not support penetration of the anus. *Id.* at 417-19. On appeal, A.M. argued "penetration of the buttocks, but not the anus" was insufficient to prove rape of a child because it does not constitute sexual intercourse. *Id.* at 418-19. Reviewing it as an issue of first impression, this Court interpreted the statute. *Id.* at 420. To determine the ordinary meaning of the statutory terms, this Court consulted the dictionary. *Id.* But no definition "say[s] that sexual intercourse occurs upon insertion of the penis between the buttocks." *Id.* Further, in response to the State's argument that "because the buttocks protect the anus from

penetration, they are like the labia, which protect the vagina from penetration," the Court reasoned "This may be true to some extent but it stretches credulity to maintain that the buttocks and anus are components of the same organ or that one is part of the other." *Id.* at 420-21.

Turning to Webster's dictionary definitions, this Court held that the "buttocks" and the "anus" are anatomically "two [distinct] parts, albeit related." *A.M.*, 163 Wn. App. at 421. Because "the legislature has not indicated that penetration of the buttocks alone is sufficient to be sexual intercourse," this Court reversed the rape of a child conviction. *Id.*

The same principle distinguishes penetration of the vulva from penetration of the vagina. The statutory construction principle that a single word in a statute should not be read in isolation compels that the meaning ascribed to "vagina" must comport with the meaning ascribed to the second term in the same statutory provision, "anus." *State v. Flores*, 164 Wn.2d 1, 12-13, 186 P.3d 1038 (2008); ("the meaning of a word may be indicated or controlled by reference to associated words"); *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (applying the principle of *noscitur a sociis*). This Court has

already logically distinguished use of the word "anus" from the anatomically separate "buttocks." The same result is compelled for the companion term, "vagina." The statute requires penetration of the vagina; penetration of the vulva is insufficient.

The limited body of case law interpreting penetration of the vagina under chapter 9A.44 further confirms that the evidence was insufficient here. In *State v. Snyder*, the defendant was charged with "knowing carnally and abusing a girl under the age of eighteen years, who was not his wife." 199 Wash. at 299. The statute provided, "Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge." *Id.* at 300 (quoting Rem. Rev. Stat. § 2437). The statute did not set forth a particular part of the body that had to be penetrated to constitute "sexual intercourse or carnal knowledge." *Id.* Relying on a treatise and cases from other jurisdictions, the court read the statute to require only "the slightest penetration of the body of the female by the sexual organ of the male being sufficient." *Id.* at 301 (quoting 52 Corpus Juris 1015 § 24(b)). Significantly, the State in *Snyder* was required only to prove penetration of the "sexual organ of the female." *Id.* (quoting 52 Corpus Juris 1015 § 24(b)). A "sexual organ" is simply "an organ of the

reproductive system; *esp*: an external generative organ." *Webster's Third New Int'l Dictionary* 2082 (1993) (underlining added). Accordingly, the court held that "penetration of the lips of her sexual organs" was sufficient to satisfy the element of penetration of the sexual organ, however slight.

As discussed, the rape of a child statute with which Mr. Holloway was charged specifies that penetration must be of the vagina or anus. RCW 9A.44.010(1)(a). *Snyder* does not control this Court's interpretation of "sexual intercourse."[9] This Court should also treat with caution decisions that rely on *Snyder* to interpret penetration of the vagina without recognizing the distinct "sexual organ" language at issue in that case.

For example, in *State v. Montgomery* this court interpreted vagina broadly. 95 Wn. App. 192, 974 P.2d 904 (1999). As set forth

[9] In *State v. Bishop*, this Court referred to the definition from *Snyder*, "penetrate[ion], at a minimum, the lips of the of the victim's sexual organs," to interpret sexual intercourse that was defined identically to the current statute. 63 Wn. App. 15, 19, 816 P.2d 738 (1991). The *Bishop* court did not need to rely on this definition, however, because the court determined the admissibility of evidence, not the sufficiency of it to prove the charge, and because the evidence in that case supported penetration of the vagina as opposed to only the vulva. *Id.* at 17-18, 27-28 (victim reported defendant stuck his finger "in my private" and complained of painful urination, which a treating physician testified "would generally not be present unless the introitus, recessed about 1 ½ centimeters from the outside of the labia majora, had been injured by a scratch, contact or irritant"); *id.* at 17 (setting forth issues on appeal).

below, that interpretation was incorrect. However, even under that standard, the State's proof here was insufficient. In *Montgomery*, the trial court had prevented defense counsel from arguing that the labia minora are separate from the vagina; he was limited to stating "[t]he area where the redness occurred is adjacent to the vaginal opening" and "[s]exual intercourse requires penetration, either of the anus or the vagina." *Id.* at 197-98. On appeal, Mr. Montgomery argued the limitation was reversible error. *Id.* at 200. In the limited context of reviewing the adequacy of the trial court's ruling, this Court considered the definition of "sexual intercourse" under the child rape statute. *Id.* Relying on a single dictionary definition of labia minora, "[t]he two inner folds of skin within the vestibule of the vagina enclosed within the cleft of the labia majora[,]" the court held "Clearly the labia minora are part of the statutory definition of vagina. The trial court was correct in its ruling." *Id.* at 200-01 (quoting *The American Heritage Dictionary of the English Language*, 1004 (3d ed. 1992)) (first alteration in original).

