No. 45379-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALFRED JAMES THIERRY, JR.

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stanley Rumbaugh, Trial Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed multiple acts of serious, prejudicial misconduct which compel reversal, including inciting the jury's passions and prejudice against appellant Alfred Thierry, Jr., arguing negative inferences from Thierry, Jr.'s exercise of his rights to trial, confrontation, cross-examination and counsel and misstating facts and argument while denigrating counsel and her role.

2. Appellant was deprived of his due process rights to a fair trial by the serious, prejudicial misconduct, which compels reversal under the applicable standards, even for the misconduct to which no objection was raised below. In the alternative, to the extent any of the misconduct to which counsel failed to object could have been cured by instruction, counsel was prejudicially ineffective in violation of appellant's 6th Amendment and Article 1, § 22, rights for those failures.

3. Even if the individual acts of misconduct did not compel reversal, their cumulative effect would.

4. The sentencing court erred and abused its discretion in ordering conditions of community supervision which were not statutorily authorized, several of which were also in violation of Thierry, Jr.'s, due process and First Amendment rights:

    13. You shall not possess or consume any controlled substances without a valid prescription from a licensed physician.

    . . .

    16. Do not initiate or have intentional physical contact with children under the age of 18 for any reason. Do not have any contact with physically or mentally vulnerable individuals.

    . . .

    25. You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the treatment provider and community corrections officer. You also are prohibited from joining or perusing any public social websites (Face[]book, MySpace, etc.)

    . . .

    27. Do not possess or peruse any sexually explicit materials in any medium. Your

> sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex.

CP 221-22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The only evidence at trial was the accusations of the alleged victim, J.T., presented through his testimony and the testimony of others he told.

   a. In closing argument, the prosecutor repeatedly invoked the theme that "the word of a child is enough," then accused counsel of saying that children could not be believed and defense counsel in general of saying that when children "tell." The prosecutor then said that, if the argument he claimed the defense was making "has any merit," the prosecution "may as well just give up prosecuting these cases, and the law might as well say that, 'The word of a child is not enough."

   Is there a substantial likelihood this misconduct had an effect on the jury's verdict where counsel's objection was overruled and the only issue was credibility?

   b. Did the prosecutor comment on appellant's rights to trial, confrontation and the assistance of counsel when the prosecutor repeatedly reminded the jury how the child had to testify not only in front of strangers but also in front of his dad, his alleged abuser, commented on how she "had to ask" the child questions, described counsel's cross-examination as "forcing" the child to say certain things, denigrated counsel for her cross-examination (over defense objection), and told the jury counsel "wants" them to disregard the evidence and that counsel's "explanation" for the accusations was "outrageous?"

   c. Did the prosecutor commit flagrant, ill-intentioned misconduct in stating there was "no evidence" of a crucial fact upon which counsel relied and faulted counsel for misstating the fact, even though the prosecutor herself had elicited some of that evidence?

   d. If any of the misconduct which was not objected to below could have been cured by instruction, was counsel prejudicially ineffective in failing to object and request

such a remedy?

e. Does the cumulative effect of the misconduct compel reversal where all of the misconduct affected the jury's ability to fairly and impartially decide the case?

3. Did the sentencing court err in ordering a condition prohibiting appellant from consuming controlled substances without a valid prescription from a physician where the relevant statute does not so limit the practitioners?

4. Were conditions prohibiting Internet and computer access and joining or "perusing" any public social websites not authorized as "crime-related" prohibitions where there was no evidence that the internet, computers or social websites were involved in the crime? Further, was the condition in violation of appellant's First Amendment rights?

5. Was a condition prohibiting contact with "physically or mentally vulnerable individuals" not "crime-related" where there was no evidence that any such adults were involved and the child was not unusually physically or mentally vulnerable except as normal for a child his age in his situation? Further, was the condition unconstitutionally vague and in violation of appellant's First Amendment rights to freedom of association?

6. Was a condition prohibiting possession or perusing "sexually explicit materials in any medium" also improper because it prohibits possession of constitutionally protected adult pornography protected by the First Amendment and fails to sufficiently define what it prohibited, in violation of due process?

7. Was a condition prohibiting appellant from going to places which "promote the commercialization of sex" unconstitutionally vague and in violation of due process because it fails to define or give notice of what places are covered under that definition?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Alfred J. Thierry, Jr., was charged by second amended information with four counts of first-degree rape of a child and two counts

of first-degree child molestation, all of which were alleged to have the aggravating factors of being domestic violence incidents, involving an abuse of trust and with a particularly vulnerable victim. CP 111-14; RCW 9A.44.083; RCW 9.94A.535(3)(b); RCW 9.94A.535(5)(n); RCW 9A.44.073; RCW 10.99.020.

After a number of pretrial hearings before the Honorable Judge Linda C.J. Lee on November 9, 2012, February 1, March 1 and 29, April 12, June 7 and 28, 2013, trial was held before the Honorable Judge Stanley Rumbaugh on July 22-25, 29-31, August 1, 5 and 6, 2013, after which the jury found Thierry, Jr., guilty as charged.[1] CP 157-80.

Thierry, Jr., appealed, and this pleading follows. See CP 210.

2. Testimony at trial

In October of 2012, Majaahidah Sayfullah heard her adopted son, J.T., reading aloud and thought he said something about "humping" and "kissing." 12RP 49, 136. This disturbed Sayfullah, so she asked where the book he was reading said anything like that. 12RP 136. When he showed her a picture he thought showed humping, Sayfullah told the boy that he was wrong and the picture did not look like that. 12RP 136.

She decided, however, to ask the boy if anyone had ever touched him inappropriately or did anything to him or his private parts. 12RP 137. He seemed like he did not want to say anything so she reassured him he was not in trouble. 12RP 137. According to Sayfullah, J.T. said he did not want to tell because he would never see his father again. 12RP 137.

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[1]References to the verbatim report of proceedings is contained in Appendix A.

It "took a little while" but eventually J.T. told Sayfullah that J.T.'s father "put his penis in his butt." 12RP 137.

At trial, Sayfullah admitted that she had specifically explained to the child what each private part was actually called and he then disclosed the abuse to her, using those names. 12RP 149. J.T. did not say how many times it had happened and Sayfullah said she did not ask any more questions. 12RP 137.

The next day, Sayfullah took J.T. to the doctor. 12RP 128. J.T. had been very constipated for a while so they started by talking about that with the doctor, Dr. Tracy Lin, who also did a checkup. 12RP 128.

Sayfullah admitted that the issues with constipation, pooping and wiping had been happening since J.T. was as young as 3. 12RP 129. Not only did he have a hard time going poop, he would also constantly have stains in his underwear, even after she tried to show him how to properly wipe. 12RP 129. He had to take medicine to make sure he had a regular bowel movement. 12RP 132.

At the time of trial, J.T. was still having the same constipation problems and having to take that medicine, although he was better at wiping. 12RP 132. J.T. said he had been constipated a lot and his doctor said there was a lot of waste in his stomach so J.T. had to drink a medicine and eat "healthier." 12RP 100. The boy admitted he had problems like that off and on his whole life, including with his stomach. 12RP 100. He testified at trial that his dad actually had to help him wipe his butt at times because he did not know how to do it himself. 12RP 100.

J.T.'s father, Alfred Thierry, Jr., confirmed that there were times

that he would wipe his son's bottom because J.T. did not get the feces off or would have stool in his pants. 14RP 91. From about age 4, when Thierry, Jr., started having his son for overnight visits, Thierry, Jr. would always have to wash out his son's pants and underwear to clean out the feces. 14RP 91. J.T. would pull on his backside like he was trying to pull the underwear out of the "crack of his pants," so Thierry, Jr., would take the boy the bathroom and ask if the child had wiped "good." 14RP 92. Although J.T. would say yes, Thierry, Jr., would check and see feces all the time so Thierry, Jr., would have to get a wet, warm rag to wipe J.T. and sometimes change his underwear. 14RP 92. Thierry, Jr., would show J.T. how to wipe carefully and J.T. would say he understood, but it did not seem to get better. 14RP 92.

