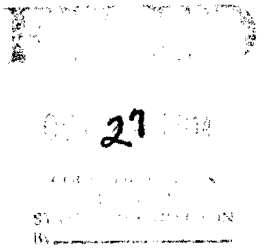
No. 320961



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

State of Washington, Respondent
v.
Richard M. Payne, Appellant

APPELLANT'S BRIEF

David R. Hearrean
WSBA#17864
Attorney at Law
P.O. Box 55
Wilbur, WA 99185
davidhearrean@gmail.com
(509)324-7840

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Assignments of error

1. The trial court erred when the jury was allowed to hear that Mr. Payne has a prior sex offense plus the victim and mother of that conviction testify. (Oct 2, 2013 Trl RP 731-739).

2. The trial court erred by entering the findings of fact and conclusions of law regarding ER 404(b). (CP 628-630; 701-702).

3. The trial court erred by denying Mr. Payne's request to stipulate to the element of a prior sex conviction in count 3 and mitigate the major prejudicial effect of the prior sex offense. (CP 642-646).

4. The trial court erred when it refused to allow in person interviews of key witnesses prior to trial.(March 15, 2013 Status Conf. RP 2-8)

5. The trial court erred by violating appearance of fairness doctrine.

6. The trial court erred by denying Mr. Payne's motion to confront his accuser (ARH) and ARH did not testify and she was the only alleged victim to the major counts of count 1 and 2 which resulted in life in prison.

7. The trial court erred by denying Mr. Payne's motion to dismiss count 1 since no witness testified that they were touched.

8. The trial court erred by refusing to dismiss this case due to government misconduct under CrR 8.3. (July 9, 2013 Motion RP. 113-114).

9. The trial court erred by proceeding with a vital and important portion of the trial/hearing without Mr. Payne's presence. (Aug. 16, 2013 Show Cause RP. 271-306; 554-555).

10. The trial court erred by denying Mr. Payne's request for a missing witness (WPIC 5.20) failure to produce witness) jury instruction.(Oct. 7, 2013 Trl. RP.922-932;CP 752-759).

11. The errors by the Honorable Judge O'Connor require reversal and complete dismissal or new trial.

12. The trial court erred by denying Mr. Payne's motion to suppress his alleged statements and other evidence.(CP 582-594; 463-467) (June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168; CP 623-627; 655-659; 573-594)(See also Ex. D104 - D112).

13. The trial court erred by entering the findings of fact and conclusion of law over Mr. Payne's objections for the CrR 3.5 and CrR 3.6 suppression hearing. (July 9, 2013 3.5 Hrg. RP 70-168; CP 623-627).

B. Issues pertaining to assignments of error

1. Whether Mr. Payne's constitutional rights were violated by the trial court allowing the jury to hear that Mr. Payne has a prior sex offense and allowing emotional testimony from the prior victim and her mother in the present case.

2. Whether Mr. Payne's constitutional rights were violated by the trial court entering finding of fact and related conclusions of law regarding the ER 404(b) evidence.(July 9, 2013 404(b) Hrg. RP 177-179; CP 565-572; 628-630;701-702).

3. Whether Mr. Payne's constitutional right to a fair trial was violated by the trial court denying his request to stipulate to the element of a prior sex conviction in count III. (CP 642-646).

4. Whether Mr. Payne's due process rights were violated by the trial court when it refused to allow in person interviews of key witnesses prior to trial-Mr. Payne was indigent.(March 15, 2013 Status Conf. RP 2-8)

5. Whether Mr. Payne's constitutional right to a fair trial was violated by the trial court and whether Judge O'Connor violated appearance of fairness doctrine..

6. Whether Mr. Payne's constitutional right to confront his accuser (ARH) was violated when ARH did not testify and she was the only alleged victim to the major counts of count 1 and 2 which resulted in life in prison.

7. Whether Mr. Payne's constitutional rights were violated by the trial court not dismissing count 1 since no witness testified that they were touched.

8. Whether Mr. Payne's constitutional rights were violated when the trial court refused to dismiss this case due to government misconduct under CrR 8.3. (July 9, 2013 Motion P. 113-114).

9. Whether Mr. Payne's constitutional due process rights were violated by the trial court when the court proceeded with a vital and important portion of the trial/hearing without Mr. Payne's presence. (Aug. 16, 2013 Show Cause P. 271-306; 554-555).

10. Whether Mr. Payne's constitutional rights were violated when the trial court denied his request for a missing witness jury instruction. (Oct. 7, 2013 Trl. P.922-932; CP 752-759).

11. Whether the errors committed by Judge O'Connor require reversal and complete dismissal or new trial.

12. Whether Mr. Payne's constitutional rights were violated when the trial court denied Mr. Payne's motion to suppress his alleged statements and other evidence. (June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168; CP 176 – 223; 623-627; 655-659; 573-594)(See also Ex. D104 -D112).

13. Whether Mr. Payne's constitutional rights were violated by the trial court entering finding of fact and related conclusions of law regarding the 3.5 and suppression. (June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168; CP 623-627; 655-659; 573-594)(See also Ex. D104 -D112).

C. Statement of the case

1. Factual Background. On June 21, 2012 at about 8:00 p.m., law enforcement was called about a male who had exposed himself and touched a juvenile. (Oct. 2, 2013 trl. RP 616). According to Officer Willard, he arrived at Bumpers located in the mall at 8:13 p.m. However, the alleged touching and exposure had occurred 2 hours prior at 6:07 p.m., almost two hours before law enforcement was contacted. Additionally, the officer stated that security and others had already viewed a surveillance video before law enforcement was called. (Oct. 2, 2013 Trl RP 622-625). A

Bumpers employee pulled the surveillance video and viewed it with several other individuals. Several minutes later, mall security was also viewing the video. The store employee identified Mr. Payne as the individual in the video. (Oct. 2, 2013 Trl. RP 656-659). The employee also stated that the mother of the five year old was also watching the video and became very hysterical. The video is not the best quality. This Bumpers employee released the surveillance video to the press and the press released the video on the news and informed the public that Mr. Payne had a prior conviction of child molestation. (Oct. 2, 2013 Trl. RP 667-674). ARH's brother reported that he was present at the mall and noted that his sister really did not know what was going on. This witness stated that he also viewed the video surveillance with other family members. ARH's brother also stated that KC, the eleven year old present with ARH, did not say much at first. While everyone was watching the video, including several family members, several people started screaming and crying and were upset after they saw the video. ARH's brother also verified that a lot of people really did not know what happened until they watched the video and KC and the girls were close by and witnessed the reaction of the crying and

screaming. Further, he stated that the man pulled his penis out of his pants and was following the girls around. (Oct. 2, 2013 Trl. RP 665-695). ARH's mother, who was shopping at the time, was contacted and she stated that she wanted to find out what happened and get to the bottom of it and then she viewed the video. Her older son did not believe that it was that bad, so she made him watch the video also. ARH's mother stated that she saw Mr. Payne's hand on her daughter's backside while she was sitting on a wave runner or jet ski machine. She verified that she did not personally witness Mr. Payne touch anyone until she watched the video. She stated that she saw in the video, the gentleman take out his penis, however, after viewing the video closer, she realized that "he did not pull himself out". She admitted that when she first watched the video, she thought she saw him pull his penis out and she screamed. All her children were close by and heard her panic. She admitted that after she watched the video, she literally lost it and began screaming and crying. ARH, the five year old girl, came up to her and asked "Mom, are you okay?". The police were not contacted until two hours later, after the video was repeatedly watched. Ms. Holland (ARH's mother) believed in the beginning

that she viewed him taking himself out of his pants; however, the screen was small, so you could not see detail. (Oct. 2, 2013 Trl. RP 702-717). Afterwards, KC, the 11 year old agreed that she saw Mr. Payne touch ARH as charged in Count 2 and expose himself as charged in Count 3 but did not see any touching as charged in Count 1. However, she did indicate that she did not really see any touching until she watched the video on the news. (Oct. 2, 2013 Trl. RP 835-854; 824-834; 742-750). Within a few days, detectives went to Mr. Payne's residence to gather evidence against him. Upon arrival at Mr. Payne's residence they knocked on the front door and when there was no answer, they walked to the side of the residence looking for Mr. Payne. One detective tip toed at the west side of the yard and peeked over the 6 foot privacy fence and called to Mr. Payne to come and talk to them. Mr. Payne complied and stated that he felt that he had to cooperate or he would be arrested. The detectives did most of the talking and Mr. Payne just agreed with what they were asking after they told him that the video showed him exposing his penis and touching the 5 year old girl, ARH.(July 9, 2013 3.5 Hrg RP 71-135; Oct. 2, 2013 Trl. RP637-647; 753-812). Mr. Payne was later arrested and charged with 2

counts of Child molestation in the first Degree involving touching ARH and 1 count of indecent exposure with KC, the 11 year old after they watched the video. ARH never testified or was interviewed by anyone including a child forensic interviewer. The prosecution and Judge O'Connor refused to assist Mr. Payne in arranging and paying for any interview of ARH or KC even though Mr. Payne was unemployed and indigent.(Mar 15, 2013 Hrg RP 5-9). Mr. Payne experienced numerous obstacles preventing him from in person interviews of a majority of the family members of ARH including ARH. Just before the August 2013 trial date, Mr. Payne's defense counsel suffered an illness and had to continue the trial due to this illness. Judge O'Connor found him in contempt of court and held the show cause hearing without Mr. Payne being present. This show cause was for the purpose of attempting to replace Mr. Payne's defense counsel and other important matters. Judge O'Connor held the hearing without Mr. Payne and granted an arrest warrant for Mr. Payne's failure to appear. The warrant was quashed by another judge the next working day when Mr. Payne explained that he did not believe it involved him and did not know of the importance. (Aug 1 and 16, 2013 Hrg RP 244-307). Mr.