Setting aside the scant basis for determining the labia minora are part of the statutory definition of vagina, *Montgomery*'s categorization of the labia minora as part of the vagina for purposes of sexual

intercourse does not save the sufficiency of the State's evidence here. The State did not prove beyond a reasonable doubt that Mr. Holloway's finger penetrated G.S.R.'s labia minora. At best as to counts four and eight, the evidence showed penetration of the "creases" without delineation between the labia majora and the labia minora. Moreover, Webster's Third New International Dictionary provides a more persuasive definition of "labia minora." *Webster's Third New Int'l Dictionary* 1259 (1993). According to Webster's, the single definition of "labia minora" is "the inner highly vascular largely connective-tissue folds bounding the vulva." *Id.*

In light of the above authority, this Court should hold the State's evidence on counts four and eight was insufficient. This result is compelled even if the Court relies on *Montgomery*'s flawed reasoning.

d. Counts four and eight should be reversed and dismissed with prejudice against refiling.

Where the State's evidence is insufficient to prove an offense beyond a reasonable doubt, the only appropriate remedy is to reverse the conviction and dismiss the counts with prejudice against the State refiling. *See, e.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The State presented insufficient evidence of sexual intercourse to satisfy counts four and eight.

Consequently, the convictions on those counts should be reversed and dismissed with prejudice.

3. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge and the prosecutor's argument in closing diluted the State's burden of proof in violation of Mr. Holloway's due process right to a fair trial.

a. The emphasis on the truth of the charge in the court's instructions and the prosecutor's argument diluted the burden of proof.

"The jury's job is not to determine the truth of what happened; a jury therefore does not 'speak the truth' or 'declare the truth.'" *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (emphasis added) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012); *State v. McCreven*, 170 Wn. App. 444, 472-73, 284 P.3d 793, 807-08 (2012). "[A] jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Confusing jury instructions raise a due process concern because they may wash away or dilute the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The court bears the obligation to vigilantly protect the presumption of innocence.

Id. "[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." *Emery*, 174 Wn.2d at 757 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

The trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had "an abiding belief in the truth of the charge." CP 106 (Instruction # 3). By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Emery*, 174 Wn.2d at 741.

Mr. Holloway proposed an instruction without the offensive language. CP 71. However, the court provided the abiding belief in the truth of the charge language over Mr. Holloway's exception. RP 570-73, 581; CP 106.

In *State v. Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), to be "problematic" because it was inaccurate and misleading. 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007).

Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in future cases. *Id.* at 318. WPIC 4.01 includes the "belief in the truth" language only as a potential option by including it in brackets.

The pattern instruction reads:

> *[The] [Each]* defendant has entered a plea of not guilty. That plea puts in issue every element of *[the] [each]* crime charged. The *[State] [City] [County]* is the plaintiff and has the burden of proving each element of *[the] [each]* crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists *[as to these elements]*.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [*If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.*]

WPIC 4.01.

The *Bennett* Court did not comment on the bracketed "belief in the truth" language. Notably, this bracketed language was not a mandatory part of the pattern instruction the Court approved. Recent

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

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

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

b. Additional argument by the prosecutor further diluted the burden of proof.

The error was amplified when the State further diluted the burden on several occasions in closing argument. *See State v. Cronin*, 142 Wn.2d 568, 580-81, 14 P.3d 752 (2000) (incorrect instruction not harmless where prosecutor discussed it during closing argument).

The prosecutor argued that the jury had to "maybe [make] a decision on credibility." RP 643. After discussing credibility briefly, the prosecutor argued that the jurors should also rely on their "gut." RP 643. He argued, "And then you finally – you have other things that you can all look at. But also you have your gut, and your instructions tell

you you're allowed to use your experiences and your own feelings on who you believed on that stand." RP 643. Then, the prosecutor's argument emphasized the erroneous definition of beyond a reasonable doubt: "If you believe [G.S.R.] then you've met that burden of beyond a reasonable doubt. If you believed her, if you believed her as she sat there crying on the stand . . . ." RP 643-44. Even more emphatically, the prosecutor concluded his closing remarks as follows:

> You have no reason to believe she is telling you anything but the truth when she got up there on that stand and told you . . . what happened to her, and you can believe her, and you can know. And if you sit there in that room, as you're talking about it, and you say, "I believe [G.S.R.]. I believe in the truth of what she is saying. I have that abiding belief [in the truth of the charges], a belief that lasts, that I know that this happened to that poor little girl," then you must convict him. And the State asks you to do just that.