When she saw J.T. in October right after the allegations were made, Dr. Lin would have trouble and ultimately would stop trying to do a physical exam of J.T.'s bottom because J.T. had so much "stool" around his anus and became uncomfortable with the exam. 13RP 117.

Lin had started doing the exam after Sayfullah had talked with her about the constipation, cleaning and bottom issues, because Sayfullah had then told the doctor about the allegations of inappropriate touching. 12RP 129, 13RP 112-14. According to Sayfullah, after she reported the allegations to the doctor, she then went outside while Lin talked to J.T. in privacy. 12RP 129. Dr, Lin, however, not only remembered that Sayfullah was present during the conversation but she also had documentation confirming it. 12RP 129, 13RP 113.

When Sayfullah raised the allegations, Dr. Lin, who had not seen

J.T. as a patient before, got concerned because constipation can sometimes show up in sex abuse cases. 13RP 116. Further, Sayfullah told Dr. Lin that J.T.'s bathroom and constipation issues had only been going on for about a year. 12RP 100, 129. At trial, both Sayfullah and J.T. would concede it was far longer, either his whole life or about five years. 12RP 100, 129; 13RP 116. But as a result of what she was told, the doctor then asked the child, "[h]as anyone touched your penis or bottom to make you scared or uncomfortable?" 13RP 114. J.T. said yes, his dad "in" his bottom and that the last time it happened was "[a]t his apartment two weeks ago." 13RP 114.

The last visit J.T. had actually had with his father before the disclosure of alleged abuse was in late August of 2012, more than a month earlier. 12RP 52.

Sayfullah explained that she was J.T.'s aunt on his mom's side and had adopted J.T. when he was three days old. 12RP 112-18. Thierry, Jr., was J.T.'s biological dad and had been at the hospital when he was born. 12RP 112-18. There was no formal court order for visitation but if Thierry, Jr., called and wanted to see his child, Sayfullah let him. 12RP 119. J.T. would also ask to have visits with Thierry, Jr., and she would arrange those, too. 12RP 120.

Sayfullah admitted that she would not make J.T. go visit if he did not want to, and J.T. testified that it was his decision whether to visit. 11RP 61-63, 12RP 122. For the most part, the visits were over the weekend and the longest J.T. stayed was "maybe one and a half to two weeks" one summer, although Sayfullah indicated it was supposed to be

longer and Thierry, Jr., and Robinson had cut it short due to problems with child care and work. 12RP 122-23.

In the summer of 2012, J.T. had been talking about wanting to live with his dad and Lorrie Robinson at Robinson's home. 12RP 82. At trial, J.T. remembered talking to his dad about it but claimed that he really "didn't care" when his dad had said no. 12RP 82-83. Sayfullah said that, for the most part, J.T. seemed to enjoy his visits with Thierry, Jr. and would talk about what they did. 12RP 122.

At the doctor's office with Dr Lin, however, J.T. said that, when he was 4, 6 and 8 years old, his dad had put his penis in his butt. 13RP 114. The day after Dr. Lin saw him, Keri Arnold-Harms, a child interviewer for the Pierce County prosecutor's office, interviewed J.T. after being briefed on the allegations by Sayfullah and investigators. 12RP 14-15, 23. The interviews are recorded and usually police and others watch, with Arnold-Harms checking in to make sure she has asked what investigators need asked. 12RP 28. The building is decorated in an "under the sea theme," with fantastical sea creatures hang from the ceiling and around the rooms which Arnold-Harms admitted frequently caught the attention of children who would focus on them and ask about them. 12RP 27.

Arnold-Harms has a bachelor's degree in sociology with a "minor" in psychology, trained for about six months and then attended some conferences and trainings relating to things like interviewing techniques and investigating child sexual abuse. 12RP 12-16. She discussed her use of a "truth and a lie" exercise having the child make up a story using a drawing of children outside the house and a hypothetical of one of the

children breaking the window. 12RP 32. Arnold-Harms would ask the child what it meant if an adult asked the child who threw the rock who threw it and that child lied. 12RP 32. The interviewer used this as a sort of "morality" question as well as a "truth and lie" issue, sort of looking at "[w]hat should happen to the child for lying," as opposed to a child who tells the truth. 12RP 32.

Arnold-Harms then testified that she would have a child "promise that they're going to tell the truth as we talk today." 12RP 33. She described "[c]oaching," saying that it occurs if there may be "an individual who is creating an abuse story that isn't true and having the child disclose that information in an interview[.]" 12RP 37. Although at one point she stated her job was "not to determine whether or not the child is telling about a true event or not," the investigator also thought that when a child gave lots of detail that was an indication something was not a "story." 12RP 60. Arnold-Harms admitted, however, that children can tell stories with a great deal of detail, even if the stories were not true. 12RP 60. She also conceded that a child who was simply seeking attention would consider being talked to by adults a reward. 12RP 63.

The video of the interview as played for the jury and in it, J.T. made accusations that his father had abused him, including an incident where he said his dad had made him touch his penis when J.T. was 8, at his grandma's home, while saying something about wanting to see how big it got and that he should "[p]et like you would pet a pet." Ex. 1. J.T. described how it felt once like his dad went pee in his butt. Id.

At trial, J.T. was 9 years old. 11RP 57. He could not say where he

lived and thought the city was named "Washington." 11RP 57. He also said he did not remember talking to the doctor about what happened and did not remember "that much" about the videotaped interview. 11RP 85-86. He remembered talking to "Amber," though, and said she helped him write a book. 11RP 86.

"Amber" was Amber Bradford, a mental health therapist, who works with children who have reported sexual abuse. 13RP 57. Bradford was not licensed as a mental health therapist yet and admitted that her role is not in any way designed to investigate but rather to provide therapy. 13RP 62, 96. As part of that, she has kids do a "trauma narrative," encouraging them to repeatedly talk about the abuse and feel it "over and over and over again until it doesn't increase anxiety and stress," presumably because they are desensitized to it. 13RP 60-61. Bradford also said things in her notes in quotes were not always actual quotes, because she did not write "for an investigative purpose." 13RP 96.

Bradford would never question whether a child had actually been abused. 13RP 88-89. She does no "fact checking" but instead just tries to make the child as comfortable as possible with the fact of having been abused. 13RP 89. The therapist also said there was actually kind of "a reward system in all of" it for the child, because she would say "[g]ood job" and give positive reinforcement when he disclosed or talked about abuse. 13RP 89.

In this therapeutic context, Bradford said, J.T. had repeated his disclosures of anal sex and mutual masturbation with his dad, also saying his dad had "made him simulate anal sex with him." 13RP 85. Also, for

the first time at trial, Bradford testified that J.T. had said something about nightmares. 13RP 89-90. Bradford admitted that she did not mention anything about that claim in her notes of the counseling. 13RP 89.

Bradford also had in her notes that, at some point, J.T. reported that he once told Sayfullah about having touched his dad's "wee wee" and she had just told him to go wash his hands. 13RP 100. When asked at trial if he had told anyone about the allegations prior to October, J.T. first said "[n]o," but then said, "[e]xcept for my mom." 11RP 83. For her part, Sayfullah was clear that he had not said anything about penises or anything like he had told the counselor. 12RP 135. Instead, Sayfullah said, J.T. had actually said simply that "he touched something icky," so that was why she told him to wash his hands. 12RP 135. On cross-examination, she denied that J.T. had ever said, "I just touched his wee wee." 12RP 137.

At trial, J.T. testified that the first time his dad did something he did not like J.T. was four years old. 11RP 66-67. He said they were on the bed watching television and he was hot so he did not have his pajamas on. 11RP 68-69. During his testimony, J.T. could not remember what words to use to describe what he said his dad did, stating that he did not have the book with him that he and Bradford had made about the accusations. 11RP 68-69. A few moments later, however, J.T. described it as his dad putting his body part for peeing inside J.T.'s body part for pooping. 11RP 82.

J.T. thought it was a week later, now at an apartment where his dad was living, and then a week after that, with J.T.'s niece and nephew there, that the same thing happened again. 11RP 70. He thought it happened about five times total in that apartment, then said it also happened in a

small brown house his dad lived in later. 11RP 70-72. After that, he said, his dad moved into Robinson's home, where it only happened once, when Robinson was not there. 11RP 70-73. He then said it happened at his grandma's house after his dad moved in there, when J.T. was 9. 11Rp 74.