Payne was tried and convicted by jury who were informed over his objection that he was convicted in 2001 of atternpted child molestation in the first degree. Mr. Payne was then sentenced to life in prison without the possibility of parole. He now appeals. (All other reference to the record is quoted in the Argument section).

D. Argument

1.Mr. Payne claims he was denied a fair trial and the trial court erred by allowing the jury to hear that he has a prior sex offense and allowed the victim and mother of such prior testify at trial-prejudicial value outweighed the probative value(June 28, 2013 PT Motions RP 5-24; CP 565-572).

Mr. Payne claims that Judge O'Connor erred by allowing the prosecutor to present to the jury sexual propensity evidence such as his prior sex offense he pleaded guilty to over 10 years ago. Mr. Payne claims that by Judge O'Connor allowing this prior sex conviction and emotional testimony from the prior victim and her mother into evidence in front of the jury, it was so inflammatory and facially unfair as to be dispositive, and render a guilty verdict a mere formality. In State v. Smith, 103 Wash. 267, 268 (Wash. 1918) which is an early Washington case, shows how the use of propensity strips away the defendants right to a fair trial because

the state no longer has to prove mens rea in the present acts. In that case, our Supreme Court warned:

> There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial, and such testimony should only be admitted when clearly necessary to establish the essential elements of the charge which is being prosecuted. Smith at 268.(emphasis added).

Thus, Mr. Payne argues that the challenged 404(b) rule that allows the use of propensity evidence frees the state of its burden to prove each element beyond a reasonable doubt. There can be no question that the inflammatory effect on a jury of the admission of such evidence is dispositive, and makes the guilty verdict almost a formality. As reasoned by sister state, and companion Ninth Circuit denizen, Arizona,

> Our supreme court recognized seventeen years ago in Treadaway that evidence of prior sexually aberrant acts can be so highly prejudicial as to be "nearly dispositive, making the guilty verdict almost a formality." 116 Ariz. at 167, 568 P.2d at 1065. State v. Salazar, 181 Ariz. 87, 93 (Ariz. Ct. App. 1994).[1]

In addition to the legislative intent, Washington courts have noted the inapplicability of propensity evidence based on prior occasions to proving what happened on a particular occasion.

> " 'Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes.' " (quoting State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) and citing Karl B. Tegland, Washington Practice: Evidence § 114, at 383 (3d ed. 1989))). State v. Roswell, 165 Wn.2d 186, 197 (Wash. 2008)

a.Common scheme or plan finding was error

Another purpose for which the court admitted Mr. Payne's prior conviction and which he claims error was as evidence of a common scheme or plan. "There are two instances in which evidence is admissible to prove a common scheme or plan: (1) 'where several crimes constitute constituent parts of a plan in which each crime is but a piece of the larger plan' and (2) where 'an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.' "State v. Gresham, 173 Wn. 2d 405, 421–22, 269 P. 3d 207 (2012) (quoting Lough, 125 Wash.2d at 854–55, 889 P.2d 487). In the second instance, evidence of the prior act is offered to show that the defendant developed a plan and has again put that particular plan into action. Id. at 422; Lough, 125 Wash.2d at 852, 889 P.2d 487. Mr. Payne claims that all these cases including Lough involve multiple prior bad acts and not a

single act that occurred over 10 years ago. In State v. Lough, 125 Wash.2d 847, 889 P.2d 487 (1995), our Supreme Court held that common plan or scheme consisted of (plural) prior bad acts evidence that could be admitted to establish or could be established by evidence that defendant committed markedly similar acts of misconduct against similar victims under similar circumstances. Thus, Mr. Payne points out that the Lough court involved more than one act to be considered a common scheme or common plan. In the present case, Judge O'Connor allowed just one single act that occurred over 10 years ago to be considered a common scheme and plan in which Mr. Payne pleaded guilty. Therefore, a single act that occurred over 10 years ago cannot be considered a common scheme or plan under law and only was admissible by Judge O'Connor to show that Mr. Payne is a "criminal type", and is thus likely to have committed the crime for which he is presently charged. Additionally, our Supreme Court followed State v. McKinney, 110 N.C.App. 365, 372, 430 S.E.2d 300, 304 (1993) which further explained that a defendant's prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is

charged and not too remote in time. However, as the McKinney court also explained, while the lapse of time between instances may slowly erode the commonality between acts, when similar acts have been performed repeatedly over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan. (Emphasis added). Hence, common scheme and plan requires repeated acts over years in order to be considered admissible under ER 404(b). Finally, Mr. Payne also points out that even numerous prior acts are not automatically admissible.[ii] As noted in State v. Gresham, 173 Wn. 2d 405, 269 P. 3d 207 (2012), the grounds for admission specified in Rule 404(b) are not magic words, the utterance of which automatically admits all uncharged misconduct evidence. The State has the burden to show precisely how the proffered evidence is relevant to the theory advanced, how the issue to which it is addressed is related to the disputed elements in the case, and how the probative value of the evidence is not substantially outweighed by its prejudicial effect. In this regard, in State v. Sutherby, 165 Wn. 2d 870, 886, 204 P. 3d 916 (2009) the court is reminded, "[w]e have previously cautioned about the admissibility of other sex crimes,

warning that [c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Coe, 101 Wn. 2d 772, 780-81, 684 P. 2d 668 (1994). And, "[i]n cases where admissibility is a close call, "the scale should be tipped in favor of the defendant and exclusion of the evidence." State v. Smith, 106 Wn. 2d 772, 776, 725 P. 2d 951 (1986), quoting, State v. Bennett, 36 Wn. App. 176, 180, 672 P. 2d 772 (1983). As observed in State v. Saltarelli, 98 Wn. 2d 358, 363, 655 P. 2d 697 (1982):

> . . . One need not display an imposing list of statistics to indicate that community feelings everywhere are strong against sex offenders. . . Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise. When deciding the issue of guilt or innocence in sex cases, where prejudice has reached its loftiest peak, our courts . . . [offer] scant attention to inherent possibilities of prejudice. Just when protection is needed most the rules collapse.

Indeed, in State v. Gresham, 173 Wn. 2d 405, 269 P. 3d 207 (2012) the Supreme Court, fully aware of Salterelli by favorable citation in the body of the opinion thereto, had no hesitation

striking a statute allowing propensity evidence at trial, restating while doing so, yet again, "[p]roperly understood, then, ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." In fact, the Supreme Court quoted Professor Tegland, emphasizing, "In no case, . .. regardless of its relevance or probativeness, may the evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith."(Emphasis In Original) "Critically there are no 'exceptions' to this rule." Id.

b.There is no common scheme or plan and the effort to show common scheme or plan is unduly prejudicial and irrelevant and should be denied

Mr. Payne challenges Judge O'Connor's finding that the 2001 prior sex conviction of Attempted Child Molestation in the First Degree can be used under ER 404(b) for the purpose of proving a common scheme or plan. Thus, he claims that the 2001 conviction should not have been admitted for the purpose of showing a common scheme or plan. This is in part due to the fact Mr. Payne did not commit the crimes presently charged and there is no evidence to prove he did so. For example, the alleged video

surveillance does not support the claim Mr. Payne exposed himself. The evidence also shows the female Mr. Payne allegedly touched did not and could not see anything nor did or could the other child. More particularly, and of equal importance, as State v. Gresham, citing State v. Lough, 125 Wn. 2d 847, 853, 889 P. 2d487 (1995), and State v. DeVincentis, 150 Wn. 2d 11, 74 P. 3d 119 (2003) explain:

> . . . There are two instances in which evidence is admissible to prove a common scheme or plan: (1) "where several crimes constitute parts of a plan in which each crime is but a piece of the larger plan" and (2) where "an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." . . . In order to introduce evidence of the second type of common scheme or plan, the prior misconduct and the charged crime must demonstrate "such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which" the two are simply "individual manifestations." . . . Mere "similarity in results" is insufficient. And the acts must be "markedly and substantially similar. . . ." ID. (Emphasis Added)

Here, it is readily apparent the alleged acts Mr. Payne presently faces and the act supporting the 2001 conviction of Attempted Child Molestation in the First Degree are different. Nor are the alleged acts and the acts supporting the 2001 conviction