RP 650; *accord* RP 641 (emphasizing abiding belief in the truth of the charge standard).

Again in rebuttal, the prosecutor urged the jurors to stray from the evidence and the constitutionally-required beyond a reasonable doubt standard. The prosecutor concluded rebuttal by arguing,

> I ask you to review the evidence, think back over everything you saw the last couple of days, and know what you know in your mind, in your hearts, in every part of you, that that man is very guilty of what he did to that little girl. Thank you.

RP 702-03.

The prosecutor appealed to the jurors to trust what they know in their minds, their hearts and their gut and to find the truth, rather than to determine whether the State had proved each element of each charged offense beyond a reasonable doubt.

c. Mr. Holloway was denied a fair trial, requiring reversal and remand for a new trial.

Individually or cumulatively, the erroneous instruction and the prosecutor's argument diluted the burden of proof. *State v. Warren*, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008) (it is error for the State to "suggest" that it does not bear the burden "to prove every element and that the defendant is [not] entitled to the benefit of any reasonable doubt"); *Emery*, 174 Wn.2d at 741 (error where jury told its job is to search for the truth). Because the State was not held to the standard of proof beyond a reasonable doubt, Mr. Holloway was denied his constitutional right to a fair trial. His convictions should be reversed and the matter remanded for a constitutionally fair trial.

4. The sentence for counts two, three and ten should be remanded because the term of confinement plus the term of community custody exceeds the statutory maximum.

A trial court only possesses the power to impose sentences provided by law." *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). This Court reviews de novo whether a sentence is legally erroneous. *Brooks*, 166 Wn.2d at 667.

The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. RCW 9A.20.021; RCW 9.94A.701(9). RCW 9.94A.701(9) provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

In *State v. Boyd*, our Supreme Court held that RCW 9.94A.701(9) requires the sentencing court to impose an aggregate term of confinement and community custody within the statutory maximum. 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). The defendant in *Boyd*

was sentenced after the 2009 amendments to the Sentencing Reform Act went into effect. *Id.* at 472-73. His sentence exceeded the 60-month statutory maximum by imposing a 54-month term of confinement and 12-month term of community custody. *Id.* at 472. The sentence included a "*Brooks* notation," which stated "that the total term of confinement and community custody actually served could not exceed the 60-month statutory maximum. *Id.* The Court reasoned that the "'*Brooks* notation' procedure no longer complies with [amended] statutory requirements." *Id.* Because Mr. Boyd was sentenced after RCW 9.94A.701(9) became effective, "the trial court, not the Department of Corrections, was required to reduce Boyd's term of community custody to avoid a sentence in excess of the statutory maximum." *Id.* at 473. Accordingly, the Court "remand[ed] to the trial court to either amend the community custody term or resentence Boyd . . . consistent with RCW 9.94A.701(9)." *Id.*; *accord State v. Land*, 172 Wn. App. 593, 603, 295 P.3d 782 (2013) (applying *Boyd* to reach same result).

The same result is compelled here. Counts two (child molestation in the second degree), three (child molestation in the second degree), and ten (incest in the first degree) are each class B

felonies. CP 53-54, 56-57; RCW 9A.44.086; RCW 9A.64.020. The statutory maximum for these crimes is 120 months. RCW 9A.20.021(1)(b); RCW 9.94A.030(49); *accord* CP 201 (judgment and sentence). On counts two and three, Mr. Holloway was sentenced to 116 months confinement, just 4 months less than the statutory maximum. CP 202. On count ten, Mr. Holloway was sentenced to 18 months less than the statutory maximum, or 102 months confinement. *Id.* However, the court also imposed a 36-month term of community custody on each of these counts. CP 203. Notwithstanding the notation on the judgment and sentence indicating the total term of incarceration and community custody should not exceed the statutory maximum, the sentence is in violation of RCW 9.94A.701(9) and *Boyd.* Like in *Boyd*, the sentence should be remanded to the trial court to strike the term of community custody on counts two, three and ten or to amend Mr. Holloway's sentence on those counts to comply with RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 473.

F. CONCLUSION

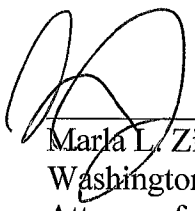
This Court should reverse Mr. Holloway's convictions and remand for a new, constitutionally fair trial because (1) the trial court improperly excluded evidence in violation of the constitutional rights to

present a defense, to confront witnesses, and to a fair trial; and (2) the court's instruction number three diluted the burden of proof and the prosecutor seized on that erroneous language and also urged the jury to convict based on what was in their guts, hearts and minds. Alternatively, two of the rape counts should be reversed because the State failed to prove penetration of the vagina, as the statute requires.