When asked whether he was sure about his age at the time, J.T. went back and forth between 8 and 9 and then said, "I have a bad memory a little bit." 11RP 74-75. He was sure it was in October, though, because it was the "day after he got arrested," apparently referring to Thierry, Jr. 11RP 75. On cross-examination, J.T. was again confused about when it happened, saying it was when he was 9 and that it happened the day after his dad was arrested. 12RP 93.

J.T. first said what happened in October was the same thing that had happened before but then corrected himself, saying actually that time his dad put J.T.'s hand on his privates through his underwear and, when he tried to move his hand off, his dad said to put it back on and then wanted to feel J.T.'s privates. 11RP 77-78. J.T. said his dad had not said anything any of the other times but this time said he wanted to feel how big it would get and moved his hand around. 11RP 79-81. They stopped when his dad got tired. 11RP 79-81. J.T. also said his dad then said something about not telling, which his dad had never said before. 11RP 82.

J.T. thought it was "like five years ago" that he heard the word "humping." 11RP 92-93. When asked where he heard the word, he responded, "[w]ell, since I was 4, I had to, 4 or 5, my mom said since I was getting older, I had to know about - - I forgot." 11RP 93. After counsel prompted, "[y]ou had to know about the facts of life," J.T. responded,

"[y]es," and said his mom called it "[p]roducing life." 11RP 93. Counsel then asked, "[s]o she used the word "humping?" 11RP 93. The following exchange occurred:

> A: Well, yes.
>
> Q: Tell me. Give me an example of how your mom would use the word "humping" when you were 4 or 5.
>
> A: Well, I saw this thing. I saw it in animals and I clicked on it, and then once she came downstairs and then she found out and then she told me about it and stuff and then I heard it, and I really didn't know what the word meant.
>
> Q: So how did you find out what it meant?
>
> A: My mom told me.

11RP 94. Counsel then made "some guesses," asking the child to correct her if she was wrong, suggesting the child meant he was on the computer clicking on inappropriate things and his mom found out. 11RP 94. J.T. confirmed, "[y]es." 11RP 94. He also said he got in trouble for it. 11RP 94. A moment later, when asked again, he said,"if I can remember correctly, I said, '[a]m I in trouble?' and she said, '[n]o, no. It's normal,' and then I can't remember the rest." 11RP 94.

A little later, however, when asked if he ever got in trouble for looking at something on the computer, J.T. first said, "[y]es," then said, "I mean no." 12RP 105. The prosecutor next asked, "[h]as your mom ever gotten mad at you for something that you looked at on the computer?" 12RP 105. J.T. then stated, "[o]nly that one time which I told you guys," which he said was the "animal thing" on the computer. 12RP 105. A few minutes later, when counsel asked him about it, J.T. said he was "kind of uncomfortable saying it" and that he had looked at a bunch of different

animals mating, including horses, cows, rhinos and a giraffe. 12RP 108. He had typed in "animals" and "sex" something else to get this kind of site with animals having sex. 12P 109-111. He admitted he watched it for awhile and said his mom "talked to" him "a little bit" after that. 12RP 109. He thought he was in kindergarten or first grade. 12RP 109.

J.T. then admitted there were other times he saw similar stuff but claimed not to remember when. 12P 110. He then backtracked, saying it was all on that same day. 12RP 110. But when counsel promised not to "tell" and asked, "[d]id you do it later, maybe," J.T. admitted, "[m]aybe." 12RP 110.

Sayfullah was positive that J.T. had not been on the computer looking at animal sex. 12RP 132. She also denied ever catching J.T. looking at anything improper on a computer and said J.T. did not get access to computers really until about age 7. 12RP 133. Instead, she recalled, he had seen some animals mating on the television show "Animal Planet" when he had been about 5 or 6, so she had explained it to him. 12RP 132.

At Sayfullah's home, J.T. lived with Sayfullah's kids and other kids on and off for most of the time, including a boy who was about 10 years older than J.T. and a couple of boys of an unspecified age. 11RP 96- 99, 12RP 138. The boy who was 10 years older lived in the same room as J.T. when J.T. was probably 6 or 7 years old. 11RP 103.

J.T. said he likes to use a computer to write fairy tales, action books and scary books, making the stories up on his own. 12RP 83-84. When asked, "[w]ho reads these books," J.T. responded, "[w]ell, not that much because we have to check our work." 12RP 84. He also said he did not

write the stories for school. 12RP 84.

A little later, however, when asked about the stories, J.T. said they were in his "writing journal" which he had for school, and that it stayed at school until the end of the year. 12RP 106. He first said he did not show them to his mom but then said that, when he took it home, he did just that. 12RP 106.

At one point during his testimony J.T. referred to something happening but then talked about how he had himself improperly touched the private parts of a younger boy. He said he was "4 so I didn't know better and I didn't know what it was or something and stuff, and then when my nephew was watching TV, I would crawl under the covers and start touching his private." 11RP 87.

Michelle Breland, a pediatric nurse practitioner who works in child abuse investigation, examined J.T, after he had spoken with Arnold-Harms. 14RP 18-19. Breland testified about "delayed disclosure" and said it was common for children not to disclose right away. 4RP 18-19. After trying to solicit any information J.T. might have forgotten to tell Arnold-Harms, Breland conducted a physical exam of J.T. and found nothing. 14RP 18-21. At trial, she said it was rare to have physical findings when the allegations involve the anus, because of how it heals. 14RP 23.

Lorrie Robinson and Thierry, Jr., started living together in her home in probably May of 2008. 14RP 30-32. She first met J.T. when Thierry, Jr., brought J.T. over for a visit before Thierry, Jr., moved in. 14RP 33. Robinson said that, after Thierry, Jr., moved in, when J.T. would visit, there were always a lot of people in the house. 14RP 35. When J.T. had to go

home, he would stomp, huff and puff and was reluctant to get his things. 14RP 39. Robinson said that Thierry, Jr.'s work schedule was "all over the place" because he drove a truck, so he could be up at 3 in the morning and back at 11, 12 or 1 in the morning, and was rarely there. 14RP 41. Robinson herself worked from Monday through Friday, 8 to 5, so J.T. was usually only there on weekends. 14RP 49-54.

Mr. Thierry, Jr., testified that he was a licensed truck driver and that he was often not home, as he did not get weekends off. 14RP 74-89. Regarding the first house where he said J.T. visited overnight probably once or twice, Thierry, Jr., did not think he and J.T. were alone in the house together because Thierry, Jr.'s girlfriend, Tina, "went nowhere," did not have a job and had a daughter who was not in school. 14RP 86-87. He then clarified that there was a store close by where Tina sometimes went, but it was really only during those brief times when he might have been alone with J.T. at that home, which Thierry, Jr., lived in only for a little while when J.T. was about four years old. 14RP 89.

Thierry, Jr., said he would never touch his son's penis on purpose but might have done so when he was wiping off feces or cleaning J.T. up due to J.T.'s bathroom problems. 14RP 94. Thierry, Jr., also thought his son might have seen his dad's penis in the bathroom, maybe during an incident when he showed his son how to pee in the toilet instead of peeing everywhere after his son had sprayed the room. 14RP 94. J.T. would also come inside sometimes when his dad was in the bathroom and Thierry, Jr., had to yell a couple of times to get privacy. 14RP 95.

Thierry, Jr., was clear that his penis never came anywhere near his

son's penis. 14RP 95. When asked if his penis ever came anywhere near J.T.'s butt, Thierry, Jr., could only think of one time it might have "[i]ndirectly, maybe," happened at the apartment he lived in just before moving in with Robinson. 14RP 96. It was Halloween and J.T.'s uncle, who was actually a year younger than J.T., had gone with them trick-or-treating. 14RP 96. They all got home possibly at 11 or 11:30, he thought and the next morning, J.T. was under the covers and went "exploring," touching Thierry, Jr.'s penis through his boxers. 14RP 97. J.T. himself had on only underwear because he had not brought a change of clothes. 14RP 98. J.T.'s uncle asked what J.T. was doing, which made Thierry, Jr., wake up. 14RP 98. Thierry, Jr., said J.T. was touching his penis and trying to drive it like a gearshift. 14P 98.

