NO. 44453-4-II

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

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STATE OF WASHINGTON, Respondent

v.

BRIAN G HOLLOWAY, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01762-1

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# BRIEF OF RESPONDENT

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Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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B. STATEMENT OF THE CASE

Brian Holloway (hereafter 'Holloway') was charged by Second Amended Information with 11 counts, including Child Molestation in the First Degree, two counts of Child Molestation in the Second Degree, two counts of Rape of a Child in the Second Degree, two counts of Child Molestation in the Third Degree, two counts of Rape of a Child in the

Third Degree, Incest in the First Degree and Incest in the Second Degree. CP 53-57. Each count alleged the offense was part of an ongoing pattern of sexual abuse of the same victim and also alleged the defendant used his position of trust to facilitate the commission of the offense. CP 53-57. Every charge was alleged to have occurred against Holloway's biological daughter, G.S.R. CP 53-57.

Prior to trial, the trial court heard a number of pre-trial motions regarding the admissibility of evidence. CP 16, 20, 26, 36; RP 15-87. One significant motion was whether the trial court would allow evidence of the victim's prior sexual abuse by others in at trial. Defense's original theory of his defense was that the victim suffered from flashbacks to her prior abuse which caused her to super-impose her father, Holloway, into the place of her prior abuser and imagine new abuse was occurring. RP 21, 25-28. The trial court ruled this evidence and theory of the case was inadmissible. RP 36-38. Holloway's initial theory of the case was that his daughter had not fabricated the prior abuse but had fabricated the abuse against him. RP 48. After the trial court ruled the evidence of the victim's prior abuse was inadmissible, the parties called the case ready for trial to start the next day. RP 88-89.

The next morning, the day trial was set to begin, defense requested a continuance. RP 91. Holloway's theory of his defense had changed

overnight and his new theory was that the prior sexual abuse of the victim did not occur. RP 95. Holloway's theory was that the victim was a "passive player" in the prior allegedly false allegation and that the defendant's wife, Stephanie Holloway, was the mastermind who previously fabricated the prior abuse and then again fabricated abuse by Holloway in order to gain custody of G.S.R. RP 94-95. The trial was continued to allow defense to investigate this potential new theory. RP 119.

Defense obtained several documents from other states for the court to review, which the trial court did and sealed as CP___ (sealed records Sub #127A, 127B, 127C and 127D). These documents included information that the victim, G.S.R., had claimed as a 7 year old that she was abused by a man named Michael Nichols; per a one line entry in a many paged report; G.S.R. later "recanted" this allegation. CP ___ (Sealed record Sub #127C, p. 11 (labeled as page 10 of the report)). The trial court excluded this evidence as irrelevant and more prejudicial than probative. RP 169, 176-77, 217. The case proceeded to trial.

G.S.R. testified at trial that she was 15 years old and her birthdate was December 1, 1996, and that she was in the tenth grade. RP 333. G.S.R. testified she was unmarried and not in a state-registered domestic partnership. RP 335. Holloway is G.S.R.'s biological father; she came to

live with him when she was 10 years old. RP 336. G.S.R. testified that her father first touched her in a bad way when she was in fifth grade. RP 339. The touching would occur in her bedroom and Holloway's bedroom. RP 341. G.S.R. indicated the touching "happened a lot." RP 341. G.S.R. described many incidents including the first time when she was in the fifth grade, and it occurred when she had a Hannah Montana bedspread on her bed. RP 344. The first time she and her father were "cuddling," lying on the same bed under a blanket, and G.S.R. woke up and her father's hand was inside her shirt and inside her bra, massaging her breast. RP 344-45. His hand then went in her pants and touched her butt. RP 345.

G.S.R. testified about another incident where Holloway touched and rubbed her vagina while on Holloway's bed when she was in the fifth grade. RP 347. Holloway's finger went in the folds of G.S.R.'s vagina. RP 349. Another time, Holloway touched G.S.R. on her vagina, inside "the creases" and butt while in her bedroom soon after she got her new daybed when she was in the sixth grade. RP 349-50. A fourth time occurred when Holloway "finger[ed] G.S.R. and it "hurt really bad afterwards." RP 350. This occurred in the seventh grade. RP 351. G.S.R. described the term "fingered" to mean Holloway touched her vagina on the inside and rubbed. RP 352. G.S.R. indicated her father's finger went inside her vagina like a tampon goes inside. RP 353. G.S.R. testified her

vagina hurt afterwards and she had cramping and felt like she could not walk. RP 353.

On July 4, 2011, Holloway rubbed G.S.R.'s vagina and went inside her vagina and tried to have G.S.R. touch his penis and Holloway touched his penis as well and G.S.R. felt the tip of his penis was wet. RP 355, 357. G.S.R. indicated Holloway's penis was hard and he moved her hand up and down on his penis. RP 358.