Finally, the sentence should be remanded for resentencing within the statutory maximum.

DATED this 16th day of October, 2013.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX A

Appendix A
State v. Brian Holloway
No. 44453-4-II

This chart summarizes the testimony of the complaining witness, G.S.R., presented in support of counts one through nine and the argument of the prosecutor in support or identification thereof.

Charge	**Second Degree Rape of a Child** (RCW 9A.44.076)	**Third Degree Rape of a Child** (RCW 9A.44.079)	**First Degree Child Molestation** (RCW 9A.44.083)	**Second Degree Child Molestation** (RCW 9A.44.086)	**Third Degree Child Molestation** (RCW 9A.44.089)
Ct I			RP 519, 628-31; RP 343-46		
Ct II				RP 525, 631-33; RP 358-60	
Ct III				RP 520, 627, 633-34; RP 349-50	
Ct IV	RP 519, 634-35; RP 347-49				
Ct V	RP 520, 635-36; RP 350-52				
Ct VI					RP 636-37; RP 358-60
Ct VII					RP 524-25, 636-37; RP 358-60
Ct VIII		RP 524, 637; RP 360, 362			
Ct IX		RP 520-21, 637-39; RP 355-58			

APPENDIX B

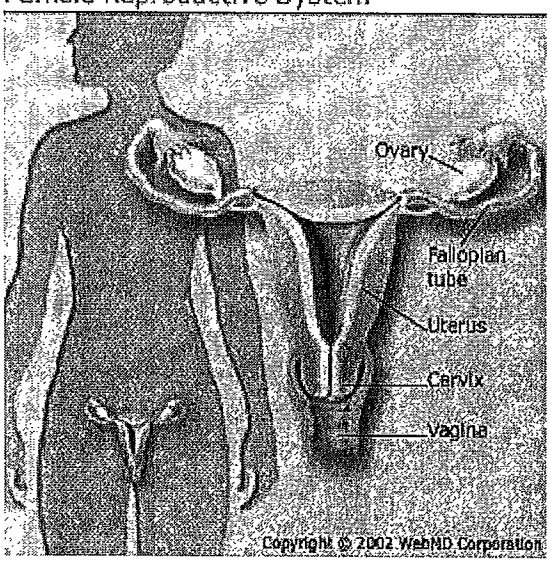
Your Guide to the Female Reproductive System

The female reproductive system is designed to carry out several functions. It produces the female egg cells necessary for reproduction, called the ova or oocytes. The system is designed to transport the ova to the site of fertilization. Conception, the fertilization of an egg by a sperm, normally occurs in the fallopian tubes. The next step for the fertilized egg is to implant into the walls of the uterus, beginning the initial stages of pregnancy. If fertilization and/or implantation does not take place, the system is designed to menstruate (the monthly shedding of the uterine lining). In addition, the female reproductive system produces female sex hormones that maintain the reproductive cycle.

What Parts Make up the Female Anatomy?

The female reproductive anatomy includes parts inside and outside the body.

Female Reproductive System



The function of the external female reproductive structures (the genitals) is twofold: To enable sperm to enter the body and to protect the internal genital organs from infectious organisms. The main external structures of the female reproductive system include:

Labia majora: The labia majora enclose and protect the other external reproductive organs. Literally translated as "large lips," the labia majora are relatively large and fleshy, and are comparable to the scrotum in males. The labia majora contain sweat and oil-secreting glands. After puberty, the labia majora are covered with hair.

Labia minora: Literally translated as "small lips," the labia minora can be very small or up to 2 inches wide. They lie just inside the labia majora, and surround the openings to the vagina (the canal that joins the lower part of the uterus to the outside of the body) and urethra (the tube that carries urine from the bladder to the outside of the body).

Bartholin's glands: These glands are located beside the vaginal opening and produce a fluid (mucus) secretion.

Clitoris: The two labia minora meet at the clitoris, a small, sensitive protrusion that is comparable to the penis in males. The clitoris is covered by a fold of skin, called the prepuce, which is similar to the foreskin at the end of the penis. Like the penis, the clitoris is very sensitive to stimulation and can become erect.

The internal reproductive organs in the female include:

Vagina: The vagina is a canal that joins the cervix (the lower part of uterus) to the outside of the body. It also is known as the birth canal.