Thierry, Jr., told the boy not to do that, also saying, "[i]f you ever want to see me again, that will not happen." 14RP 98. After Thierry, Jr., told him to stop, J.T. was withdrawn and seemed to think it was his fault. 14RP 98.

On cross-examination, Thierry, Jr., elaborated on the incident, saying that J.T. was on Thierry, Jr.'s back when he first woke up and he was trying to roll over and move the child when J.T. had grabbed Thierry, Jr.'s, penis. 15RP 36. J.T. probably grabbed through the slit in Thiery, Jr.'s boxers. 15RP 37. After that, Thierry, Jr., went into the bathroom and J.T. followed him, but Thierry, Jr., told his son to get out. 14RP 99. A few moments later, when Thierry, Jr., came out of the bathroom, the uncle was up on the bed looking out the window and said he saw a squirrel, so J.T. got up on the bed and was looking out, too. 14RP 99. J.T. said he could

not see it and Thierry, Jr., got on the bed and was looking out, too, pointing to the squirrel. 14RP 99. Thierry, Jr., thought that was the only time where his penis might have grazed the back of his son or anything like that and it had occurred about five years before. 14RP 99,15RP 42-45.

On cross-examination, Thierry, Jr., was unclear about some of the dates when he lived in various places in terms of specific year but he could sort of trace back how long he lived a particular place. 15RP 27.

Thierry, Jr. said that he hardly ever saw J.T. and it was just "irregular" because of his work issues. 15RP 44. He agreed that there were times when he did not work at all but thought that when he was working it was seven days a week. 15RP 45. A moment later, however, he indicated that there may have been times he did not work seven days a week. 15RP 45. He also said there were times when he was on unemployment. 15RP 47. He could not exactly recall all the different days in his irregular work calendar and specifically when he was working or not. 15RP 47. He remembered working until his arrest but then thought that, in August of 2012, he was actually collecting unemployment. 15RP 48. He was not sure when he had moved out of Robinson's home and into his mother's home, ending up saying he was still there in May and June of 2012. 15RP 54.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED REPEATED ACTS OF HIGHLY PREJUDICIAL MISCONDUCT ALL OF WHICH COMPELS REVERSAL

Public prosecutors are not like other attorneys but instead enjoy special status as "quasi-judicial officers." See State v. Suarez-Bravo, 72

Wn. App. 359, 367, 864 P.2d 426 (1994). Along with the status, however, comes responsibility, including the duty to ensure that a defendant receives a constitutionally fair trial and a duty to seek a verdict free of prejudice, based on reason, evidence and law rather than emotion. See, State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). As a result, a prosecutor must refrain from being a "heated partisan" trying to "win" a conviction and instead has a duty to seek justice. See State v. Rivers, 96 Wn. App. 672, 674, 981 P.2d 16 (1999).

In this case, the prosecutor failed in all of those duties by repeatedly engaging in prejudicial misconduct which ultimately deprived Mr. Thierry of his constitutionally protected right to a fair trial.

a. Relevant facts

In initial closing argument, the prosecutor started by invoking the very serious emotional issues surrounding the alleged crimes, describing the case as involving a "violation of trust, the trust that every child should be able to have in their parent to take care of them, certainly not to hurt them, and certainly not to sexually abuse them." 15RP 87.

After setting that stage, the prosecutor then started arguing about direct and circumstantial evidence, noting that, in a case where there is child sex abuse, jurors really had to "make reasonable inferences" in order to decide because such cases usually have no witnesses. 15RP 89. The prosecutor told the jurors that impartial witnesses to the crimes would be

"direct evidence of the acts themselves" but that such direct evidence was not required in order to convict. 15RP 89.

Indeed, the prosecutor declared, if direct evidence were required, "**the State could never prosecute any of these types of cases**." 15RP 90 (emphasis added).

A few moments later, the prosecutor turned to the specifics of the case and J.T.'s testimony as the only evidence, stating:

> What's the evidence? [J.T.] is the evidence, and he is all that is required for you to find the Defendant guilty of these crimes. If the law required more, if the law required anything, something, anything beyond the testimony of a child, the child's words, [J.T.'s] words, those instructions would tell you that, and there is no instruction that says you need something else. **And, again, if that was required, the State could rarely, if ever, prosecute these types of crimes** because people don't rape children in front of other people and often because children wait to tell.

15RP 93 (emphasis added).

The prosecutor then discussed why there was not physical evidence based on the late disclosure, but returned to the "word of a child" theme, stating, "[w]hat you are left with are words, a child's words, and, again, that is enough." 15RP 94. Although in the initial part of her first closing argument, the prosecutor had said it would be improper to decide the case based on sympathy or prejudice, just a few minutes later she argued that J.T. got no "benefit" from "this whole situation" except "maybe" that "the sexual abuse has stopped. 15RP 88, 98-99.

The prosecutor went on:

> [J.T.] had to get up here in this courtroom on that stand and talk to a room full of strangers, all of you, and everybody here, strangers, adult strangers, about exceedingly embarrassing topics, things that no one adult would want to get up there and talk about or really talk about anywhere. **And not only did he have to do that in front of**

> **all of you,** in front of a bunch of adult strangers, **but also in front of his father, the man who sexually abused him. A 9-year-old boy had to get up here and talk about being anally penetrated by his father here in front of him** and all of you. I submit to you that's not something anyone would want to do[.]

15RP 98-99 (emphasis added). Counsel did not object. 15RP 98-99.

In her closing argument, counsel said that a child heard saying "humping" and "kissing" loudly in a household and is confronted about where he finds them, he "needs to explain those words away." 16RP 6. She pointed to all the problems with the credibility of the accusations, and also asked whether it was important that his "mom calls him out on using the words, he makes an accusation[.]" 16RP 13.

Counsel also raised a policy argument, saying it was a good thing to tell children who have allegations of abuse they did nothing wrong and would not get in trouble. 16RP 14. She said that, however, it was terrible when it happened that this "help[ed] them to create the worst story any of us can imagine[.]" 16RP 14. She asked the jury how Thierry, Jr., could defend against these claims and tried to minimize the prosecutor's arguments that Thierry, Jr.'s story about seeing the squirrel and grabbing Thierry, Jr.'s penis one day was not credible, commenting that Thierry, Jr., had not testified before and stating that he was "totally without guile and he just wanted the truth out." 16RP 14. The prosecutor objected "that's vouching for a witness," and court told the jurors, "you are going to be the sole determiners of who is telling the truth and who isn't, not Counsel and not me." 16RP 14.

The prosecutor began her rebuttal closing argument:

Thank you, Your Honor. [Defense Counsel] says, "It's a good thing

> to tell kids, 'Tell someone if you've been abused. You are not going to get in trouble.'" She said, "It's a good thing to make sure that they know that they can tell when this has happened to them." **That statement contradicts everything that she just stood up here and argued to you about. How is it a good thing when basically the crux of her argument is, "They aren't going to be believed. Children can't be believed. There's never any other physical evidence. We can't believe what they say because they make up stories," so how is it a good thing to tell them that they should tell somebody because we're going to bring them in here to court to have a Defense attorney say, "You can't believe them."**
>
> [Counsel] wants you to basically disregard everything that J.T. has said between what he told his mom, between what he told Ms. Arnold-Harms, between when he told his primary care provider Ms. Lin and what he told Amber Bradford. **"Just disregard all of that because he's a child, because he was 8 when he said these things and because he was 9 when he was on the stand. Nothing he said is credible so just disregard it all."** **<u>If that argument has any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that, "The word of a child is not enough</u>**."

16RP 16-17 (emphasis added). Counsel objected that the prosecutor was "fueling the passion and prejudice of the jury" and the prosecutor said it was "[n]o worse" than what counsel had argued. 16RP 17. The court then overruled the objection. 16RP 17.