G.S.R. testified that at least once in each grade in sixth, seventh and eighth grades, Holloway would use his hand to touch her underneath her breast and lift up. RP 359-60. Another incident occurred after G.S.R. remembered getting a lava lamp and Holloway touched the inside and inside the crease of G.S.R.'s vagina and rubbed her. RP 360. G.S.R. indicated this type of touching occurred at least fifty or more different times. RP 361.

G.S.R. started wearing extra clothes thinking it would make it harder for Holloway to touch her or thinking that she would wake up before it really started happening. RP 364. Holloway had a lot of pictures of naked girls on his cell phone and he showed them to G.S.R. RP 365.

G.S.R. did not immediately report the touching that occurred with her father because she loved him and did not want him to get in trouble. RP 366. She indicated she told only because she was worried on the last

occasion that she could have gotten pregnant. RP 366. G.S.R. continued to love her father and admitted to lying about how frequently it happened, minimizing the number of times because she did not want him to get in trouble. RP 367.

Stephanie Holloway testified at trial that she was married to Holloway since 2004 and in a relationship with him since 2002. RP 425-26. G.S.R. was ten years old and in the fifth grade when she came to live with Stephanie and Holloway for good. RP 428. Stephanie testified she first learned of the sexual abuse of G.S.R. on July 7, 2011. RP 431. The police were called and Stephanie spoke to police. RP 435. Stephanie testified that it was not unusual for Stephanie to sleep on the couch in the living room. RP 440-41. And that it was fairly common for G.S.R. to sleep in the bed with Holloway in his bedroom. RP 441. Stephanie also observed Holloway lying in bed with G.S.R. in G.S.R.'s bedroom. RP 442. Stephanie corroborated that Holloway had pictures of naked girls on his cell phone. RP 443.

Stephanie testified she confronted Holloway about his "cuddling" with G.S.R. and how she felt like it was not appropriate as G.S.R. got older. RP 444-45. Stephanie indicated Holloway would make comments about G.S.R.'s body, referring to her butt and her figure. RP 446. Stephanie also noticed that G.S.R. started wearing multiple layers of

clothes. RP 448. G.S.R. also had started to withdraw from the family, but after Holloway moved out of the house in July 2011, she became more and more interactive. RP 449.

Stephanie testified about a conversation she had with Holloway on the phone, after the allegations came to light, where he asked Stephanie to "can you please just have [victim] lie? Can you please just have her lie? I'll get help and we can be a family again." RP 449.

G.S.R.'s counselor, Jessica Boldt, testified at trial that she began seeing G.S.R. as a patient in January 2012 and saw her 18 to 20 times to treat her. RP 416. Ms. Boldt indicated G.S.R. gradually disclosed the abuse by her father. RP 417. Ms. Boldt indicated that 'gradual disclosures' of sexual abuse are very common, and that a victim can feel scared or threatened and be guarded about telling what happened to them. RP 420.

Two police officers were involved in the investigation of the sexual abuse by Holloway on G.S.R. Corporal Jeff Sundby responded to the Holloway home in Vancouver, Washington, on July 7, 2011, and there he spoke to Stephanie, G.S.R., and Holloway. RP 497-98. G.S.R. was crying and subdued. RP 498. G.S.R. told Corporal Sundby that she did not want to get her father in trouble and Corporal Sundby felt that G.S.R. did not really want to speak with him. RP 499. Corporal Sundby took an initial report and forwarded it to detectives at the Children's Justice Center

for further investigation. RP 499. Detective Evelyn Oman works at the Children's Justice Center and was assigned to investigate this case. RP 480. She interviewed G.S.R. a few weeks later during which time G.S.R. indicated she loved her father and missed him very much. RP 482. G.S.R. cried throughout much of her interview with Detective Oman and indicated she only wanted to be a family again. RP 483.

Holloway denied any improper contact with G.S.R. RP 546-54.

A jury convicted Holloway of all 11 counts as charged in the Second Amended Information. CP 166-76. The jury also returned special verdicts on each count finding this was part of a pattern of ongoing abuse and that Holloway violated a position of trust. CP 177-87. Holloway was sentenced to a standard range sentence on each count. CP 202.