"markedly and substantially similar." For example, there really is no data or information to suggest what acts actually constituted an attempt. Moreover, as concerns the allegations regarding the attempt count in 2001, there was no amusement arcade; there was no alleged offense or attempt to offend in a place with a video surveillance. And, in the 2001 count there was no alleged offense completed. Nor was there was any offense or attempted offense in front of others. Nor was there an offense or attempted offense in a crowded place. Nor was the attempted molestation set forth in 2001, markedly similar to the present allegations. Thus, the trial court's ruling (CP 628 – 630) runs afoul of ER 401, ER 402, ER 403 and ER 404(b). Some critics have charged that by irresponsibly invoking the theory without careful analysis, many courts have converted plan into a "euphemism" for bad character, and have allowed the theory to degenerate into a "dumping ground" for inadmissible bad character evidence." Miguel A. Mendez and Edward J. Imwinkelried, People v. Ewoldt: The California Supreme Court's About Face on the Plan Theory for Admitting Evidence of An Accused's Uncharged Misconduct, 28 Loy. L.A. L Rev. 473, 478-479. Thus, "caution is called for in the

application of the common scheme or plan exception," (Emphasis Added), DeVincentis at 18, and at 124, and "random similarities are not enough." Id. For, as noted in the recent ER 404(b) decision of our sister state twenty miles to the east, "we do not suggest today that any and all evidence of prior sexual misconduct is admissible in sex crime cases merely by placing it under the rubric of corroborative evidence of a common scheme or plan . .. there must be limits to the use of bad acts evidence to show a common scheme or plan in sexual abuse cases. State v. Grist, 147 Idaho 49, 54, 205 P. 3d 1185, 1190 (2009) and ER 404(b).

c."Intent" is not an element necessary to convict

And thus irrelevant and unduly prejudicial

Mr. Payne also claims that the trial court erred by admitting his 2001 prior attempted sex offense conviction for the purpose for "other acts" evidence of "intent" under ER 404(b) However, the crimes charged are not crimes with intent as an element to convict. For as held in State v. Lorenz, 152 Wn. 2d 22, 93 P. 3d 133 (2004), sexual gratification is not an essential element of first degree child molestation that must be included in the to-convict instructions. As the State should clearly concede, to admit evidence of other acts to

establish intent, intent must be at issue. State v. Salteralli, 98 Wn. 2d 358, 365-366, 655 P. 2d 697 (1982). State v. Ramierez, 46 Wn App 223, 730 P. 2d 98 (1986). Of course, since intent is not a material element of the charged offenses, there is no effort by the State to analyze how the alleged "other acts" fit this purpose. The effort runs afoul of ER 401, ER 402, ER 403 and ER 404(b).

d.The alleged prior misconduct is more prejudicial than probative

Next, Mr. Payne argues that Judge O'Connor did not appropriately balance the probative versus the prejudicial effect of the prior sex conviction within the boundaries of the law. The trial judge seemed to say without explanation that she finds the probative value outweighed the prejudicial effect. (July 9, 2013 Motion RP 177-180). Additionally, Mr. Payne claims that Judge O'Connor erred by allowing the victim in his prior 2001 attempted child molestation conviction and her mother to testify and cry at the trial in front of the jury. This caused further prejudice to Mr. Payne which the trial court could have prevented. Mr. Payne claims that it was not necessary to have the victim and her mother verify and emphasis the prior conviction.(Oct. 2, 2013 Trl. RP 731 -739). The trial court never considered this fact in the required

balancing of prejudicial effect versus the probative value. As observed in State v. Bowen, 48 Wash.App. 187, 195-196 (1987) and still true to this day, ER 404(b) evidence "is highly prejudicial because the possibility exists that the jury will vote to convict, not because they find [a person] guilty of the charged crime beyond a reasonable doubt, but because they believe [a person] deserves to be punished for a series of immoral actions. . . . (citations omitted) . . .The jury may place undue weight or overestimate the probative value of the other prior acts. . . . (citations omitted) . . overestimation problems are especially acute where the prior acts are similar to the charged crime." State v. Anderson, 31 Wn. App. 352, 356, 641 P. 2d 728, review denied, 97 Wn. 2d 1020 (1982). Indeed, prejudice arising from prior convictions which may appear similar to the charged crimes is great since the jury is likely to believe "if he did it before he probably did so this time." For, as Bowen continues, ". . . introduction of other acts of misconduct inevitably shifts the jury's attention to [a person's] genera] propensity for criminality, the forbidden inference; thus, the normal "presumption of innocence" is stripped away." And, as concerns the efficacy of a limiting instruction, as observed in State v. Miles, 73 Wn. 2d 67, 71, 436 P. 2d 198 (1968):

> . . We do not think the prejudicial effect of this testimony could be removed by an instruction. As the defendants point out, a more elaborate instruction than that which was given would only emphasize the testimony in the minds of the jury.
>
> As we said in State v. Green, 71 Wn. 2d 372, 428 P. 2d 540 (1967), the final measure of error in a criminal case is not whether [a person] was afforded a perfect trial, but whether he was afforded a fair trial. A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial. State v. Devlin, supra. [145 Wash 44, 258 P. 826 (1927)].[iii]

The State's efforts and the Honorable Judge O'Connor's ruling should have been barred by ER 401, ER 402, ER 403 and ER 404(b). Therefore, Mr. Payne argues that his trial should have focused on proving the current charges and not efforts to convict him with his past convictions or prior alleged acts. The allegations and convictions are time barred and ancient. Moreover, "motive" and "intent" are irrelevant and there is no evidence of a common scheme or plan. And, the prior allegation and conviction would be unduly prejudicial and outweigh whatever probative value otherwise might exist. Moreover, curative or limiting instructions would not assist and only compound matters. In fact, the jury panel even made a plea to Judge O'Connor that she was asking them to do a lot more than expected and how can they not consider the prior sex

offense and give Mr. Payne a fair trial.[iv]Mr. Payne's defense is that he did not touch anyone or have his penis exposed and the video only shows him touching the back of a seat and not a 5 year old. (Oct 7, 2013 Trl RP 958-981). Finally, close-up and still photos of the video clearly do not show any pants unzipped or penis exposed; only an innocent adjustment to his shirt and shorts similar to a baseball pitcher adjusting his cup in front of millions of viewers. There is no law against this type of innocent behavior. Therefore, this case does not involve an identity or mistake or intent or motive since the video shows what really happened, i.e., nothing. Thus, with the video showing nothing except "fill in the blanks with your imagination", if Mr. Payne's prior convictions are communicated to the jury, the jury will only convict based upon the prior conviction and Mr. Payne being a convicted sex offender who should not have been at the mall in the first place. No jury instruction would prevent this type of prejudice from occurring. Therefore, Mr. Payne's prior conviction is highly prejudicial and this prejudice far outweighs any probative value and should not have been communicated to the jury under ER 404(b). Thus, Mr. Payne asks this court to reverse Judge O'Connor's ruling and not allow the state to prejudice the

jury with facts, witnesses and emotion from a prior conviction. ER 404(b) was not meant to extend this far. This case should be dismissed or in the alternative a new trial should be granted with a different judge. Finally, Mr. Payne objected to the State's and the Court's Finding of Fact and Conclusion of Law on similar basis as stated above regarding the ER 404(b) ruling. (CP 565-572).

2. Mr. Payne claims the trial court erred by entering the findings of fact and conclusion of law 404b (cp 628-630) over Mr. Payne's objections.

Next, Mr. Payne claims that the trial court erred when it entered the Findings of Fact and Conclusions of Law over his objection regarding allowing the jury to hear of his prior sex conviction under ER 404B. Thus, Mr. Payne notes the following objections and exceptions:

1. Mr. Payne objects that the findings of fact do not include the defense and other facts as stated below or in the conclusions of law. [v]He is alleged to have touched the buttocks area of a five year old female while that child was separated from adult supervision which Mr. Payne denies.

2. The defendant objects to the presentment of his 2001 conviction one count of Attempted First Degree Child Molestation. Mr. Payne served his sentence and was not on any probation conditions.

Additionally, he is not being currently charged for such incident as described in this section. Therefore, to allow the jury to hear of Mr. Payne's prior sex conviction is highly prejudicial and inflamed the jury.

3. Mr. Payne objects to the live testimony on June 28, 2013 and during trial of the victim of the 2001 offense (MH) and her mother, Candice Short who testified about the 2001 incident and identified the defendant as the perpetrator of that offense. Mr. Payne is not being tried for this incident.

Conclusion of Law Objections

1. Defense objects to the 2001 case being presented to the jury. This conviction is a sexual offense and this introduction to the jury is too prejudicial and will prevent Mr. Payne receiving a fair trial.

2. Mr. Payne objects to this conclusion of law on the basis that the theories to establish admissibility of this ER 404(b) evidence were not proved. Mr. Payne also objects to intent and accident or mistake portion of the state's basis in that counts I and II do not require intent and Mr. Payne claims that he never touched anyone.

3. Mr. Payne objects that the 2001 conviction is relevant to the present case based on a similarity of actions. This incident is not

similar and is not timely. There has been too much time between the alleged current incident and prior conviction and the findings do not support this conclusion. .

4. Mr. Payne objects to this conclusion and claims the prejudicial impact of admitting the prior conviction for which he is not charged with in the present case is greater than the probative value. Since the only victim will not testify to counts I and II which resulted in a life sentence. Plus, the fact that the 12 year old, K.C., watched the video and witnessed extreme excitement by others watching the same video including screaming that they saw Mr. Payne's private parts and claimed that they clearly saw Mr. Payne touching ARH before the police were even called. Plus, the video does not show such clear claims (Oct 2, 2013 Trl RP 712-718). The prejudicial impact of the jury being told that Mr. Payne is a convicted sex offender is far greater than the probative value. Mr. Payne claims that the jury will only use their imagination and anger toward his past and convict based on emotion.