The prosecutor also made an emotional appeal again regarding J.T. having to testify, ostensibly in commenting on counsel's arguments that Thierry, Jr.'s awkwardness on the stand could be explained by the situation he found himself in. The prosecutor declared:

> Well, how do you think J.T. felt? He's 9. **He's up here having to talk about these very uncomfortable details in front of, like I said on Thursday, a bunch of strangers, all of you, including the person who abused him.** I submit to you to think back to his testimony. . .and how much of that was Defense Counsel's words where he was being pinned down with Defense Counsel's words and language where he was either having to agree or disagree and how much she actually allowed him to say[.]

16RP 20-21 (emphasis added).

The prosecutor then accused counsel of mischaracterizing the evidence in saying "this all came up with [J.T.] being confronted." 16RP 21. The prosecutor declared:

> [J.T] was not confronted. **There is no evidence that he was confronted.**
>
> His mom asked him out of concern, "Where did you hear that word?" **He was never in any trouble**. She didn't convey that he was in any trouble. [Defense counsel] says he was trying to deflect the blame. The blame for what? He wasn't being blamed for anything. . . What was he being blamed for? Nothing. There was no blame to deflect.

16RP 21-22 (emphasis added). A few moments later, the prosecutor told the jury that "[n]obody wants attention for being anally raped by their father," again reminding the jury that J.T. "had to come in here and talk about it with you all and **he did the best he could with the questions that I had to ask him.**" 16RP 25 (emphasis added). The prosecutor again told the jury that defense counsel was engaged in "mischaracterization" of the evidence, because J.T. was "never caught watching anything inappropriate," was "never caught doing anything," and "was never punished for it." 16RP 25.

A few minutes later, the prosecutor accused counsel of "putting statements to [J.T.], and forcing him to agree or disagree." 16RP 26. The prosecutor reminded the jury the child was only 9 and asked how the child was supposed to respond when defense counsel asked questions in the format she used. 16RP 26. Counsel objected, "[t]hat was cross-examination," but the court overruled the objection. 16RP 26.

The prosecutor also told the jury, again, that defense counsel was trying to make the jury believe things "based on nothing," but "wants you

to disregard" the evidence:

> [Defense counsel] wants you to disregard everything that [J.T.] told to his counselor Amber over the course of I think it was about six months because she says he gets rewarded for being a victim and he can write his book. This 8-year old boy gets rewarded for being a victim of anal rape by his father. **That explanation for suddenly why he would create this story is outrageous, and there is no reasonable inference or evidence to support it**.

16RP 27 (emphasis added). The prosecutor declared that there was no "reward," again reminding the jury that it was not something a boy would "want to come in here in court and talk about." 16RP 28.

After the conclusion of arguments, once the jurors were out, counsel told the judge, "what I was objecting to in the State's rebuttal [was] when the State argued that. . . we might as well stop prosecuting cases." 16RP 31. She said she thought it "went over the line as far as fueling the passion and prejudice of the jury. 16RP 31. The trial court said it understood that "argument is argument" and the judge stated his belief that the comments of the prosecutor had not crossed the line. 16RP 31.

b. All of these arguments were serious, prejudical misconduct which compels reversal

In making these arguments, the prosecutor committed serious, prejudicial misconduct which compels reversal. At the outset, three different standards of review apply. Where counsel objected below, reversal is required if there is a substantial likelihood the misconduct affected the verdict, in light of the entire argument and instructions given. See State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995), cert. denied, 516 U.S. 843 (1995). Where there was no objection below, reversal is required if the misconduct was so flagrant and ill-intentioned that no jury

instruction could have cured the resulting prejudice. See State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). The third standard is the constitutional harmless error standard, which applies when a prosecutor's misconduct violates a defendant's rights. Monday, 171 Wn.2d at 680. Under that standard, prejudice is presumed and reversal is required unless the prosecution satisfies a very heavy burden of proving the error "harmless," beyond a reasonable doubt. See id.

Each of these standards applies and compels reversal based on the prosecutor's repeated misconduct in this case. First, reversal is required based on the prosecutor's improper appeals to the passion and prejudice of the jurors in exhorting them to convict in order to send a message that children will be believed and also because otherwise "the State may as well just give up prosecuting these cases and the law might as well say that, 'The word of a child is not enough.'" 16RP 16-17.

Appeals to passions and prejudices of the jury are misconduct because they inspire improper verdicts based on emotion, not evidence. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). It is highly prejudicial for a prosecutor to tell a jury in effect "that a not guilty verdict would send a message that children who reported sexual abuse would not be believed" or suggest that it would encourage abuse. See State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86, review denied, 118 Wn.2d 1013 (1992). Indeed, comments referring to the general societal ill of abuse of children and how the criminal justice system requires a child to go through difficult things when they are involved in a crime are well-recognized to be "designed to appeal to the passion and prejudice of the jury." See, e.g.,

State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Even a single argument telling the jury to "[l]et [the victim] and children know you're ready to believe them and [e]nforce the law on there behalf" is highly improper and misconduct appealing to the passion and prejudice of the jury. State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1001 (1990).

In Powell, supra, the court reversed after finding an argument very similar to the one here to be so flagrant and ill-intentioned that a lack of objection did not preclude relief. 62 Wn. App. at 918-19. In that case, the prosecutor asked the jurors what would happen "when we tell them [children], yes, if something happens, you're supposed to tell. . . [a]nd then when they do, in fact, tell something has happened to them, what do we do? We don't believe them." 62 Wn. App. at 918 n. 4. The prosecutor also told jurors that not believing would tell kids "[y]ou can go ahead and tell, but don't expect us to do anything" because children would not be believed." Id.

On review, the Court of Appeals characterized this argument as telling jurors that a not guilty verdict would "send a message" that children who said they had been abused would not be believed. 62 Wn. App. at 918-19. The Court also found the arguments so flagrant and prejudicial that it refused to speculate about whether a "carefully worded curative instruction could have remedied the prejudice," especially because the comments were made at the "completion of the final closing argument." 62 Wn. App. at 919.

In this case, unlike in Powell, counsel specifically objected as soon as the prosecutor's argument became so offensive that it was apparently worth the risk of drawing the jury's attention. Initially, it should be noted, the prosecutor's arguments that the state could "never prosecute" child sex abuse cases if direct evidence were required or that the jury could convict based solely on J.T.'s testimony did not start out as highly improper, although the "never prosecute" comments could be seen as invoking some emotion. See 15RP 90, 93, 94.

It was at the start of her rebuttal closing argument, however, when the prosecutor went far, far afield, not only making an argument very similar to the one in Powell but also denigrating counsel by deliberately misstating her arguments from the permissible arguments counsel made about the credibility of the claims in this case to the completely offensive argument that counsel never made - that children "aren't going to be believed," "can't be believed," and "[w]e can't believe what they say." 16RP 16-17. And the prosecutor insulted the very role of defense counsel in general and Thierry, Jr.'s counsel in particular, stating, "how is a good a thing to tell them that they should tell somebody because we're [then] going to bring them in here to court **to have a Defense attorney say, "You can't believe them,**" followed by again telling the jury, improperly and incorrectly, that counsel wanted the jurors to "basically disregard" everything J.T. had told others simply because "he's a child," and that counsel was saying "'**[n]othing he said is credible so just disregard it all.'"** 16RP 16-17 (emphasis added).

At that point, the prosecutor then went completely off the

reservation of legal propriety, telling the jury that if they accepted the straw-man argument the prosecutor had now repeatedly accused counsel of making and found that it had **"any merit, then the State may as well just give up prosecuting these cases, and the law might as well say that, "The word of a child is not enough."** 16RP 16-17 (emphasis added).

As counsel objected below, these arguments fueled the passions and prejudice of the jury. 16RP 16-17; see also 16RP 31. Just as in Powell, the prsecutor's arguments here amounted to telling the jury that, if they did not convict based solely on J.T.'s testimony regardless of any concerns about credibility, they would be telling sending the message to children that their "word" is "not enough" and the prosecutors "might as well stop" prosecuting child sex abuse cases. The obvious, clear message from those declarations was to send the same message as in Powell - that a failure to convict would send the message that children would not be believed and child sex abuse cases would not be prosecuted. 62 Wn. App. at 918 n. 4.