Uterus (womb): The uterus is a hollow, pear-shaped organ that is the home to a developing fetus. The uterus is divided into two parts: the cervix, which is the lower part that opens into the vagina, and the main body of the uterus, called the corpus. The corpus can easily expand to hold a developing baby. A channel through the cervix allows sperm to enter and menstrual blood to exit.

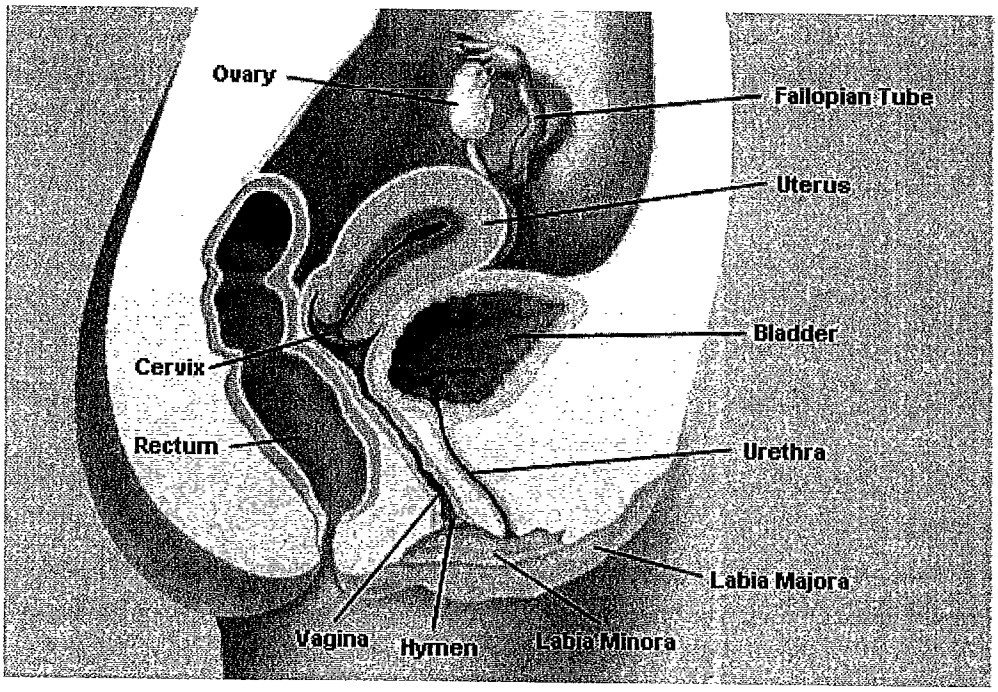
Ovaries: The ovaries are small, oval-shaped glands that are located on either side of the uterus. The ovaries produce eggs and hormones.

Fallopian tubes: These are narrow tubes that are attached to the upper part of the uterus and serve as tunnels for the ova (egg cells) to travel from the ovaries to the uterus. Conception, the fertilization of an egg by a sperm, normally occurs in the fallopian tubes. The fertilized egg then moves to the uterus, where it implants into the lining of the uterine wall.

1 | 2 | 3 NEXT PAGE >

Save This Article For Later

Web MD, "Picture of the Vagina," http://women.webmd. com/picture-of-the-vagina (last visited Sept. 27, 2013)



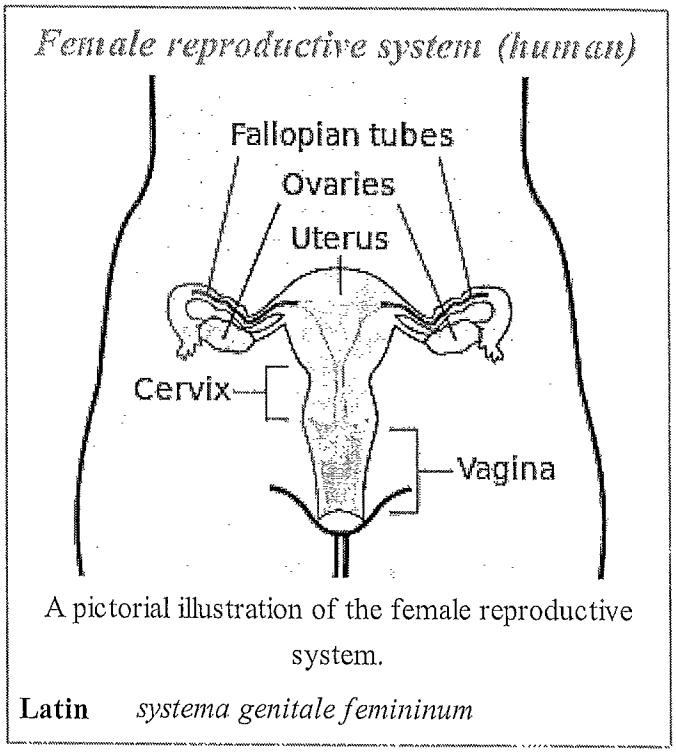
Picture of the Vagina

The vagina is an elastic, muscular canal with a soft, flexible lining that provides lubrication and sensation. The vagina connects the uterus to the outside world. The vulva and labia form the entrance, and the cervix of the uterus protrudes into the vagina, forming the interior end.
The vagina receives the penis during sexual intercourse and also serves as a conduit for menstrual flow from the uterus. During childbirth, the baby passes through the vagina (birth canal).
The hymen is a thin membrane of tissue that surrounds and narrows the vaginal opening. It may be torn or ruptured by sexual activity or by exercise.