## C. ARGUMENT

### I. THE TRIAL COURT'S EXCLUSION OF EVIDENCE WAS PROPER AND THIS DID NOT DENY HOLLOWAY A FAIR TRIAL, THE RIGHT TO PRESENT A DEFENSE, OR THE RIGHT TO CONFRONT THE WITNESSES AGAINST HIM

Holloway claims the trial court's exclusion of evidence of the victim's prior sexual abuse and alleged recantation was improper and denied him the right to present a defense, the right to a fair trial, and the

right to confront witnesses against him. Holloway was not denied his right to confront the witnesses against him, the right to present a defense or a fair trial. The trial court's exclusion of the evidence pertaining to the victim's prior sexual abuse and supposed recantation was not improper. Holloway's claim fails.

A defendant has the right to confront and cross examine witnesses adverse to him as guaranteed by both the Washington state and federal constitutions. Wash. Const. art. I, §22; U.S. Const. amend VI. However, this right is limited by general considerations of relevance. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A defendant does not have a constitutional right to admit irrelevant evidence, and sometimes even relevant evidence is excluded if it is too prejudicial or inflammatory. *Id.* at 624; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Holloway claims that the existence of a purportedly false prior accusation by the victim, some eight years prior to trial, was relevant. Evidence that a sex abuse victim has previously accused another of similar behavior is not relevant unless the defendant demonstrates that the previous accusation was false. *State v. Harris*, 97 Wn.App. 865, 872, 989 P.2d 553 (1999). This Court reviews a trial court's limitation on the scope of cross-examination for manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). Further, a trial court's determination of

relevancy of evidence is within its sound discretion. *State v. Demos*, 94 Wn.2d 733, 736, 619 P.2d 968 (1980).

ER 608(b) provides that specific instances of conduct of a witness, for the purpose of attacking that witness' credibility, may not be proved by extrinsic evidence, but may, in the court's discretion and if probative of the witness' truthfulness, be inquired into on cross-examination. ER 608(b). All other evidence rules apply, and the subject of the cross-examination must be relevant and any probative value must outweigh the prejudicial effect. ER 401, ER 403. Evidence is relevant if it has "any tendency to make the existence of any fact...of consequence...more ...or less probable [.]" ER 401; *State v. Clark*, 78 Wn.App. 471, 477, 898 P.2d 854 (1995). A determination of relevancy of evidence is within the sound discretion of the trial court. *Demos*, 94 Wn.2d at 736. Generally, evidence that a sexual assault victim has accused others in the past is not relevant to the current case, and therefore not admissible unless the defendant can show that the prior accusation was false. *State v. Harris*, 97 Wn.App. 865, 872, 989 P.2d 553 (1999) (citing *State v. Demos*, 94 Wn.2d at 736-37).

The issue of whether the victim's prior allegation was true or false is integral to the trial court's determination of whether the evidence was relevant and therefore admissible. *See Demos*, 94 Wn.2d at 736-37 (holding evidence a rape victim has previously accused others is not

relevant and not admissible unless the defendant can demonstrate the accusation was false). Even in cases from other jurisdictions, the courts have ruled that cross-examination of the victim about prior allegations of sexual abuse is only appropriate in the face of evidence showing that the prior accusations were false. *See e.g. White v. Coplan*, 399 F.3d 18, 24-27 (1st Cir. 2005) (allowing cross-examination of victim only after defense offered proof to a reasonable probability that the victim's prior accusation was false); *Redmond v. Kingston*, 240 F.3d 590, 591-92 (7th Cir. 2001) (holding trial court should have allowed cross-examination of victim about prior sexual assault claim when evidence convincingly demonstrated its falsity).

In Holloway's case, the only evidence that the victim's prior allegation of sexual abuse was false was one statement included in a police report, in which, according to a social worker, the victim "recanted her disclosure." CP ___ (sealed Sub #127C p. 11 (labeled page number 10 of the report)). This evidence, standing alone amid the circumstances of that report, and the victim's current insistence that the prior accusation was not false, is not enough evidence to establish a reasonable probability or to convincingly demonstrate the prior accusation was indeed false. It is also important to put the one statement Holloway has as evidence of the victim's recantation in context; it is clear from reading the entirety of the

report, that this "recantation" was made after the then 7 year old victim returned to her mother's home, where the prior abuse was alleged to have occurred, and that the mother was adamant that the alleged perpetrator was innocent and that what the victim had reported was false. CP ___ (sealed Sub #127C, p. 11 (labeled page number 10 of the report)). It is also important to note that at the time of the trial, the victim maintained she had been previously sexually abused and though she could not remember the name of the person, she remembered he drove a blue truck. CP 37. Holloway never showed and never produced an offer of proof to the trial court that this prior accusation was indeed false. The only evidence he could have admitted pursuant to ER 608(b) was through the victim on cross-examination, at which point she would have denied fabricating a prior sex abuse allegation. The victim presently claimed it was true she had been previously abused; it is clear from the defendant's statements to police he had believed it was true. CP 37, 24. There are circumstances surrounding the situation which lead to untrustworthiness of a supposed "recantation" that occurred after the victim returned to the unsafe environment in which the abuse occurred and into the care of a mother who adamantly did not believe the victim and who was under investigation by protective services. The victim, 8 years later, now safely living in a caring, protective environment maintains her prior accusation

was not false. CP 37. The circumstances presented to the trial court did not give sufficient evidence for the trial court to find the prior allegation of sexual abuse was indeed false. The trial court did not improperly prohibit Holloway from cross-examining his daughter on this subject.