Nor could the arguments of the prosecutor be seen as proper response to counsel's arguments, even given the "wide latitude" prosecutors have in closing argument. The prosecutor's first comments occurred in initial closing argument, *before* counsel made any argument for which prosecutorial response could be deemed "proper." See 15RP 98-99. Further, counsel did not say anything even close to what the prosecutor claimed. Counsel argued that it was a good thing to tell children who have allegations of abuse they did nothing wrong and would not get in trouble but that it was terrible when the protections "help[ed] them to create the worst story any of us can imagine[.]" 16RP 14. She never once

said "children can't be believed." Nor did she ever say that the word of child was always not "enough." Counsel did not say "[w]e can't believe what they say," or that children should not be believed because they sometimes make up stories, despite the prosecutor's claims below. Instead, counsel focused on the legitimate problems with the credibility of the claims in this case, noting there were too many inconsistencies and too much doubt for a criminal conviction to occur. Nothing she said was anything like what the prosecutor then claimed to the jury.

And nothing counsel said in any way "invited" the prosecutor to effectively tell the jurors that finding Thierry, Jr., not guilty would send a message that children will not be believed if they tell that they have been sexually abused, that it was saying the world of a child was not honored as enough to support a conviction and that prosecutors will have to stop trying to even prosecute child sex abuse cases. This misconduct was not "invited" or a "fair" response to the arguments of defense counsel.

Because counsel objected below, in deciding whether reversal is required, the Court asks whether there is a substantial likelihood this misconduct affected the jury's decision. Gentry, 125 Wn.2d at 640. There is more than such a likelihood here. The evidence in this case was extremely thin, perched solely on the shoulders of an 8-9 year old boy whose claims included something happening when it could not have happened (two weeks before disclosure, even though he had not seen his father for more than a month) and who had other credibility problems. The initial questioning of the child was not ideal and done under circumstances where the child might have a motive to make up a story. There was no

physical evidence, and the "potty" issues had gone on for years, with Sayfullah admitting they might have started before Thierry, Jr., had the visits where the alleged abuse occurred. The prosecutor's incredibly prejudicial argument effectively told the jury that a failure to believe J.T.'s claims and convict based on his testimony would send the message to children that they would not be believed and further that it would cause prosecutors not to even bother to try to prosecute *other* allegations. As the only real issue was whether the jury would believe J.T.'s claims and thus convict, there is clearly far more than a reasonable probability that the misconduct affected the outcome of the case, and reversal is required

Reversal is also required based on the prosecutor's incredibly improper, constitutionally offensive comments drawing a negative inference from Thierry, Jr.'s exercise of his rights to jury trial and to confront and cross-examine the witnesses against him. And this misconduct was coupled with serious, flagrant and prejudicial comments denigrating counsel, some of which drew counsel's objection to no avail.

Although counsel objected to only some of this misconduct, when a prosecutor comments on the exercise of a constitutional right, that issue may be raised as manifest constitutional error for the first time on appeal. See State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002); see also, State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002).

Here, the prosecutor repeatedly drew negative inferences from and commented on Mr. Thierry, Jr.'s, exercise of his constitutional rights to jury trial, confrontation and cross-examination. When a prosecutor comments in a way which invites the jury to draw a negative inference from

a defendant's exercise of a constitutional right, it "chills" the defendant's free exercise of that right and thus violates not only that right but due process, as well. See State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996); State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but "grave" misconduct for a prosecutor to make such arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 229, 14 L. Ed. 2d 106 (1965).

Defendants have a state and federal right to confront and cross-examine the witnesses against them. See Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990); Sixth Amendment; Art. I, § 22. Indeed, the Supreme Court has called cross-examination "the 'greatest legal engine ever invented for the discovery of truth,'" and has noted the importance of having the witness give his statements under oath, subject to cross-examination in front of the jury. Maryland, 497 U.S. at 845-46 (citations omitted). Further, the defendant has a state and federal right to a jury trial to require the prosecution to prove its case against him. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), reversed on other grounds on petition for writ of habeus corpus sub nom Hanna v. Riveland, 87 F.3d 1034 (9th Circ. 1996); 14th Amend.; Art. 1, § 3. And they have the right to counsel and the right to be present at trial when the evidence is presented against them. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8,

162 P.3d 1122 (2007); see also, Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

As a public prosecutor and quasi-judicial officer, the prosecutor must refrain from making arguments which penalize the assertion of a constitutional right. State v. Gregory, 158 Wn.2d 759, 806, 147 P.3d 2011 (2006). Here, the prosecutor made such improper comments and incited the passion and prejudice of the jurors repeatedly in closing argument. First, she focused on how J.T. "had to get up here in this courtroom on that stand and talk to a room full of strangers, all of you, and everybody here, strangers, adult strangers, about exceedingly embarrassing topics, things that no one adult would want to get up there and talk about or really talk about anywhere." 15RP 98-99. Then, she focused on having to do it at trial in front of Thierry, Jr., declaring, **"not only did he have to do that in front of all of you,** in front of a bunch of adult strangers, **but also in front of his father, the man who sexually abused him**." 15RP 98-99 (emphasis added). And then she reminded the jury, "[a] **9-year-old boy had to get up here and talk about being anally penetrated by his father here in front of him** and all of you." 15RP 98-99 (emphasis added).

Again, in rebuttal closing argument the prosecutor returned to this argument, ostensibly in commenting on counsel's arguments that Thierry, Jr.'s awkwardness on the stand could be explained by the situation he found himself in, declaring, "how do you think J.T. felt? He's 9. **He's up here having to talk about these very uncomfortable details in front of, like I said on Thursday, a bunch of strangers, all of you, including the person who abused him**." 16RP 21-25. She also reminded the jurors,

"[h]e had to come in here and talk about it with you all," telling jurors "he did the best he could with the questions that I had to ask him." 16RP 25. And she accused counsel of doing something improper in the way she asked questions, "putting statements to [J.T.], and forcing him to agree or disagree." 16RP 26. The trial court overruled counsel's objection that she was engaging in cross-examination. 16RP 26.

Reversal is required. Where, as here, the prosecutor argues that the jury should draw a negative inference from a defendant's exercise of his constitutional rights, reversal is required unless the prosecution can meet the heavy burden of proving it harmless, beyond a reasonable doubt. See Romero, 113 Wn. App. at 783-84. As a result, reversal is required unless the **prosecution** - not Mr. Thierry, Jr. - can meet the extremely high standard of proving the error constitutionally harmless. The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

This standard is far different than the deferential standard used by this Court when the issue raised on appeal is sufficiency of the evidence. See Romero, 113 Wn. App. at 783-85. In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

In stark contrast, with the constitutional harmless error test, the "overwhelming evidence" test, the Court is *required* to "reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Indeed, Romero is a good example of the difference between the two standards, because in that case the Court first found that the evidence was sufficient to withstand scrutiny under the standard for "sufficiency of the evidence," but then found that same evidence insufficient under the "overwhelming evidence" test, after an officer commented about the defendant's not speaking with police. 113 Wn. App. at 783-85. Because there was conflicting evidence and the improper comments about the defendant's "failure" to speak to police could have affected the jury's verdict, the prosecution could not prove that *every* reasonable jury would *necessarily* have convicted. Id. As a result, reversal was required. Id.

Here, the evidence was extremely thin. The prosecutor's arguments, inciting the jury's passions and prejudices based on what the child had to suffer by testifying in front of a bunch of strangers was bad enough in this already emotionally-charged trial, given that the "suffering" was based upon Thierry, Jr.'s, exercise of his right to have the state prove its case against him at trial.

But the prosecutor truly crossed the line in repeatedly commenting on the fact that J.T. had to testify in front of Thierry, Jr., the man accused of committing heinous acts against J.T., because J.T.'s testimony was mandated as part of Thierry, Jr.'s, right to confrontation. And the fact that

the prosecutor also repeatedly denigrated counsel for asking questions on cross-examination and performing her assigned role. a prosecutor may certainly argue that the evidence does not support the defense theory, a prosecutor must not "impugn the role or integrity of defense counsel." State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009).