Human female reproductive system

From Wikipedia, the free encyclopedia

The **human female reproductive system** (or **female genital system**) contains two main parts: the uterus, which hosts the developing fetus, produces vaginal and uterine secretions, and passes the male's sperm through to the fallopian tubes; and the ovaries, which produce the female's egg cells. These parts are internal; the vagina meets the external organs at the vulva, which includes the labia, clitoris and urethra. The vagina is attached to the uterus through the cervix, while the uterus is attached to the ovaries via the Fallopian tubes. At certain intervals, the ovaries release an ovum, which passes through the Fallopian tube into the uterus. If, in this transit, it meets with sperm, the sperm penetrate and merge with the egg, fertilizing it.



A pictorial illustration of the female reproductive system.

Latin *systema genitale femininum*

During the reproductive process, the egg releases certain molecules that are essential to guiding the sperm and these allow the surface of the egg to attach to the sperm's surface then the egg can absorb the sperm and fertilization begins.[1] The fertilization usually occurs in the oviducts, but can happen in the uterus itself. The zygote then implants itself in the wall of the uterus, where it begins the processes of embryogenesis and morphogenesis. When developed enough to survive outside the womb, the cervix dilates and contractions of the uterus propel the fetus through the birth canal, which is the vagina.

The ova are larger than sperm and have formed by the time a female is born. Approximately every month, a process of oogenesis matures one ovum to be sent down the Fallopian tube attached to its ovary in anticipation of fertilization. If not fertilized, this egg is flushed out of the system through menstruation.

Contents

Embryonic development

Chromosome characteristics determine the genetic sex of a fetus at conception. This is specifically based on the 23rd pair of chromosomes that is inherited. Since the mother's egg contains an X chromosome and the father's sperm contains either an X or Y chromosome, it is the male who determines the fetus's sex. If the fetus inherits the X chromosome from the father, the fetus will be a female. In this case, testosterone is not made and the Wolffian duct will degrade thus, the Müllerian duct will develop into female sex organs. The clitoris is the remnants of the Wolffian duct. On the other hand, if the fetus inherits the Y chromosome from the father, the fetus will be a male. The presence of testosterone will stimulate the Wolffian duct which will bring about the development of the male sex organs and the Müllerian duct will degrade.[2]

Internal

The female internal reproductive organs are the vagina, uterus, fallopian tubes, cervix and ovary.

Sagittal MRI showing the location of the vagina, cervix and uterus

Vagina

Main article: Vagina

The vagina is a fibro-muscular tubular tract leading from the uterus to the exterior of the body in female mammals, or to the cloaca in female birds and some reptiles. Female insects and other invertebrates also have a vagina, which is the terminal part of the oviduct. The vagina is the place where semen from the male penis is deposited into the female's body at the climax of sexual intercourse, a phenomenon commonly known as ejaculation. The vagina is a canal that joins the cervix (the lower part of uterus) to the outside of the body. It also is known as the birth canal.

Cervix

Main article: Cervix

The cervix is the lower, narrow portion of the uterus where it joins with the top end of the vagina. It is cylindrical or conical in shape and protrudes through the upper anterior vaginal wall. Approximately half its length is visible to the naked eye, the remainder lies above the vagina beyond view. The vagina has a thick layer outside and it is the opening where the fetus emerges during delivery. The cervix is also named the neck of the uterus.

Uterus

Main article: Uterus

The uterus or womb is the major female reproductive organ of humans. The uterus provides mechanical protection, nutritional support, and waste removal for the developing embryo (weeks 1 to 8) and fetus (from week 9 until the delivery). In addition, contractions in the muscular wall of the uterus are important in pushing out the fetus at the time of birth.

The uterus contains three suspensory ligaments that help stabilize the position of the uterus and limits its range of movement. The uterosacral ligaments keep the body from moving inferiorly and anteriorly. The round ligaments restrict posterior movement of the uterus. The cardinal ligaments also prevent the inferior movement of the uterus.