Further, appellate courts in our State have specifically considered whether prior false allegations of sexual abuse are admissible at trial. In *State v. Mendez*, 29 Wn.App. 610, 630 P.3d 476 (1981), the trial court properly excluded evidence of a victim's "arguably false" rape allegation on the grounds of relevance. *Mendez*, 29 Wn.App. at 612. In *State v. Williams,* 9 Wn.App. 622, 513 P.2d 854 (1974), the trial court did not abuse its discretion in barring defense from cross-examining the victim on a prior allegation of sexual abuse. *Williams*, 9 Wn.App. at 623. The Court, in finding the trial court did not abuse its discretion in prohibiting defense from cross-examining the victim on this subject, considered that though it may be easy for a victim to make this type of allegation and hard to disprove, it is also easy to allege a child victim has lied about sexual abuse. *Williams*, 9 Wn.App. at 623 (quoting *People v. Hurlburt*, 166 Cal.App.2d 334, 343, 333 P.2d 82, 75 A.L.R.2d 500 (1958)). The Court in *Williams* further considered that "[t]he courts should be vigilant in seeing to it that the privilege of cross-examination here approved should not be abused." *Id.* at 623 (citing *Hurlburt*, 166 Cal. App.2d at 343).

In *State v. Harris*, 97 Wn.App. 865, 989 P.2d 553 (1999), the trial court properly excluded evidence that the victim had previously made an accusation of rape against another person because the allegation was remote in time, the allegation was not an official complaint, there was no proof the allegation was false and the proposed evidence was impeachment by a prior inconsistent statement on a collateral matter. *Harris*, 97 Wn.App. at 872-73. The trial court's exclusion of the evidence was affirmed as defense presented no evidence the alleged prior accusation was false, the victim utterly denied making the accusation, and the only evidence of it was extrinsic and therefore inadmissible. *Id.*

To be admissible under ER 608(b), the witness' conduct must be relevant to her credibility regarding the subject of the testimony. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). There are limits to the admissibility of evidence under ER 608(b). *State v. Wilson*, 60 Wn.App. 887, 893, 808 P.2d 754 (1991). Importantly, the instances of prior conduct must not be remote in time, and the evidence must be more probative than prejudicial. *Id.* (citing to ER 403 and ER 611). Here, the evidence of the alleged recantation proffered by Holloway was remote in time to the victim's testimony at trial and therefore was inadmissible under ER 608(b). The alleged recantation and alleged false accusation occurred

when the victim was 7 years old. CP ___, (sealed Sub #127C, p. 8, (labeled as page 7 of the report)). The victim testified in Holloway's trial one month shy of her 16th birthday. Over eight years had passed between the alleged false accusation and the time the victim's credibility came into issue. This is clearly too remote in time to be relevant in Holloway's trial. Further, a potential lie by a 7 year old child is quite different from a prior false accusation made by an adult. Given the circumstances of the supposed 'recantation,' the victim's age at the time of that accusation, and the case law on the subject, it is clear that the trial court properly excluded evidence of the victim's 2004 accusation against another man for a one-time abuse that another party later claimed she recanted.

The trial court did not abuse its discretion in excluding evidence of the victim's prior abuse and prior alleged recantation of that accusation. The evidence relating to the prior incident and the victim's prior accusation was irrelevant because it was too remote in time and because Holloway did not show and cannot show that the accusation was indeed false. Further, this evidence was more prejudicial than probative as the victim's actions as a 7 year old child show little, if any, indication of her veracity as an almost-adult teenager of 15 years old. Holloway was able to present his own defense, received a fair trial, and was able to effectively

cross-examine his accuser. Holloway's claim the trial court erred and violated his rights by failing to admit this evidence is without merit.