Indeed, our Supreme Court has recently noted that "[p]rosecutorial statements that malign defen[s]e counsel can severely damage and accused's opportunity to present his case and are therefore impermissible." State v. Lindsay, __ Wn.2d __, __ P.3d __ (2014 WL 1848454) (May 8, 2014) (slip op. at 5-6).

Here, the prosecutor repeatedly declared that defense counsel "wants" the jury to ignore the evidence based on the improper theory that counsel was saying that "children cannot be believed." Further, the prosecutor denigrated not only counsel but her role, declaring, "how is a good a thing to tell them that they should tell somebody because we're [then] going to bring them in here to court **to have a Defense attorney say, "You can't believe them**," impugning the role of defense counsel as trying to prevent reporting of child sex abuse and the conviction of abusers. See 16RP 16-17. This is akin to the arguments the Supreme Court has held were improper and egregious, such as the argument that a defense attorney had a duty to his client but the prosecutor had a duty to "see that justice is served" or by saying something implying that all defense counsel in criminal cases are there to "distort the facts and camouflage the truth." Lindsay, slip op. at 5; see State v. Gonzales, 111 Wn. App. 276, 283, 45

P.3d 205 (2002).

As if that was not egregious enough, the prosecutor then declared counsel's argument's about the child's credibility and potential motives to be "outrageous," again invoking passions and prejudices in this highly emotionally-charged trial and denigrating counsel and her role. See Lindsay, slip op. at 5-6 (calling a defense argument a "crock" is improper).

Finally, the prosecutor repeatedly misstated crucial facts in denigrating counsel when she repeatedly told the jurors that counsel was misstating the evidence and there was no evidence that J.T. was "confronted" about saying the improper words and seeing the animal sex video and had to explain them. When the prosecutor declared, "[J.T] was not confronted. **There is no evidence that he was confronted**," that he was never in "any trouble" and there was no "blame to deflect," regarding the words "humping" (16RP 21-22), and that counsel was engaged in "mischaracterization" of the evidence, because J.T. was "never caught watching anything inappropriate," was "never caught doing anything," and "was never punished for it." 16RP 25.

But the prosecutor knew there was, in fact, such evidence, *as she elicited some of the testimony herself.* She herself asked J.T. if he ever got in trouble for looking at something on the computer, J.T. first said, "[y]es," then said, "I mean no." 12RP 105. The prosecutor next asked, "[h]as your mom ever gotten mad at you for something that you looked at on the computer?" 12RP 105. J.T. then stated, "[o]nly that one time which I told you guys," which he said was the "animal thing" on the computer. 12RP 105.

Thus, there *was* evidence, contrary to the prosecutor's claims, that J.T. got in trouble or was facing it, just as counsel said. There was also evidence that Sayfullah confronted J.T. after hearing him used the words "humping" and "kissing," because she went upstairs, demanded to know where he had heard the words, made him show her where in the book he thought he saw that, then told the boy that he was wrong and the picture did not look like that before finally deciding to ask if he had been improperly touched. 12RP 136.

Reversal is required for this misconduct, as well. Although counsel did not object to the repeated denigration of counsel and her role, this misconduct was so flagrant and ill-intentioned that it compels reversal even absent objection below. An appellate court may deem it "a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial" when an improper argument is made well after an opinion condemning it. See State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076, review denied, 131 Wn.2d 1018 (1997). Indeed, this Court has found arguments flagrant and ill-intentioned even when there is no published opinion declaring it to be so, if those misstatements are grave. See State v. Johnson, 158 Wn. App. 677, 682, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011).

Further, even if this Court finds some of the misconduct was not so flagrant and ill-intentioned that it compels reversal absent objection, because counsel was ineffective in failing to object and at least try to mitigate the prejudice to her client. Thierry, Jr., had a state and federal right to effective assistance of counsel. Strickland, 466 U.S. at 687; see State v. Madison, 53 Wn. App. 754, 770 P.2d 662 (1989). Even applying a

strong presumption of reasonableness, counsel's failure to object to all of the misconduct below cannot be deemed effective assistance, if this Court finds that any of that misconduct could have been cured had that objection been made.

Further, even if this misconduct, standing alone, did not compel reversal, the cumulative effect of all of the misconduct would, because that effect deprived Thierry, Jr., of his right to a fair trial. See State v. Jones, 144 Wn. App. 284, 301, 183 P. 3d 307 (2008). Here, all of the misconduct went directly to the only issue in the case - credibility. With the misconduct, the prosecutor injected into this already incredibly emotionally-charged case extremely prejudicial concepts such as convicting in order send a message to children that they would be believed, sympathy for J.T. for having to face his accuser, and disgust for defense counsel for cross-examining the victim and for all defense attorneys who were painted as taking the position that *no* child's word would *ever* be believed when they claimed abuse. As Division One has noted, this Court "has a responsibility to insist upon and enforce minimum standards of professionalism in the conduct of our system of criminal justice." Rivers, 96 Wn. App. at 675. Where, as here, the prosecutor engages in repeated, multiple acts of serious misconduct, including making highly inflammatory and extremely emotional arguments, that falls "well below the standards appropriate to the conduct of the State's case," and the appellate court "cannot countenance such tactics." Id.

The only issue in this case was whether the jurors would believe J.T.'s claims. That was the only evidence. There was no physical evidence

or witnesses. The potty issues had happened for years and there was evidence that it started *before* Thierry, Jr., had the child overnight and was alleged to have committed the first crime. J.T.'s claims, as made by him and repeated by others, were all the prosecution had as evidence, as the prosecutor herself admitted in closing. That is why the incredible corrosive effect of all of the serious misconduct in this case had such a devastating impact on Mr. Thierry, Jr.'s, rights to a fair trial. Under all the applicable standards, reversal is required. This Court should so hold.

2. SEVERAL TERMS OF COMMUNITY CUSTODY WERE NOT STATUTORILY AUTHORIZED OR VIOLATE APPELLANT'S RIGHTS

The authority of the sentencing court is limited and the court may imposed only those conditions of sentencing which are authorized by the law. See State v. Kolsenik, 146 Wn. App. 790, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). For this reason, although conditions of community custody are usually reviewed for abuse of discretion, such abuse exists when the sentencing court exceeds its statutory authority in imposing a condition. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). Here, conditions 13, 16, 25 and 27 were not statutorily authorized and further, conditions 16, 25 and 27 were in violation of Thierry, Jr.'s due process and/or First Amendment rights.

At the outset, these issues are properly before this Court. It is now well-settled that a defendant may challenge an unauthorized sentence for the first time on appeal. See State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Further, where, as here, the issues raised are primarily legal, do not require further factual development and the conditions burden

the defendant without further action by the state, those issues are properly considered on direct review, even before the term of community custody or placement starts. See State v. Sanchez-Valencia, 169 Wn.2d 782, 787, 239 P.3d 1059 (2010) (reversing this Court's decision that a pre-enforcement challenge to a condition of community custody was "premature").

On review, this Court should strike conditions 13, 16, 25 and 27, contained in Appendix H to the judgment and sentence. First, none of the conditions were authorized by statute. Because the sentencing court has no independent or inherent authority to impose conditions of community custody, the authority must be in a sentencing statute. See Kolesnik, 146 Wn. App. at 806. This Court reviews de novo whether the a condition was authorized by statute. Yy

In general, there are conditions which prohibit conduct and those which require affirmative conduct. See, e.g., State v. O'Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). RCW 9.94A.505 authorizes the court, "[a]s a part of any sentence," to impose and enforce "crime-related prohibitions and affirmative conditions" as provided in the sentencing chapter. RCW 9.94A.703 is the part of that chapter which specifies different conditions of community custody. See Laws of 2009, ch. 214, § 3. That statute provides three types of conditions: mandatory, which the court must impose; "waivable," which are imposed by default unless waived by the court; and "discretionary," which the court may order, if it so chooses. RCW 9.94A.703(1), (2) and (3).

None of the challenged conditions in this case were authorized by any of those sections of the statute. The "mandatory" conditions a court is

required to impose include a requirement to tell DOC about court-ordered treatment, two conditions excluding an offender from a certain area or job based on the nature of their crime and a requirement that the offender "comply with any conditions imposed by the department under RCW 9.94A.704." RCW 9.94A.703(1). The relevant conditions here address possession of controlled substances, "no contact" provisions, access to the internet and social media, possession of "sexually explicit material" and patronizing prostitutes "or establishments that promote the commercialization of sex." CP 221-22. None of them fall under the "mandatory" conditions of RCW 9.94A.703.