The uterus is a pear-shaped muscular organ. Its major function is to accept a fertilized ovum which becomes implanted into the endometrium, and derives nourishment from blood vessels which develop exclusively for this purpose. The fertilized ovum becomes an embryo, develops into a fetus and gestates until childbirth. If the egg does not embed in the wall of the uterus, a female begins menstruation.

Fallopian tube

Main article: Fallopian tube

The Fallopian tubes or oviducts are two tubes leading from the ovaries of female mammals into the uterus. On maturity of an ovum, the follicle and the ovary's wall rupture, allowing the ovum to escape and enter the Fallopian tube. There it travels toward the uterus, pushed along by movements of cilia on the inner lining of the tubes. This trip takes hours or days. If the ovum is fertilized while in the Fallopian tube, then it normally implants in the endometrium when it reaches the uterus, which signals the beginning of pregnancy.

Ovaries

Main article: Ovary

The ovaries are small, paired organs that are located near the lateral walls of the pelvic cavity. These organs are responsible for the production of the ova and the secretion of hormones. Ovaries are the place inside the female body where ova or eggs are produced. The process by which the ovum is released is called ovulation. The speed of ovulation is periodic and impacts directly to the length of a menstrual cycle.

After ovulation, the ovum is captured by the oviduct, after traveling down the oviduct to the uterus, occasionally being fertilized on its way by an incoming sperm, leading to pregnancy and the eventual birth of a new human being.

The Fallopian tubes are often called the oviducts and they have small hairs (cilia) to help the egg cell travel.

Reproductive tract

The reproductive tract (or genital tract) is the lumen that starts as a single pathway through the vagina, splitting up into two lumens in the uterus, both of which continue through the Fallopian tubes, and ending at the distal ostia that open into the abdominal cavity.

In the absence of fertilization, the ovum will eventually traverse the entire reproductive tract from the fallopian tube until exiting the vagina through menstruation.

The reproductive tract can be used for various transluminal procedures such as fertiloscopy, intrauterine insemination and transluminal sterilization.

External

See also: Sex organ

The external components include the mons pubis, pudendal cleft, labia majora, labia minora, Bartholin's glands, and clitoris.

Female genital modification

There are surgical procedures which change the appearance of external female genitalia. Clitoral hood reduction, also known as clitoridotomy, is a procedure intended to reposition the protruding clitoris and reduce the length and projection of the clitoral hood. The procedure is indicated in women with mild clitoral enlargement who are unwilling to undergo a formal clitoris reduction.[3]

Clitoral hood removal, also known as hoodectomy, is a cosmetic surgery intended to enhance a female's sexual experience. This surgery involves the trimming back of the clitoral hood or a complete clitoris hood removal.[4] Removal of the protective hood allows for more clitoral exposure which increases sensitivity in the clitoris. This procedure, sometimes called female circumcision, is different from a clitoral excision and is not intended to prevent a woman from experiencing sexual pleasure.[5]

Clitoral reduction is indicated to reduce the size of the clitoris which may be enlarged due to hormonal abnormalities, ingestion of steroids, or birth. Surgery can reduce the glans or shaft of the clitoris through an outpatient procedure.[6]

According to the World Health Organization (WHO), female genital mutilation (FGM) comprises all those procedures that involve partial or total removal of the external female genitalia as well as other injury to the female genital organs for non-medical reasons.[7] Contrary to surgical procedures intended to enhance a woman's sexual experience or her physical appearance, female genital mutilation does not have cosmetic or health benefits and can be harmful to the emotional and physical well-being of those it is inflicted upon.[7] This kind of procedure may have complications including, but not limited to, severe bleeding, tetanus, sepsis, urine retention, open sores in the genital area, irreparable tissue damage, potential childbirth complications, infertility, and death.[7] The practice of female genital mutilation is common in the western, eastern and north-eastern regions of Africa. It also takes place in some countries in Asia and the Middle East. The mutilation is practiced by some immigrant communities in North America and Europe.[7]

Ancient Greek thought

It is claimed in the Hippocratic writings that both males and females contribute their seed to conception; otherwise, children would not resemble either or both of their parents. Four-hundred years later, Galen "identifies" the source of female semen as the ovaries in female reproductive organs.[8]

See also

- Conception
- Development of the reproductive system
- Evolution of sexual reproduction
- Female infertility
- Male reproductive system
- Oogenesis
- Reproduction
- Reproductive system