## II. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SUPPORT THE CONVICTIONS FOR COUNT 4 RAPE OF A CHILD IN THE SECOND DEGREE AND COUNT 8- RAPE OF A CHILD IN THE THIRD DEGREE

Holloway argues there was insufficient evidence to convict him of Counts 4 and 8, Rape of a Child in the Second Degree and Rape of a Child in the Third Degree, respectively, because there was no evidence of penetration of the victim's vagina which is required to prove 'sexual intercourse.' Holloway's argument asks this Court to set aside years of authority which have held that the labia are part of the term 'vagina' and therefore penetration past the labia constitutes sexual intercourse. The State asks this Court to affirm Holloway's convictions on Counts 4 and 8, finding, as many Courts have in the past, that the term 'vagina' as used by the Legislature includes the labia of the female sexual organ.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the

State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

RCW 9A.44.076(1) defines Rape of a child in the Second Degree as "when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." Rape of a Child in the Third Degree is defined as "when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." RCW 9A.44.079(1). The term "sexual intercourse" for the purposes of sex offenses, including Rape of a Child, is defined as:

> (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....

RCW 9A.44.010(1).

In determining whether the State met its burden of proof in showing that 'sexual intercourse' occurred in this case, we should first look to the construction of the statute and its intent and purpose. *See State v. Montgomery*, 95 Wn.App. 192, 200, 974 P.2d 904, *rev. denied*, 139 Wn.2d 1006, 989 P.2d 1139 (1999). If an ambiguity exists in a statute, "the primary duty of the court in interpreting the statute is to ascertain and give effect to the intent and purpose of the Legislature." *State v. Hennings*, 129 Wn.2d 512, 919 P.2d 580 (1996). Words "in a statute are to be understood in their ordinary and popular sense." *State v. Cain*, 28 Wn.App. 462, 464, 624 P.2d 732 (1981). In doing this, a court should interpret a statute "so as to avoid strained or absurd consequences which could result from a literal reading." *In re Detention of A.S.*, 138 Wn.2d 898, 911, 982 P.2d 1156 (1999) (quoting *In re Detention of LaBelle*, 107 Wn.2d 196, 205, 728 P.2d 138 (1986)).

In *Montgomery*, the Court of Appeals analyzed whether defense counsel was properly prohibited from arguing that penetration past the labia did not constitute sexual intercourse. *Montgomery*, 95 Wn.App. at 200. The Court looked to the intent and purpose of the statute in determining what the legislature intended in prohibiting "any penetration...however slight." RCW 9A.44.010(1)(b); *see Montgomery*, 95 Wn.App. at 200. The Court in *Montgomery* chose to "read subsections

(a) and (b) of RCW 9A.44.010(1) together" and found in that context that "vagina means all of the components of the female sexual organ and not just '[t]he passage leading from the opening of the vulva to the cervix of the uterus....'" *Montgomery*, 95 Wn.App. at 200 (citing *The American Heritage Dictionary of the English Language,* 1970 (3rd ed. 1992) (definition of "vagina"), *State v. Snyder*, 199 Wn. 298, 91 P.2d 570 (1939), and *State v. Bishop*, 63 Wn.App. 15, 19, 816 P.2d 738 (1991), *rev. denied*, 118 Wn.2d 1015, 827 P.2d 1011 (1992)).

Though as Holloway indicates the facts in *Montgomery* included an injury to the victim's labia minora, it is clear from reading the opinion that the Court did not hold that the labia minora only are included in the definition of 'vagina,' to the exclusion of labia majora. In fact, the Court found that all "components of the female sexual organ" are included in the definition of "vagina." *Montgomery*, 95 Wn.App. at 200.

In *State v. Snyder*, 199 Wn. 298, 91 P.2d 570 (1939), the Supreme Court considered whether penetration of the "lips of [the victim's] sexual organs" was sufficient to prove the crime of carnal knowledge. Similar to the current definition of sexual intercourse, the statute evaluated in *Snyder* required "[a]ny sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge." *Snyder*, 199 Wn. At 300. The Court considered authority which stated that "it is not necessary

that the penetration should be perfect, the slightest penetration of the body of the female by the sexual organ of the male being sufficient; nor need there be an entering of the vagina or rupturing of the hymen; the entering of the vulva or labia is sufficient." *Id.* at 301. The *Synder* Court found there was sufficient evidence of penetration in this case, where the evidence was that the defendant has penetrated the "lips" of the victim's sexual organs. *Id*