5. Defense objects to the court not allowing him to stipulate that he was convicted of the element crime by statute number instead of a sex offense name and/or attempted first degree child molestation.

(See also legal argument in Section D 3 below). The prejudicial impact of admitting such evidence can be mitigated by such stipulation and careful wording as suggested Mr. Payne. See D3.

6.Mr. Payne objects to the conclusion of law that such evidence of this prior bad act is admissible under any of the three theories identified above (Common scheme or plan, Motive or intent, and to refute a claim of accident or mistake). The defense and other missing facts as stated by Mr. Payne above and the state's summary findings of fact do not support such conclusion of law and looks like a judicial comment on the prior evidence and convictions.

7. Mr. Payne objects and claims that any limiting instruction given was not followed by the jury and the fact of Mr. Payne being convicted of a prior sex offense only resulted in heat and fire in the eyes of the jury.

3.Mr. Payne claims that the court erred by not allowing him to stipulate to the element of a prior sex conviction in count iii and mitigate the major prejudicial effect of the prior sex offense

Mr. Payne further claims that the trial court erred by not allowing him to stipulate to the prior conviction and avoid further prejudice. (CP 642-646). Specifically, Mr. Payne asked Judge O'Connor to allow him to stipulate that he was convicted in 2001 of

Attempted First Degree Child Molestation and that the specific facts of this prior conviction cannot be bought in evidence to the jury. ER 403 and State v. Roswell, 165 Wn.2d 186; 196 P.3d 705 (2008) and Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). As the Roswell court stated at 191 n.10, "However, the Court in Old Chief did not hold that a jury must be completely shielded from any reference to the prior offense, only that when a defendant stipulates to a prior conviction the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction".

Regarding a similar issue, Mr. Payne argues that the trial court erred by allowing the prosecutor to mention that the defendant has been convicted of a sex offense in regards to the prior conviction element in Count III when the record reflects that the defendant would stipulate that he "was convicted of an offense as defined in RCW 9.94A.030" or allow defendant to bifurcate the trial and immediately prior to closing arguments, the stipulation would be read to the jury.[vi] In Oster at p. 147, the court ruled that a trial court did not abuse its discretion in bifurcating the "to convict"

instruction with respect to prior criminal offenses in order to protect a defendant from possible prejudice.

In fact, the Washington Association of Prosecuting Attorneys appearing as amicus curiae has offered a different procedure that could be used by trial courts to limit prejudice in these situations. See FN VII.

In State v. Rivera, 95 Wn. App. 132, 137-138; 974 P.2d 882; 1999, the court addressed this similar issue and ruled:

> "In *Johnson,* we recognized the standard rule that a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Johnson*, 90 Wn. App. at 62 (quoting *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 651, 136 L. Ed. 2d 574 (1997)). The Supreme Court thus held that a trial court abuses its discretion when it spurns a defendant's offer to stipulate and admits a record of defendant's prior crimes thereby raising the risk of a verdict tainted by improper considerations when the purpose of the evidence is solely to prove the element

of prior conviction. *Old Chief*, 117 S. Ct. at 647. *See also* 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 106 (2d ed. 1982)."[vii] See Roswell at P. 199.

4.Mr. Payne's due process rights were violated by the trial court when it refused to allow in person interviews of key witnesses prior to trial-Mr. Payne was also indigent and Judge O'Connor refused availability of witnesses at no cost to him. (May 28, 2013 Motion RP 38-54; CP 132 – 141).

Since the first hearing and thereafter with the Honorable Judge O'Connor, Mr. Payne has requested verbally through counsel and in written motions for an order or judicial assistance requiring the prosecution to arrange for in person defense interviews of the key prosecution witnesses[viii]. Mr. Payne through counsel explained to the court that this case was a life in prison sentence and because of the seriousness of the charge and allegations of coaching and suggestibility by others during the replay of the surveillance video, in person defense interviews was absolutely necessary. (March 15, 2013 Status Conf. RP 2-7). The trial court even agreed and stated that "The defense has a right to interview the witnesses. And all of you are going to want to talk to these people in person anyway. I cannot imagine in a serious matter that you are not going to want to –". (Mar 15, 2013 Status

Conf. RP 8). The prosecutor also requested financial assistance from the court for expenses to transport the witnesses from out of state for an in person interview for the defense. Judge O'Connor refused the defense and prosecution requests and even denied all future requests despite Mr. Payne claiming he was unemployed and could not afford the additional costs.[ix] Judge O'Connor clearly stated that Mr. Payne or the prosecutor should not be looking for the court to pay for travel expenses to interview the key prosecution witnesses who were located out of state.(Mar 15, 2013 Status RP 3-8). Mr. Payne claims that Judge O'Connor violated his federal and Washington State constitutional right to assistance of counsel, a right to a fair trial and due process of law. Thus, he asks this court to dismiss these charges pursuant to CrR 8.3, sixth Amendment, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Article 1 sec 22 and State v. Beadle, 173 Wn. 2d 97, 265 P. 3d 863 (2011).

As noted in State v. Burri, 87 Wn. 2d 175 (1976) "the constitutional right to have the assistance of counsel, Art 1 sec 22, carries with it a reasonable time for consultation and preparation . .

Burri goes on to state, "the defendant's right to compulsory process includes the right to interview a witness in advance of trial. The attorney for the defendant not only had the right, but it was his plain duty towards his client, to fully investigate the case and to interview and examine as many as possible of the eye-witnesses to the assault in question, together with any other persons who might be able to assist him in ascertaining the truth concerning the event in controversy . . . The violation of defendant's constitutional right to counsel and the right to compulsory process is presumed to be prejudicial." Additionally, a defendant's right to the compulsory attendance of witnesses includes the right to interview a witness in advance of trial. State v. Burri, 87 Wn. 2d 175, 180-81, 550 P. 2d 507 (1976). As stated by our Washington State Supreme Court in Burri at p. 181;

> Moreover, as stated in State v. Papa, 32 R.I. 453, 459, 80 A. 12 (1911), the defendant's right to compulsory process includes the right to interview a witness in advance of trial.
>
> The violation of defendant's constitutional right to counsel and the right to compulsory process is presumed to be prejudicial. It is nonetheless prejudicial even if the prosecutor believed his conduct lawful. Burri at p. 181 (emphasis added).

Thus, Mr. Payne argues that because of such prejudice the matter should be hereby dismissed with prejudice or Mr. Payne be released from prison and a new trial ordered. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988); Sixth Amendment, Article 1 sec 22 Washington Constitution.

5.Mr. Payne claims that the trial Judge O'Connor violated appearance of fairness doctrine -trial judge should have recused

Mr. Payne claims that he never received a fair trial. He alleges that from the first hearing and afterwards, Judge O'Connor sided with the prosecution's case and violated his due process right to a fair trial and the doctrine of appearance of fairness. He alleges that Judge O'Connor was bias and prejudicial throughout his case and should have recused herself. This trial judge also refused to order the prosecutor to allow a defense interview of this person or require this person to testify at trial. Please note that there was no child forensic interview conducted or furnished in discovery regarding ARH who was the only alleged victim in both counts of First Degree Child Molestation. (May 3, 2013 Motion Hrg RP 32-34). Mr. Payne points out that Judge O'Connor was unfair to his

defense counsel. One example was when Mr. Payne's defense counsel experienced technical or mechanical problems with the defense video exhibit (Ex D222) during a vital portion of the closing argument and asked for a minute to fix, Judge O'Connor refused to excuse the jury and this judge complained in front of the jury that "We have been at this for about 15 minutes....at this point I would like to get this going".(Oct 7, 2013 Trial RP 975-976). Mr. Payne also complains that Judge O'Connor raised her voice in a very threatening manner saying that defense counsel will never again interrupt her while she is talking or object while she is talking. (Nov. 20, 2013 Sent. RP 1017-1018). Judge O'Connor admitted that maybe she "tipped him (Mr. Payne's defense counsel, Mr. Hearrean) over or what...". (August 1, 2013 Ct. Hrg. RP 257, lines 16-18). The record shows that Judge O'Connor even personally attacked Mr. Hearrean's wife by saying she (Mrs. Hearrean) "was a major problem." (August 1, 2013 Ct. Hrg. RP 255, line 10). Mr. Payne also adds that Judge O'Connor purposefully conducted an important hearing (show cause) without Mr. Payne's presence which he has an absolute right to attend. (Aug.16, 2013 Motion Contempt RP 29-64). He alleges that Judge O'Connor showed

further bias and prejudice against him when she attempted to convince him (unsolicited) to fire his attorney and apply for a public defender in violation his right to his attorney of choice and appearance of fairness doctrine. (Aug. 1, 2014 AM Session RP13, RP23, RP25).[x] Mr. Payne also points out that Judge O'Connor mis-stated the record and alleged that she specifically ordered Mr. Payne to be at the show cause hearing; thus, she issued a warrant for his arrest.[xi] However, the transcribed court record does not reflect such judicial order as Judge O'Connor stated.(Aug. 1, 2014 Ct Session RP 2-28). Additionally, Judge O'Connor never served Mr. Payne with the show cause order she ordered prepared at her direction. Judge O'Connor also allowed and sided with the prosecutor to argue motions without adequate notice; allowed the prosecutor to delay until the last minute to set up defense interviews of key witnesses and allowed and sided with the prosecutor's witnesses who refused to be interviewed. (Mar 15, 2013 Status RP 16-19)((July 26, 2013 Motion Hrg RP 227-243). Judge O'Connor also cancelled Mr. Payne's defense counsel's scheduled prepaid vacation and used defense counsel's arguments on another matter as a basis which involved not using a scheduled