References

1. ^ Freedman, David H. (1992). *"The Aggressive Egg"in DISCOVER*. Biology & Medicine.
2. ^ "Details of genital development" (http://www.baby2see.com/gender/internal_genitals.html). Retrieved August 6, 2010.
3. ^ "Clitoropexy / Clitoral Hood Reduction" (http://www.altermd.com/clitoropexy_clitoral_hood_reduction.htm). Retrieved August 6, 2010.
4. ^ "Clitoris Hood Removal Surgery and More" (http://www.clitoris.com). Retrieved August 6, 2010.
5. ^ "Clitoral Hood Removal" (http://www.cosmeticsurgeon.co.uk/Cosmetic-Surgery-Glossary-Clitoral-Hood-Removal.html). Retrieved August 6, 2010.
6. ^ "Clitoral Reduction and Clitoral Hood Removal" (http://www.labiaplastycenters.com/clitoral_reducation.htm). Retrieved August 6, 2010.
7. ^ *a b c d* "Female Genital Mutilation" (http://www.who.int/mediacentre/factsheets/fs241/en/). World Health Organization. Retrieved August 6, 2010.
8. ^ Anwar, Etin. "The Transmission of Generative Self and Women's Contribution to Conception." Gender and Self in Islam. London: Routledge, 2006. 75. Print.

External links

- Female reproductive system (http://www.the-human-body.net/female-reproductive-system.html)
- Interactive diagram of female reproductive system (http://www.aboutkidshealth.ca/En/HowTheBodyWorks/SexDevelopmentAnOverview/Pages/FemaleGenitalAnatomy.aspx)

Navigation Panel

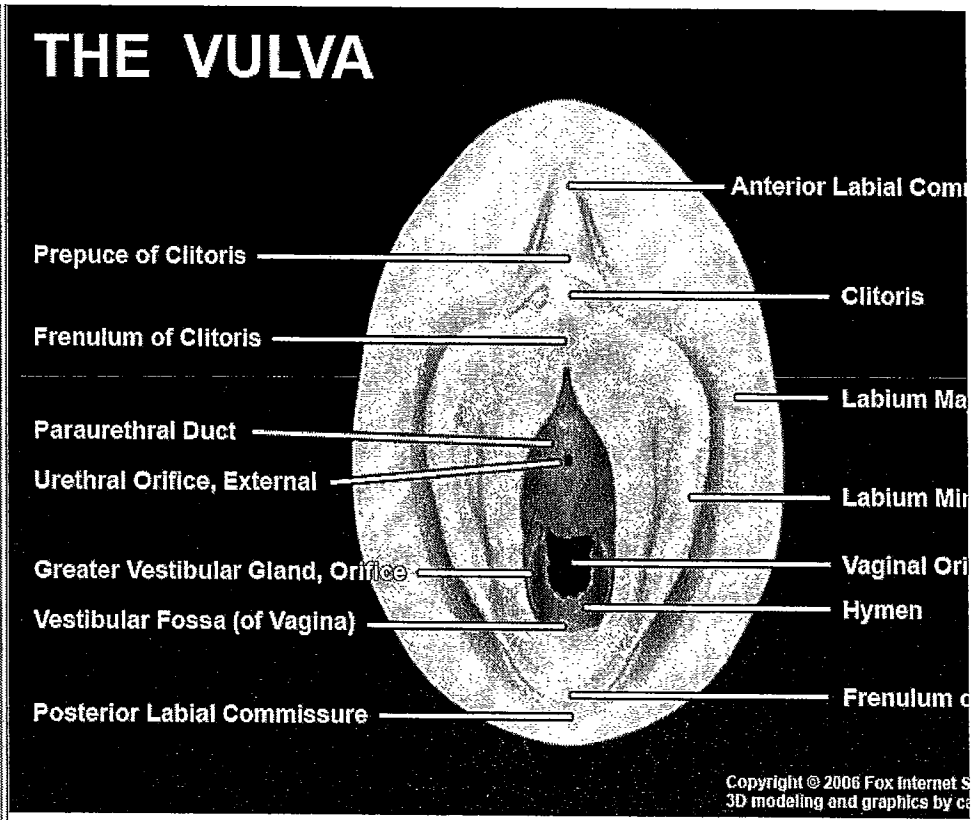
3D Diagram of Vulva At Rest

3D Diagram of Vulva Spread Open

3D Diagram of Clitoris

3D Diagram of Female Reproductive Organs

3D Diagram of Female Prostate Gland



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

STATE OF WASHINGTON, Respondent, v. BRIAN HOLLOWAY, Appellant.	)	NO. 36185-2-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANNE MOWRY CRUSER CLARK COUNTY PROSECUTOR'S OFFICE PO BOX 5000 VANCOUVER, WA 98666-5000 E-MAIL: prosecutor@clark.wa.gov;	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] BRIAN HOLLOWAY 361852 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF OCTOBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

October 16, 2013 - 3:53 PM

Transmittal Letter

Document Uploaded: 444534-Appellant's Brief.pdf

Case Name: STATE V, BRIAN HOLLOWAY

Court of Appeals Case Number: 44453-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: **maria@washapp.org**

A copy of this document has been emailed to the following addresses:
prosecutor@clark.wa.gov