In *State v. Delgado*, 109 Wn.App. 61, 33 P.3d 753 (2001), *rev'd in part on other grounds in* 148 Wn.2d 723, 63 P.3d 792 (2003), the Court of Appeals again considered an attack against the definition of "vagina" and whether penetration of the labia suffices to prove "sexual intercourse." The defendant, Delgado, argued that the term "vagina" does not include the labia. *Delgado*, 109 Wn.App. at 65. The Court addressed his argument as one that hinged on "an anatomical distinction between the terms 'vagina' and 'labia minora.'" *Id.* The Court in *Delgado* stated, "this court has specifically held that "[u]nder RCW 9A.44.073, the State must prove that the defendant penetrated, at a minimum, the lips of the victim's sexual organs." *Id.* (quoting *State v. Bishop*, 63 Wn.App. 15, 19, 816 P.2d 738 (1991) and citing to *Snyder, supra* at 300). The court in *Delgado* also referenced its holding in *Montgomery, supra* that "vagina means all of the components of the female sexual organ." *Id.* at 66. The Court affirmed the

conviction, adhering to its prior holdings that labia minor are part of the definition of vagina. *Id.*

The same should occur here. There was sufficient evidence that Holloway penetrated G.S.R.'s vagina by using his fingers to penetrate past the victim's labia. As stated previously, "vagina means all of the components of the female sexual organ." *Montgomery*, 95 Wn.App. at 200. The labia, whether distinguished as majora or minora, are a component of the female sexual organ. This Court should give effect to the purpose and intent of the statute. It is clear from the case law on this subject over the years that the Legislature intended to prohibit any penetration of the vagina, including the labia. To follow Holloway's reasoning now would lead to a strained and absurd result which is what this Court should refrain from doing in interpreting the meaning of the words in the statute on sexual intercourse. This Court should affirm Holloway's convictions in Counts 4 and 8, based on prior case law and prior interpretations of this same statute. The State proved the defendant penetrated the victim's "vagina" as that term is meant in the statute defining sexual intercourse. Holloway's claim of insufficient evidence fails.

## III. THE TRIAL COURT DID NOT ERR IN GIVING THE WASHINGTON PATTERN JURY INSTRUCTION ON REASONABLE DOUBT TO THE JURY AND THE PROSECUTOR'S ARGUMENTS DID NOT DILUTE THE BURDEN OF PROOF

Holloway alleges the trial court's instruction on reasonable doubt, combined with the prosecutor's closing argument, diluted the State's burden of proof. The trial court gave a proper instruction on reasonable doubt, one which has been accepted and upheld. The prosecutor did not in any way misstate the State's burden or attempt to convince the jury it had any duty other than to prove the case beyond a reasonable doubt through the evidence it presented. Holloway's claim of a violation of due process by the combination of the jury instruction and the prosecutor's closing argument fails.

Jury instructions must convey that the State bears the burden of proving every essential element of each criminal offense beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L.Ed.2d 583 (1994). The trial court must also instruct the jury on reasonable doubt, inform the jury of applicable law, not mislead the jury ad allow the parties to argue their theories of the case. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *State v. Coe*, 101 Wn.2d 772, 787-88, 684 P.2d 668 (1984) and *State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996)).

Washington Pattern Instruction for Criminal cases 4.01 includes language that instructs the jury that if they have an "abiding belief in the truth of the charge" that they are "satisfied beyond a reasonable doubt." WPIC 4.01. WPIC 4.01 has been repeatedly approved. *See Bennett*, 161 Wn.2d at 308 (citing to *State v. Pirtle*, 127 Wn.2d 628, 656-58, 904 P.2d 245 (1995), *State v. Lane*, 56 Wn.App. 286, 299-301, 786 P.2d 277 (1989), *State v. Mabry*, 51 Wn.App. 24, 25, 751 P.2d 882 (1988) and *State v. Price*, 33 Wn.App. 472, 475-76, 655 P.2d 1191 (1982)).

Holloway cites to *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007) in support of his argument that the instruction the trial court gave on reasonable doubt, the pattern jury instruction (WPIC) is "problematic." However, in *Bennett*, the Supreme Court stated

> We also exercise our inherent supervisory powers to maintain sound judicial practice and instruct the trial courts of this State to use the approved Washington Pattern Jury instruction to instruct juries on the government's burden to prove each element of the crime beyond a reasonable doubt.

*Bennett*, 161 Wn.2d at 305.

Though the language Holloway complains of, the "abiding belief" sentence is bracketed in the WPIC and not mandatory on courts, it does not, as Holloway asserts, inject a search for truth into the State's burden of proof.

Holloway cites to *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) in his argument that the "abiding belief" language found in the WPIC instruction on reasonable doubt injects a search for truth into the jury's duty. However, *Emery* is a case involving improper argument by the State, telling the jury that the jury's verdict needed to "speak the truth." *Emery,* 174 Wn.2d at 751. The Supreme Court analyzed *Emery* in a prosecutorial misconduct claim, and not as instructional error, so *Emery* is of little assistance in analyzing whether the "abiding belief" instruction dilutes the burden of proof as Holloway claims.