vacation for law enforcement as a basis for allowing a video deposition in lieu of testimony at trial. (July 26, 2013 Motion Hrg RP 241-243). However, the court was very verbal about allowing law enforcement to have a vacation. (July 9, 2013 Motion RP 63). Mr. Payne also alleges that Judge O'Connor was bias when she refused to appropriately schedule a fair chance for defense counsel to interview witnesses or have available to him for in-person defense interviews of key prosecution witnesses prior to trial or even order timely interviews of such witnesses and this same judge refused to make these witnesses available to him at no costs since he was indigent. (May 28, 2013 Motion Hrg RP 38-54; July 9, 2013 Motion Hrg RP 57-70). However, Judge O'Connor allowed the prosecutor to pay KC's mother $100 for lost wages caused by her testifying. (Sept. 30, 2013 Motion RP 379-380); however, this judge and prosecutor refused to assist Mr. Payne's right to confront and call witnesses at no expense to him even though the court knew he was indigent. (Aug. 16, 2013 Show Cause RP 297). Mr. Payne next claims that he was forced with an illegal Hobson choice when Judge O'Connor allowed the prosecutor to submit untimely documents for sentencing and give him a choice of either given up

his right to a speedy sentencing or his right to a fair sentencing unprepared by surprise. Judge O'Connor also found Mr. Payne's defense counsel in contempt for being ill (CP 529-559) and sending officers to his personal residence and also ordering defense counsel to appear in court while very ill. Therefore, based upon the above bias and prejudicial behavior of the trial judge and her refusal to recuse after several motions (Aug 16, 2013 Show Cause RP 274, 277; Sept. 30, 2013 Trl. RP 381), Mr. Payne alleges that Judge O'Connor violated the appearance of fairness doctrine and was the complainant, indicter and prosecutor which constituted a denial of the fair and impartial trial required in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Art 1 Sec 3 of the Washington State Constitution.

In re Murchison, 349 U.S. 133, 135, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), the Supreme Court of the United States stated:

> This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71

> L.Ed. 749...But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13. (emphasis added).

a.The trial court judge erred by not recusing herself and prosecutor; thus, this error requires reversal

Mr. Payne next claims that a new trial and/or dismissal should be granted since the trial court judge and prosecutor refused to recuse. The Judge's conduct in instructing the prosecutor to pursue the charges of contempt and leading up to the instruction to the prosecutor shows a personal animus bolstered by her statements on record. The transcripts clearly show that Judge O'Connor ordered the prosecutor to write up and deliver the show cause order. Next, the judge went to the ultimate sanction rather than pursuing gradual lesser progressive sanctions. Finally, the judge's action of finding Mr. Payne's defense counsel of contempt prior to trial violates the Appearance of Fairness/actual antipathy. Additionally, the deputy prosecutor's filing of the motion at the Judge's instruction creates a conflict with prosecutorial neutrality in assuring the defendant a fair trial as the deputy is a tool of the judge by citing it up at court's direction and not a neutral player. Judge O'Connor also asked the prosecution's key law enforcement

officer leading question to assist her in making the prosecutor's record. (July 9, 2014 3.5Hrg RP77[xii]; RP78[xiii]). Additionally, Judge O'Connor loudly ordered Mr. Payne's defense counsel that he was not allowed to object (November 20, 2013 Sent RP 1037)[xiv] or even speak at times (Nov. 20, 2014 Sent RP 1017-18[xv]; June 28, 2013 Motion RP6) which Mr. Payne further claims clearly violates the appearance of fairness doctrine.

The appearance of fairness doctrine, only applies to *judicial and quasi-judicial decision makers.* The doctrine seeks to prevent "the evil of a biased or potentially interested judge or quasi-judicial decisionmaker." *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, , 837 P.2d 599 (1992). This doctrine not only requires the judge to be impartial but "'it also requires that the judge appear to be impartial.'" *Id.* at 618 (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). The Defendant asserts that the doctrine applies to prosecutors, based on a line of cases out of the Washington Courts of Appeals. *See State v. Perez*, 77 Wn. App. 372, 891 P.2d 42 (1995); *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992). Additionally, there are several cases that have ruled that finding another's lawyer guilty of contempt is very

prejudicial to the defendant. In re: Cary, 165 Minn 203 206 N.W. 402 (1925) where the defendant is on trial for a grave crime, the court ruled that it might result in serious prejudice to him if his attorney was adjudged to be guilty of contempt and subject to punishment in the midst of the trial. If the court is of the opinion that imposing punishment at the time of trial would be unwise or that prejudice to some of the parties before the court might issue therefrom, it may defer action in the interests of justice and fairness. United States v. Sacher, 182 F. 2nd 416 (1950); affirmed by Sacher v. U.S., surpa. Mr. Payne claims that he was severely prejudiced throughout his case by Judge O'Connor's actions as indicated in this appeal. Finally, since Judge O'Connor was the one person who ordered the prosecutor to commence the show cause contempt action and directed all procedures (Aug. 16, 2013 Contempt Motion RP 31)[xvi], the law requires the judge to recuse herself.[xvii]

Therefore, Judge O'Connor erred by refusing to recuse herself after several requests. (Aug 16, 2013 Show Cause RP 274, 277; Sept. 30, 2013 Trl. RP 381). These convictions should be reversed and dismissed.

b.Mr. Payne alleges that Judge O'Connor was bias and unfair to Mr. Payne for not allowing him to have in person interviews of state's key witnesses and payment for such costs at public expense eventhough Mr. Payne was indigent

Mr. Payne argues that the trial court demonstrated further prejudice and bias and violated his constitutional right to interview witnesses face to face by refusing to order the prosecutor to have his key witnesses available for an in person defense interview and fund the witness transportation; especially since he was indigent. The prosecutor agreed that there was a potential competency issue with the 5 year old alleged victim contained in the two counts of First Degree Child molestation that resulted in a mandatory life sentence for Mr. Payne. (March 15, 2013, Status Conf., P. 5). The prosecutor stated that if in-person interviews are needed or ordered that the prosecutor would ask the trial court to pay for the costs to transport the out of state witnesses to Spokane area. The court clearly responded that the court was not going to pay such costs. The defense counsel also clearly stated that due to the extreme penalty of life in prison, Mr. Payne requires in person interviews. The trial court added that "I think you are looking to me, to try to pay for it, and that is not going to happen....You are going to have

to find the resources and do what you need to do". Defense counsel clearly objected to any other type of defense interview other than in person and the trial judge clearly refused to pay for Mr. Payne's expenses to travel out of state or even the prosecutor's request for expenses to be paid at public expense due to Mr. Payne being indigent. (March 15, 2013, Status Conf., P. 5-8). Thus, Mr. Payne argues his constitutional rights were violated when he was denied face to face contact with the witnesses and denied public expense to pay for such face to face interviews. Mr. Payne was found indigent by the trial court (Aug. 16, 2013 Show Cause RP 297; CP 139-141, 161-162, 522-526, 1304-1310). Thus, Mr. Payne argues that the trial court violated his constitutional right to due process at public expense since he was indigent and the trial court refused to pay for the costs required to travel out of state in order to interview witnesses in person. At arraignment, he was clearly advised by the court that he had such a right if he could not afford it. Additionally and according to the Washington State Constitution, Art. 1, § 22, entitled "Rights of the Accused": Thus, Mr. Payne asks this court to reverse the conviction due to violation of these rights and dismiss all charges.

6.Mr. Payne claims that the trial court erred when Judge O'Connor denied his constitutional right to confront his accuser a.r.h. (who was the only alleged victim on counts1 and 2) not testifying

Mr. Payne claims that the trial court erred by not granting his motion for ARH to testify since she was the only alleged victim in the counts 1 and 2 that resulted in a life sentence without the possibility of parole. Specifically, Mr. Payne demanded several times that in "any prosecution at any hearing or any trial A.R.H. and all witnesses against him be required to appear and be subject to cross examination and does not waive his rights in this regard." (CP 83, 87). Pointer v. Texas, 380 U.S, 400(1965); Coy v. Iowa, 487 U.S. 1012 (1998). Mr. Payne also made it clear that he moved the trial court for an order requiring live testimony from the complainant witness identified as A.R.H. (CP 83, 87). Pointer v.Texas. 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Coy v. Iowa, 487 U.S. 1012, 108 S. Ct.25 2798, 101 L. Ed. 2d 857 (1988); Sixth Amendment, Article 1 sec 22 Washington Constitution. (CP 83, 87). Judge O'Connor clearly denied Mr. Payne's request to confront his accuser (ARH) who was the only alleged victim to the charges that resulted in a life sentence without any possibility of parole. Mr.