In *Pirtle*, the Supreme Court found that a jury could not have disassociated the determination of whether there was reasonable doubt from the evidence in the case from the "abiding belief" jury instruction given. *Pirtle*, 127 Wn.2d at 657. This same instruction was upheld and found to "adequately instruct[] the jury on the State's burden of proving each element of the offense beyond a reasonable doubt" in *Mabry*, 51 Wn.App. at 25.

Holloway argues the "abiding belief" instruction suggests to the jury that they should decide the case based on what they think is true. However, that language is not contained anywhere in the reasonable doubt instruction the jury in Holloway's trial was given. The instruction clearly sets forth that the State had the burden of proving every element beyond a

reasonable doubt. It tells the jury it must "fully, fairly and carefully consider[] all the evidence or lack of evidence." WPIC 4.01; CP 106. It is only after this consideration that if the jury has an "abiding belief in the truth of the charge" then they "are satisfied beyond a reasonable doubt." *Id.* This instruction, in no way, infers or communicates to the jury that they should disregard the evidence and go with whatever they think is true, as Holloway appears to suggest. Holloway's claim that the "abiding belief" instruction to the jury is improper is wholly without merit.

Holloway also appears to argue the prosecutor committed misconduct by then using the "abiding belief" language in her argument to the jury. Holloway alleges the prosecutor appealed to the jurors to "find the truth, rather than to determine whether the State had proved each element of each charged offense beyond a reasonable doubt." See Br. of Appellant, p. 33. However, the prosecutor never uttered the phrase "find the truth" or told the jury to "speak the truth" or that their job was to "declare the truth" or any other argument which insinuated to the jury that it should speak, declare, or deliver the truth of this case. The prosecutor argued to the jury that witnesses, notably the victim, were telling the truth, and that the evidence presented through these witnesses proved the State's case beyond a reasonable doubt as that phrase is defined. The prosecutor did not commit misconduct and her statements did not dilute the State's

burden of proof, but rather informed the jury of the elements of the crimes, the evidence the state presented to support those crimes, and that the State had the entire burden in this case. The prosecutor did not commit misconduct.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of

prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn.App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to

everyday decision-making. *Id* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn.App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn.App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

This court should inquire as to whether any improper argument influenced the jury and whether it could have been cured by instructing the jury to disregard the remark. *Id.* at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)). If there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, the defendant was

denied a fair trial. *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981). But if a curative instruction would have obviated any prejudicial effect on the jury, then the case should not be reversed. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2011) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Here, Holloway appears to argue the prosecutor's closing argument was improper. "Urging the jury to render a just verdict that is supported by evidence is not misconduct." *State v. Curtiss*, 161 Wn.App. 673, 701, 250 P.3d 496 (2011). In *Curtiss*, the prosecutor asked the jury, "[d]o you know in your gut—do you know in your hear that Renee Curtiss is guilty as an accomplice to murder? The answer is yes." *Id.* The Court on appeal found no misconduct in this argument stating "the State's gut and heart rebuttal arguments in this case were arguably over simplistic but not misconduct." *Id.* at 702. That is the most that could be said for the prosecutor's arguments in Holloway's trial. The arguments were the prosecutor's attempts to use common language to argue to the jury that they had the evidence they needed to find the defendant committed the crimes beyond a reasonable doubt.

The prosecutor's arguments must be considered in the context of the entire argument, and not the isolated sentences Holloway argues were improper. In her initial argument, the prosecutor went through each count,

discussing the elements of the crime and the evidence presented to support that count. RP 628-40. The prosecutor told the jury, regarding each count, that

> each count has a checklist with it in the paperwork you have. It tells you what you have to find. And it says that you have to find all of those elements, all of those checklists, the numbers, are found beyond a reasonable doubt.

RP 641.

The prosecutor went on to discuss the corroborating evidence presented to the jury during the trial. RP 644-48. In her final statements in her initial closing, the prosecutor told the jury to

> remember the things [the victim] told you. He touched her vagina, he rubbed her vagina, he touched her breasts, her buttocks, all under her clothes. He made comments about her body; he showed her naked pictures on his phone. He sexualized their relationship from the time she was in the fifth grade.

RP 649-50.

The prosecutor urged the jury to convict based on the evidence it presented, and not, as Holloway alleges, in order to speak the truth or find the truth. Further, the prosecutor's statements must be considered in the light of the entire context, and not the snippets and portions Holloway chose to highlight in his brief. Holloway argues the last paragraph of the State's initial closing argument is problematic because it refers to abiding

belief. See Br. of Appellant, p. 32. However, the prosecutor again, urged the jury only to convict based on the evidence, based on what the victim described to them. She stated,

> ...when she got up there on that stand and told you, when she cried to you, when she explained over and over, in all the detail that I made her do, she was telling you what happened to her, and you can believe her and you can know.

RP 650.

Further, Holloway never objected to the prosecutor's arguments he now complains of. In order for this court to reverse for prosecutorial misconduct, it needs to find that the prosecutor's statements were so flagrant and ill-intentioned that no curative instruction could have cured the misconduct. *See Russell*, 125 Wn.2d at 86. Certainly, if the court told the jury to disregard the State's argument or reiterated that the jury must render a verdict based on the evidence or lack of evidence, then the jury would have followed that instruction. It is clear, the prosecutor's argument did not amount to misconduct and did not dilute the State's burden of proof, but rather appropriately used the accepted definition of "beyond a reasonable doubt" to argue to the jury that the State had met its burden through the witnesses it presented.

Holloway also complains of the State's closing paragraph in its rebuttal argument. The State, in its rebuttal, again highlighted the evidence it had presented and responded to defense's argument that the jury needed more evidence than one witness saying something happened in order to convict. RP 697. This statement by Holloway's counsel in closing is a clear misstatement of the law as no corroboration is required in order to convict for sex abuse crimes. RP 659; RCW 9A.44.020 (stating that it shall not be necessary that the victim's testimony be corroborated in order to convict a person of a crime under RCW ch. 9A.44). The State highlighted that the victim's testimony was evidence, was an eye-witness account of the crimes that occurred. RP 697. The State further argued to the jury that reasonable doubt is "a doubt for which a reason exists...." RP 701. And the complained-of argument in the prosecutor's rebuttal starts with asking the jury to "review the evidence." RP 702. This is quite the opposite of what Holloway alleges the State did of "stray[ing] from the evidence." See Br. of Appellant, p. 32. The statements of the prosecutor regarding the heart, minds and guts, is no worse than the prosecutor's statements in *Curtiss*, *supra* wherein the Court found no error. This argument was not improper and did not, even when combined with the "abiding belief" instruction, in any way dilute the State's burden of proof. Holloway was convicted because the jury found beyond a reasonable

doubt that he had molested his daughter over a period of years, based on the evidence presented at trial. Holloway was properly convicted and his convictions should be affirmed.

## IV. THE STATE AGREES THE SENTENCE FOR COUNTS 2, 3, AND 10 SHOULD BE REMANDED AS THE TERM OF CONFINEMENT COMBINED WITH THE TERM OF COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM

Holloway argues the trial court's sentence on Counts 2, 3, and 10 exceed the statutory maximum. Holloway is correct and this Court should remand for resentencing on Counts 2, 3, and 10.

A term of community custody and a prison term may not, when combined, exceed the statutory maximum of a sentence. RCW 9A.20.021; RCW 9.94A.701(9). In *State v. Boyd*, 174 Wn.2d 470, 275 P.3d 321 (2012), our Supreme Court addressed this exact issue after a defendant was sentenced to 54 months in prison and 12 months on community custody, even though the maximum term of his sentence was 60 months. *Boyd*, 174 Wn.2d at 472. The Supreme Court remanded the defendant's case for the trial court to either reduce the term of community custody or resentence the defendant to be in compliance with RCW 9.94A.701(9). *Id.* at 473.

Holloway's convictions on Counts 2, 3, and 10 are class B felonies with a maximum standard range of 120 months. RCW 9A.20.021(1)(b); RCW 9.94A.030(49). Holloway was sentenced to 116 months on counts 2 and 3 and 102 months on count 10, all followed by 36 months of community custody. On each of these counts, the term of community custody when added to the prison term imposed exceeds the statutory maximum of 120 months. CP 203. Given that Holloway's convictions for Counts 2, 3, and 10 exceed the statutory maximum, this Court should remand to the trial court to amend the community custody term or resentence Holloway in order to comply with the statutory maximum sentence.

## D. CONCLUSION

Holloway's convictions should be affirmed. The trial court did not improperly exclude irrelevant and prejudicial evidence of a victim's supposed recantation at the age of 7 when she testified in Holloway's trial at the age of 15. Further, the State presented sufficient evidence of sexual intercourse regarding counts 4 and 8 as the term "vagina" includes all components of the female sex organ, and the court's instruction on reasonable doubt was appropriate and did not misstate or dilute the State's

burden of proof, and neither did the State's arguments to the jury. Finally, the case should be remanded for resentencing on Counts 2, 3, and 10 to comply with the statutorily provided maximum sentence for those counts.

DATED this 14th day of March, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
RACHAEL R. PROBSTFELD,
WSBA #37878
Deputy Prosecuting Attorney

# CLARK COUNTY PROSECUTOR

# March 14, 2014 - 4:06 PM

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