Payne felt that Judge O'Connor sided with the prosecution and assisted in ARH not appearing at trial or being available for a defense interview. (Mar. 15, 2013 Status RP 5-8; May 3, 2013 Motion RP 33-35; May 28, 2013 Motion RP 38-48). After the prosecutor stated that it appears that ARH will not be available, Mr. Payne alleges that Judge O'Connor clearly sided with prosecutor and started calling ARH a "small child" and ordered that "I certainly would not want, frankly, anybody interviewing her (ARH), either the state or the defense, if it is going to be that she is not going to be called as a witness in this matter." (May 28, 2013 Motion RP 46, lines 19-23). Judge O'Connor just ignored Mr. Payne's request for ARH to appear at trial for live testimony and being available for a defense interview. Therefore, any further effort by Mr. Payne to interview or be able to confront ARH was frugal. Mr. Payne has a constitutional right to confront his accuser. Thus, this trial court action violated Mr. Payne's constitutional rights under Sixth Amendment of the U.S. Constitution and Article 1 sec 22 of the Washington Constitution and his due process rights under both the state and federal constitutions. The convictions should be reversed

and this case dismissed under double jeopardy doctrine or a new trial granted with a different judge.

7.Mr. Payne claims that the trial court erred by not dismissing count 1 since no witness testified that they were touched

Mr. Payne next claims that since no witness testified that he had sexual contact and touched A.R.H. as charged in Count I, the trial court erred and should have dismissed this count according to State v. Knapstad, 107 Wn.2d 346, 356, 729 P.2d 48 (1986). (Sept. 30, 2013 Motion RP 334-343). It was clearly undisputed that no one could or would testify that they were touched by Mr. Payne as alleged in Count 1 and the prosecutor relied only on a vague unclear surveillance video. Thus, the trial court erred by not dismissing Count 1 and allowing such charge to be heard by the jury who were already tainted by the introduction of Mr. Payne's prior 2001 attempted child molestation conviction. The jury did not hesitate convicting Mr. Payne on Count 1 despite no one testifying and only guessed at what the surveillance video showed which was vague and unclear for any verdict beyond a reasonable doubt. Additionally, Mr. Payne claims that after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime in count 1 beyond a

reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).* (Italics ours.)

8.Mr. Payne also claims that by the detective concealing the fact that he took pictures for evidence to be used at trial but such evidence was moved from its original location is withholding significant evidence requiring reversal of convictions.

Next, Mr. Payne argues that the detective in his case withheld the fact that pictures were taken of the relevant machines; however, these machines were moved and such fact was not revealed until late. Thus, this information should have been made available as soon as it was known and since it was not written in any report as the detective testified, Mr. Payne further claims that the error resulted in governmental misconduct under CrR 8.3 requiring dismissal. Therefore, it is error to withhold such significant evidence which denied Mr. Payne a fair trial. For that reason the case should be dismissed or reversed and remanded for a new trial. State v. Strobbe, 296 Ark. 74, 752 S.W.2d 29; 1988. (July 9, 2014, Hrg/3.5, P. 114)[xviii]

9.Mr. Payne's constitutional due process rights were violated when the court proceeded with a vital and important portion of the trial/hearing without Mr. Payne's presence

Mr. Payne also argues that the charges should either be dismissed or he be granted a new trial since he was not allowed to

be present during a vital portion of the criminal proceedings on August 16, 2013 when the court held a hearing regarding the finding of contempt of his defense attorney. Under the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, a criminal defendant has a constitutional right to be present during all "critical stages" of the criminal proceedings. *United States v. Gagnon.,* 470 U.S. 522, 526,105 S. Ct. 1482. 84 L. Ed. 2d 486 (1985); *State v. Berrvsmith,* 87 Wn. App. 268, 273. 944 P.2d 397 (1997). A defendant has the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the fairness of the procedure. *Kentucky v. Stincer.* 482 U.S. 730, 745, 107 S: Ct. 2658, 2667, 96 L. Ed. 2d 631 (1987); *Berrysmith.* 87 Wn. App. at 273. Mr. Payne believes that he has a constitutional right to be present during any portion of the crirninal proceedings especially when it involves the contempt and/or replacement of his attorney of choice. This portion missed by Mr. Payne who was not in custody was not just any hearing but a vital portion of his case and representation of counsel and the court should not have proceeded without his presence. This

hearing was first a purely legal matter and Mr. Payne claims that his absence affected the opportunity for him to hear all of Judge O'Connor's show cause hearing involving his case and his counsel of choice. Thus, Mr. Payne argues that this portion of his criminal proceeding was a critical stage and required his attendance. Therefore, Mr. Payne requests either a dismissal of all charges or a new trial with a different judge.

10.Mr. Payne claims that the trial court erred by denying his request for a missing witness (WPIC 5.20 failure to produce witness) jury instruction

Mr. Payne next argues that he was denied a fair trial when Judge O'Connor refused to allow him to present a Failure to Call Missing Witness Instruction and argue the presumption that the missing witness would have been adverse to the prosecutor's case. In the present case, the missing witness (ARH) was a five or six year old girl who was never declared incompetent to testify and no testimony was ever explained on the record of why she was not called by the prosecution. ARH was the only alleged victim to both of the First Degree Child Molestation charges which ultimately resulted in a life sentence for Mr. Payne and was definitely the only witness to testify whether or not she was actually touched in any

way in both counts of child molestation.[xix] Mr. Payne expects the state to argue that there was certain proof to explain the missing witness; however, the record does not contain any such adequate evidence even if was partially explained to Mr. Payne's defense counsel during any recess of the proceedings. Additionally, although the state's explanation may appear in its brief on appeal, there is nothing in the trial record to substantiate this explanation. Thus, the courts have consistently held that cases on appeal must be decided on the record made in the trial court (Lally v. Graves, 188 Wash. 561, 63 P.2d 361 (1936)) and that the appeals court can only consider evidence presented in the record (Falcone v. Perry, 68 Wash.2d 909, 915, 416 P.2d 690 (1966); Tyree v. Gosa, 11 Wash.2d 572, 579, 119 P.2d 926 (1941); Dibble v. Washington Food Co., 57 Wash. 176, 106 P. 760 (1910)). Therefore, for the purpose of considering this issue, the appeal's courts must assume that the state's failure to call the only alleged victim in both counts of child molestation that resulted in a life sentence was unexplained at the time of trial. Also see State v. Davis, 73 Wash.2d 271, 276, (1968). Therefore, this alleged witness was vital to the prosecution's case and the record shows that the prosecution had

a special relationship and able to contact this alleged victim's family at almost any time and was particularly available to the prosecution.

11.Mr. Payne Submits Argument for Reversal and Complete Dismissal or New Trial for Errors Committed by Judge O'Connor

Finally, Mr. Payne points out that federal and state law forbids the prosecution obtaining the benefit of a missing witness at trial. This witness (ARH) was not just a normal prosecution witness but was the only alleged victim of the two major counts that resulted in a life sentence for Mr. Payne. The prosecution never produced this witness at trial. See also State v. Nelson, 63 Wash.2d 188, 386 P.2d 142 (1963). Such conduct by the prosecution has, of course, been condemned in both federal and state courts as a denial of due process and thus a ground for the reversal of any conviction resulting therefrom. Brady v. State of Maryland, 373 U.S. 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); United States ex rel. Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1964); People v. Fisher, 23 Misc.2d 391, 192 N.Y.S.2d 741 (1958)l. (emphasis added).

12.Mr. Payne claims that the detectives violated his constitutional rights by presenting statements against miranda

and while trespassing and conducting a search and gathering evidence without a warrant to search the curtilage(June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168; CP 623-627; 655-659; 573-594)(See also Ex. D104 -D112).

Mr. Payne next claims that the detectives violated his constitutional rights by trespassing and conducted a search and gathering evidence against him without a warrant to search the curtilage. Mr. Payne also alleges that any statements he allegedly made to the detectives were coerced and involuntary and also in direct violation of his constitutional rights. Thus, all evidence seized including all statements and other derivative evidence are fruits of the piousness tree and must be suppressed.

a. The defendant's admissions were involuntary and the direct results of coercion

Mr. Payne also alleges that his statements to law enforcement were involuntary and induced by physical and/or psychological coercion. Thus, the statements must be suppressed. This claim by Mr. Payne is governed by the constitutional standard of voluntariness under the Fifth and Fourteenth Amendments. *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); *State v. Kysar*, 114 Idaho 457, 458, 757 P.2d 720, 721 (Ct.App.1988). Whether a defendant acted voluntarily in choosing

to make an inculpatory statement, although essentially a factual question is determined in the first instance by the trial court. *State v. Blevins*, 108 Idaho 239, 243, 697 P.2d 1253, 1257 (Ct.App.1985); *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), *cert. denied*, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971)..

"The evil against which the *Miranda* decision was directed was lengthy interrogation, employing psychological strategems designed to elicit inculpatory statements from criminal suspects who had not made an informed or knowing waiver of their right to remain silent and to be represented by counsel." State v. Dillon, 93 Idaho 698, 706, 471 P.2d 553, 561 (1970) "If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure * * *." *Townsend v. Sain*, 372 U.S. 293, 307, 83 S.Ct. 745, 754, 9 L.Ed.2d 770, 782 (1963). In the present case, the detective falsely stated that he had a video that showed Mr. Payne touching the 5 year old and exposing his penis which pressured Mr. Payne to agree or go to jail. (July 9, 2013 3.5 Hrg RP 91-92).

In Washington State, the inquiry is whether, considering all of the circumstances, the confession was coerced. *Broadaway*, 133 Wn.2d at 132. A confession is coerced if the defendant's will is overborne. *Broadaway*, 133 Wn.2d at 132. And in deciding whether the confession was coerced, the court considers a defendant's physical condition and mental ability and the conduct of police, including any promises or misrepresentations made. *Broadaway*, 133 Wn.2d at 132. (emphasis added). Other tactics exert an equally prohibited internal or negative pressure to remove the rationale of resistance. Thus, we must disabuse ourselves of the notion that an innocent person would not confess to a crime he or she did not commit. *See generally* Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 514-16 (2006) (citing numerous studies on false confessions); Mark A. Godsey, *Reliability Lost, False Confessions Discovered*, 10 Chap. L. Rev. 623, 628 (2007). In the present case, law enforcement clearly exerted techniques designed to obtain a false confession. For example, the detective falsely stated that he had a video that showed Mr. Payne touching the 5 year old and exposing his

penis.(July 9, 2013 3.5 Hrg RP 91-92).

The defendant next argues that the coerced statements that were the direct result of law enforcement threatening jail if they were not told what they consider the truth and what they wanted to hear plus other threatening actions of surrounding Mr. Payne and placing their hands on a weapon should not only be inadmissible in the State's case in chief but also inadmissible for impeachment purposes. Involuntary, or coerced statements are still excluded for all purposes. ***Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 2330, 147 L. Ed. 2d 405 (2000)**. A statement is coerced if it was obtained after the defendant's will was overborne. ***State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997)**.

b. The trial court erred by not suppressing all evidence as fruits of the poisonous tree. (July 9, 2013 Motion RP 71-153).

Mr. Payne next argues that Detective Lebsock and Hensley conducted an illegal search without a warrant in violation of the State and Federal constitutions by entering the areas of the curtilage which were obviously not impliedly open to the public. Warrantless searches and seizures are generally *per se* unreasonable under both the federal and state constitutions. U.S.

CONST. amend. IV; WASH. CONST. art. I, § 7; *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)..

Recently the U.S. Supreme Court in Florida v. Jardines, 133 S. Ct. 1409,185 L. Ed. 2d 495, (2013) ruled:

> (a) When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." United States v. Jones, 565 U. S. ___, ___, n. 3, 132 S. Ct. 945, 181 L. Ed. 2d 911, 919. Pp. 3-4.

Most important, the U,S, Supreme Court in Jardines clearly made a bright line rule that:

> We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." Breard v. Alexandria, 341 U. S. 622, 626, 71 S. Ct. 920, 95 L. Ed. 1233, 62 Ohio Law Abs. 210 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. (emphasis added).

Additionally, Article 1 Section 7 of the Washington State Constitution provides greater protection than the Fourth Amendment to the U.S. Constitution. State v. Boland, 115 Wn.2d

571; 800 P.2d 1112; 1990. Finally, Mr. Payne putting up a (6) six foot high privacy fence is clearly a reasonable expectations of privacy. California v. Ciraolo, 476 U.S. 207; 106 S. Ct. 1809; 90 L. Ed. 2d 210; 1986. Thus, Mr. Payne claims that the trial court erred since law enforcement in the present case conducted a search for evidence without a search warrant and the statements and all other related evidence should have been suppressed as the U.S. Supreme Court ruled in Jardines.

13.Mr. Payne claims the trial court erred by entering the findings of fact and conclusion of law regarding the 3.5 and suppression (cp 623-627) over Mr. Payne's objections.(June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168; CP 623-627; 655-659; 573-594)(See also Ex. D104 -D112).

Mr. Payne claims that the trial court erred when it entered the Findings of Fact and Conclusions of Law over his objection regarding the 3.5 and suppression. Thus, Mr. Payne notes the following objections and exceptions: **Undisputed facts**: Mr. Payne objects to the court's findings of fact at page 1, lines 23-25, page 2, lines 1-25 and page 3, lines 1-6 as inclusive and only part of the facts and asks that the following findings of fact be admitted for a complete record and ask this court to replace with the following in the numbered sections. 5. On 6-22-13, Spokane Police Detectives Jerry Hensley and Paul Lebsock traveled to Mr. Payne's residence at 801 W. Bowling in Spokane, WA. 6. The purpose of

their visit was to gather evidence against Mr. Payne regarding an allegation of child molestation at Bumper's Arcade the previous day, and the defendant was the target of that investigation. (July 9, 2013 3.5 Hrg RP 94). The detectives did not have probable cause to arrest Mr. Payne at that time. Additionally, the detectives did not have a search or arrest warrant. 7. Detective Hensley approached the front door of the residence, and knocked on the door to gather this evidence against Mr. Payne. When there was no answer this detective did not leave but instead walked to the west of the residence crossing the curtilage. At the same time, Detective Lebsock walked to the west of the home and across the driveway and graveled area and approached the gated fence on the front/left/west side of the home. This fence was six foot tall and enclosed privacy fence. 8.Detective Lebsock crossed over the curtilage into the neighboring yard to the West in order to look over the fence and see into the back yard of the defendant's residence.9. Detective Lebsock stepped on or over a small row of paved stones located along the West side of the defendant's residence in order to get to the grassy area of the neighboring lawn. 10. Detective Lebsock looked over the six foot privacy fence

in two different areas and observed the defendant in the back yard of his residence. The detective yelled for Mr. Payne to drop the lawn tool he was working with and exit the back yard through the gate of the privacy vinyl fence. Once Mr. Payne exited the gate and closed it, Mr. Payne was surrounded by one detective to his right and one detective to his left. Additionally, Mr. Payne's exit was also blocked by his truck being parked on the gravel portion of the front yard. 12. The detective then falsely stated to Mr. Payne that they watched a video in which Mr. Payne exposed himself.(July 9, 2013 3.5 Hrg RP 91-92). Mr. Payne denied he did anything wrong and admitted to Detective Hensley that he had been at the Northtown Mall the prior day. 13. The detective did the most talking and asked mostly leading questions with the defendant answering either yes or no. Mr. Payne testified that he was scared by certain actions and threats made to him by the detectives and after he was threatened with jail unless he tells the detectives what they want to hear, he answered how they wanted. Mr. Payne answered yes to the detective's statement that Mr. Payne had touched a girl in the arcade and had exposed his penis to a child while in the arcade. 14. The detective asked Mr. Payne if he had "fallen off the wagon"

and that he should not have been in the arcade and Mr. Payne testified that he only told the detectives what they wanted and felt that maybe he should not have been at the mall even though he legally could be there and did nothing wrong but he answered yes. 15. Detective Lebsock quoted to Mr. Payne the legal definition of sexual motivation and Mr. Payne agreed and said yes. (June 28, 2013 3.5 Suppress Hrg. P. 70-88; July 9, 2013 3.5 Hrg. RP 70-168).

Mr. Payne objects and makes exception to the court's conclusion of law and argues the same suppression and curtilage issues that are noted in part 13 (c) of this brief and objects that the following requested conclusions were not included regarding the numbered sections. 8. The defendant was not free to leave in his mind by the actions as described above of the detectives. 9. Law enforcement was at Mr. Payne's residence to gather evidence against him. (July 9, 2013 3.5 Hrg RP 94). 11. The defendant gave a coerced and against his free will statements to the detectives. 12. Mr. Payne objects to this conclusion of law since it does not apply to a 3.5 issue and all evidence should have been suppressed. 13. Mr. Payne objects to the trial court's conclusion of law that the

defendant's claim of a curtilage violation are rooted in a 4th Amendment and Article 1, section 7 analysis, but the admissibility of statements is governed by the 5th Amendment; therefore, the state can obtain such evidence in violation of the federal and state constitution. See also Florida v. Jardines and bright line rule as cited in part 13 c which is controlling. 14. Mr. Payne claims that under a 4th Amendment or Article 1, section 7 analysis, there was a search in violation of Mr. Payne's reasonable expectation of privacy and seizure of either a person or physical items, and therefore there is a basis to suppress the confession. (15. Mr. Payne also objects to the court rejecting a claim that Detective Lebsock's action in walking over or on the line of paved stones located on Mr. Payne's property on his way to the neighboring yard constitutes a curtilage violation; however, a half shoe size step is allowed. Finally, Mr. Payne has standing to challenge such curtilage violation on his neighbor's as well as his own property. See State v. Williams, 142 Wn.2d 17, 11 P.3d 714 (2000). 16. There was a search and seizure by the detective in this case without probable cause or a warrant. U.S. v Jacobsen et al, 466 U.S. 109; 104 S. Ct. 1652; 80 L. Ed. 2d 85; 1984. 17. The record shows that police

disregarded the warrant requirement for the purpose of securing a confession; therefore the confession must be suppressed. State v. Eserjose, 171 Wn.2d 907, 929; 259 P.3d 172; 2011. When police obtain physical evidence or a defendant's confession as the direct result of an unlawful seizure such as in this case, the evidence is "tainted" by the illegality and must be excluded. *Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)*; *State v. Gonzales, 46 Wn. App. 388, 397-98, 731 P.2d 1101 (1986).* Please note that the detective testified that he was at Mr. Payne's residence for the purpose of gathering evidence against Mr. Payne (July 9, 2013 3.5 RP 94). (June 28, 2013 Motion RP 70-88).

14. Cumulative error doctrine

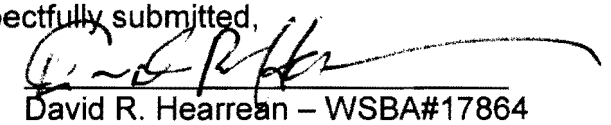
Finally, Mr. Payne asserts that the cumulative error doctrine applies to the prosecutor's and Judge O'Connor's alleged misconduct. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff,* 141 Wash.2d 910, 929, 10 P.3d 390 (2000). *Mr. Payne has clearly explained how each and the combination of each error* affected the outcome of his trial

E. Conclusion

Based on the legal authority and arguments as stated in this petition for review, Mr. Payne asks the court to dismiss this case with prejudice or in the alternative release Mr. Payne from prison and order a new trial with a different judge.

Dated this 27th day of October 2014.

Respectfully submitted,



David R. Hearrean – WSBA#17864
Attorney for Richard Payne

[i] *Parris v. State, 43 Ala.App. 351, 190 So.2d 564 (1966) (admission, for purpose of showing identity, of prior acts with wife occurring within past several years, in trial for same offense with daughter, held reversible error because tended merely to show disposition, inclination or depravity); Davis v. State, 115 Ga.App. 338, 154 S.E.2d 462 (1967) (admission, for purpose of showing specific intent of prior act with different victim occurring two years earlier, in trial for same offense, held reversible error -- same rule for sex or non-sex crimes; State v. Schlack, 253 Iowa 113, 111 N.W.2d 289 (1961) (admission, for purpose of showing motive -- gratify lust for young girls -- and identity -- similar circumstances and license number -- of other similar acts with other young girls, in trial for same offense, held reversible error to admit evidence of act occurring five years earlier although act occurring four months earlier held properly admitted; error to admit either for purpose of showing intent); State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (1973), (admission, for purpose of showing intent where intent is not at issue or for any other purpose where only effect is to show propensity, of prior rape by threat of bodily harm on different victim occurring two years earlier, in trial for assault with intent to rape, held reversible error). See State v. Treadaway, 116 Ariz. 163, 167 (Ariz. 1977) for additional examples. .*

[ii] *State v. Bowen*, 48 Wash.App. 187, 738 P.2d 316 (1987) (the fact that a physician fondled the breasts of two female patients whom he knew to be separated from their husbands was not admissible in evidence of a common scheme or plan to fondle the breasts of a third patient whom the doctor also knew to be separated from her husband); *State v. Lynch*, 58 Wash.App. 83, 792 P.2d 167 (several robberies of bank night deposit boxes by a person wearing a specific

disguise, brandishing a specific gun and making a getaway on a specific bicycle were not admissible as tending to show a common scheme or plan to rob other night deposit boxes while wearing the same disguise, brandishing the same gun and making a getaway on the same bicycle), *review denied,* 115 Wash.2d 1020, 802 P.2d 126 (1990).

[iii] In that case, speaking of the effect of the introduction of irrelevant evidence of other crimes the court said, at 51:

While it is presumed that juries follow the instructions of the court, an instruction to disregard evidence cannot be logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors. State v. Suleski, 67 Wn. 2d 45, 406 P. 2d 613 (1965). (Bracketed citations and material added).

[iv] Several jurors during voir dire verified their concerns with a prior sex offense being considered for any evidence in the same type of sex offense charge. The transcript record documented the following statements from prospective jurors during voir dire on how the admission of Mr. Payne's 2001 sex offense was too prejudicial for a fair trial:

"I can only go by so much on word of mouth versus this person (Mr. Payne) did this before."(Oct 1, 2013 Jury Selection (JS) RP 1127). "I am just curious because most trials, they do not bring in prior convictions to, you know, shepardize the jury. And that's what—when that (prior child molestation conviction) was said, that was very unusual for me to hear that because right away it seems like it was leaning against him, Mr. Payne." RP 1128. " I think that does affect what I might do...That's a strike against a person. So I don't know if I could judge it fairly now with—I felt a lot better before I knew that." RP 1128-29. "I'm only concerned with the 2001 (molestation conviction), which I heard before, coming to this trial...It's labeled just like you--- So its evidence that will say to me is that did he do it the second time as the first time. I call it add on to what really didn't happen." RP 1130-31. "It's impossible, literally physically impossible for a human being to be completely 100% objective." RP 1131. Finally, Mr. Payne noted a continuous objection for the court allowing the prosecution to introduce the prior sex conviction in any way in the present case.

[v] The defense is that Mr. Payne did not touch anyone and if the jury is told of this prior conviction which is the same charge, Mr. Payne claims that any jury will convict and disregard any proposed jury instruction. .Mr. Payne was legally present at Bumpers located inside the mall and not under any legal conditions prohibiting him from such area. The only alleged witness to Count II is a 12 year old girl, K.C. who was sitting at one of the games and said she only saw through

her **peripheral vision** Mr. Payne exposing himself and touching her 5 year old friend, ARH, which the video does not clearly show. No one else saw such allegations. Mr. Payne objects that to the fact that nothing is mentioned regarding that a video was produced of all the allegations and is not as clear as the allegations made. There is no private parts shown and there is no clear evidence that Mr. Payne touched anyone. The video is not clear and is left up to the imagination of the jury that a touching even occurred. The only victim to the alleged touching, ARH. will not testify and no one will be able to testify to witnessing count I. Mr. Payne denies he touched anyone and the only alleged victim to the allegation will not testify for the state.

[vi] 1. Conviction under the count III requires the prosecution to prove beyond a reasonable doubt the element that the defendant has a certain prior offense;
2. The defendant has stipulated to the existence of at least the requisite offense;
3. The stipulation is evidence only of the prior conviction element;
4. The prior conviction element of the charged offense must be taken as conclusively proven;
5. The jury is not to speculate as to the nature of the prior conviction; and
6. The jury must not consider the defendant's stipulation for any other purpose.
ER 403 and State v. Oster, 147 Wn.2d 141, 147 P.3d 26 (2002) and State v. Roswell, 165 Wn.2d 186; 196 P.3d 705 (2008).

[vii] The Washington Association of Prosecuting Attorneys appearing as amicus curiae has offered a different procedure that could be used by trial courts to limit prejudice in these situations. The jury would be instructed that the defendant has stipulated to a specific element of the charged offense and that this element is to be considered proved beyond a reasonable doubt. A jury instruction would then be given as stated in footnote V above. Br. of Amicus Curiae at 7–9 (citing *Murray,* 116 Hawai'i at 21, 169 P.3d 955).

[viii] The key prosecution witnesses would be all the witnesses especially the 11 year old (KC) and 5 year old (AH) who were in the video and also others who were present either close by or actually present when the surveillance video was played prior to law enforcement contacted.

[ix] Mr. Payne was found indigent in several court orders involving this case. (Aug. 16, 2013 Show Cause RP 297; CP 161-162; 526-527; 1304-1305; 1236-1237;1175-1176).

[x] THE COURT:....I am not asking anything from Mr. Payne because that would be improper.(Aug. 1, 2013 Ct Session RP 13)...Mr. Payne..but at some point you may have to make a decision about whether or not you are going to keep Mr. Hearrean or you are going to request a public defender because of all this...(Aug. 1, 2013 Ct Session RP 23)...If he wishes to retain another counsel, he needs to tell the court about whether or not he wishes to do that fairly soon...(August 1,

2013 Ct Session RP 25)

[xi] This warrant was quashed by another judge the next judicial day. (Aug. 16, 2013 Motion RP 2-10).

THE COURT: I have recollection of specifically telling Mr. Payne that I wanted him to be here because this affected him as well.(Aug. 16, 2013 Motion Contempt RP 29)

[xii] THE COURT: So you went....

[xiii] THE COURT: Okay. You believe that the property on the otherside of the fence line belonged to the house next door.

THE WITNESS: Right.....

[xiv] THE COURT: Counsel, I am making a comment. You do not get to object to my comments.....And you do not have a right to object to that either, counsel...(See Nov. 20, 2013, Hearing, P. 1037, lines 3-7).

[xv] MR. HEARREAN: ....They're old, my client---

THE COURT: Counsel, you'll have an opportunity to speak.

[xvi] MR. JOHNSON (prosecutor): I believe that this is the court's motion so I'll defer to the court as to presentation of the evidence.(Aug. 16, 2013 Contempt Motion RP 31).

[xvii] According to RCW 7.21.040(2)©(d): (c) A request that the prosecuting attorney or the city attorney commence an action under this section may be made by a judge presiding in an action or proceeding to which a contempt relates. If required for the administration of justice, the judge making the request may appoint a special counsel to prosecute an action to impose a punitive sanction for contempt of court. A judge making a request pursuant to this subsection shall be disqualified from presiding at the trial. **(d)** If the alleged contempt involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial of **the** contempt unless the person charged consents to the judge presiding at the trial. (Emphasis added).

[xviii] A. I would agree that they (pictures) do not depict the exact location of that machine prior to them being moved...I did not write a report specific to the machine (at Bumpers) being moved, ...

[xix] The only witness to testify as to any alleged touching of AH was her older sister who could only testify to one count of child molestation; however, Mr. Payne presented evidence that the older sister was coached and suggested of what to say and what she saw by other adults after the fact and after watching a surveillance video. For example, the witnesses including the older sister stated that they saw Mr. Payne's penis in the video when in fact the video did not show such allegations. Therefore, it was too prejudicial and prevented Mr. Payne from receiving a fair trial given the fact that defense counsel could not argue the presumption as the law of the court and judge.