Nor were the conditions authorized as "discretionary" conditions. The "waiveable" conditions are:

> (a) Report to and be available for contact with the assigned community corrections officer as directed;
>
> (b) Work at department-approved education, employment or community restitution, or any combination thereof;
>
> (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;
>
> (d) Pay supervision fees as determined by the department; and
>
> (e) Obtain prior approval of the department for the offender's residence location and living arrangements.

RCW 9.94A.703(2).

At first glance, it may appear that condition 13 is authorized by subsection (c). But it is not. The condition provides, "[y]ou shall not possess or consume any controlled substances **without a valid prescription from a licensed physician.**" CP 221.

Nothing in RCW 9.94A.703(2)(c), however, authorized the court to

limit the medical personnel from whom Mr. Thierry, Jr. was allowed to get a prescription. It is not only physicians but also osteopaths, optometrists, dentists, podiatrists and certain physicians assistants and nurse practitioners who are authorized by our Legislature to lawfully issue prescriptions in this state. See, e.g., RCW 69.41.030(1). The Legislature is presumed to have been aware of its own statute on who can issue "lawful prescriptions" when it wrote the condition on such prescriptions in RCW 9.94A.703(2)(c). See Wright v. Miller, 93 Wn. App. 189, 197-98, 963 P.2d 934, review denied, 138 Wn.2d 1017 (1998). And the Legislature did not choose to limit prescriptions for those subject to the condition to only those issued by a physician.

Thus, while the sentencing court was authorized to decide whether to limit Thierry, Jr. to possessing controlled substances only when he has a lawfully issued prescription, the court did not have the authority to override the Legislative decision to choose to allow all persons on community custody/placement the same medical access as other people, i.e., to get prescriptions from those the Legislature authorized to write them. Condition 13 was not statutorily authorized and this Court should so hold.

None of the other conditions were statutorily authorized, either. The "discretionary" conditions a sentencing court may order under RCW 9.94A.703(3) are:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

Condition 16 prohibits Thierry, Jr., in relevant part, as follows: "[d]o not have any contact with physically or mentally vulnerable individuals." While RCW 9.94A.703(3)(b) authorizes a sentencing court to order a defendant to refrain from contact with "a specified class of individuals," the Supreme Court has held that any such limitation must be "crime-related," in order to avoid running afoul of a defendant's First Amendment rights to freedom of association. See State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), abrogated in part and on other grounds by, State v. Valencia, 165 Wn.2d 782, 239 P.3d 1059 (2010). As the Court declared, it is "not reasonable. . .to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime. Id.

The relevant portion of condition 16 did not meet that requirement. To qualify as a "crime-related" prohibition, by definition the condition must relate to the circumstances and facts of the crime. O'Cain, 144 Wn. App. at 773. That is, in fact, how the Legislature has defined "crime-related prohibition." See RCW 9.94A.030(10) ("'[c]rime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.").

Here, there was no evidence that the crimes involved physically or mentally vulnerable adults, nor was there any evidence that the crimes involved a child who was physically or mentally vulnerable except to the extent all children might be by virtue of being a particular age. Further, the relevant portion of condition 16 fails to satisfy the fundamental due process mandates of sufficient notice of what conduct it prohibits. A condition is vague and in violation of due process under the state and federal constitutions if the condition is either not defined with sufficient "definiteness" so that an ordinary person could determine what conduct was prohibited, or if the condition "does not provide ascertainable standards of guilt to protect against arbitrary enforcement. State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). There is no definition of who, exactly, is physically or mentally vulnerable. Is it all children? Is it all people with developmental disabilities? Is it anyone who is frail physically? Is it anyone who qualifies for a handicapped parking space?

Further, where a condition of community custody or placement infringes upon a fundamental right such as those protected under the First Amendment, the condition must be "clear. . . and. . . reasonably necessary to accomplish essential state needs and public order." See State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). In fact, such a condition must meet greater requirements for specificity and be "narrowly tailored." Bahl, 164 Wn.2d at 757-58. Mr. Thierry, Jr., has a First Amendment right to freedom of association with others. Riles, 135 Wn.2d at 347. The relevant portion of Condition 16 was not sufficiently specific to establish exactly who is a "physically or mentally vulnerable individual" and the condition

was not narrowly tailored. Instead, it is a prohibition which is not crime-related. The relevant portion of Condition 16 was not authorized by statute and runs afoul of both Thierry, Jr.'s due process and First Amendment rights.

Conditions 25 and 27 were also not statutorily authorized and further violated Thierry, Jr.'s due process and First Amendment rights. Condition 25 provided:

> You shall not have access to the Internet at any location nor shall you have access to computers unless otherwise approved by the treatment provider and community corrections officer. You also are prohibited from joining or perusing any public social websites (Face[]book, MySpace, etc.)

CP 221-22. Condition 27 prohibited Thierry, Jr., from possessing or "perus[ing] any sexually explicit materials in any medium," leaving it up to his treatment provider to define exactly what that means. CP 222. It also provided, "[d]o not patronize prostitutes or establishments that promote the commercialization of sex." CP 222.

The first problem with all of these conditions is that they are not crime-related. Regarding the internet and computer provisions, O'Cain, supra, is essentially on point. In O'Cain, the defendant was accused of meeting a girl with some friends he knew, walking off with her, grabbing her and pushing her over a fence, raping her and running away. 144 Wn. App. at 773. He was ordered to "not access the Internet without the prior approval" of his CCO and sex-offender treatment provider. In striking the condition, the Court first rejected the prosecutions efforts to claim that the provision was "affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the

community." 144 Wn. App. at 774-75. The condition "does not involve affirmative conduct," the Court noted, and was instead a "prohibition." 144 Wn. App. at 775. As such, the Court held, it "must be crime-related." 144 Wn. App. at 775. Because there was no evidence O'Cain had accessed the internet before the rape or that internet access or use "contributed in any way to the crime," the condition was not crime-related. Id.

Here, just as in O'Cain, there was no evidence whatsoever that Internet access played any part in the crime. Nor is there anything in the record indicating that this case involved, in any way, prostitution, adult "toy" shops, or any of the frankly thousands of places which might fall under the definition of being involved in the "commercialization of sex." The case involved allegations of misconduct which occurred inside private homes, not in a sex shop, not with a prostitute, nor anything similar.

Further, the prohibitions are unconstitutionally vague, as they fails to provide ascertainable standards for enforcement and fails to provide sufficient notice of what is prohibited. Bahl, supra, is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the "commercialization of sex" and thus are prohibited. And definitions vary. For example, some define the "commercialization of sex"

as "offering or receiving any form of sexual conduct in exchange for money" - thus prohibiting Thierry, Jr., from going to any place where there is prostitution. See, e.g., Christopher R. Murray, "Grappling with 'Solicitation": The Need for Statutory Reform in North Carolina after Lawrence v. Texas," 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Another may define "[t]he commercialization of sex" as including "all forms of media, including movies, television shows, songs, advertising, and magazines," used "to sell products and attract consumer interest" - thus potentially prohibiting Thierry, Jr., from a much wider range of places. See Takiyah Rayshawn McClain, "An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act, 40 VAND. J. TRANSN'L L. 597, 603 (2007).

Most disturbing, however, are the constitutional implications of conditions 25 and 27. The First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Further, communicating via social media and other electronic formats is constitutionally protected behavior. See Doe v. Prosecutor, Marion County, 705 F.3d 694 (7th Cir. 2013) (striking down a statute prohibiting registered sex offenders from using social media, instant messaging and networking website on First Amendment grounds).

Where a condition of community custody affects materials, conduct or speech protected by the First Amendment, a "stricter standard" applies, requiring the government to show that the restriction in question is

"reasonably necessary to accomplish the essential needs of the state and public order." Bahl, 164 Wn.2d at 757. There is no such evidence here. .

Finally, the portion of Condition 27 regarding "sexually explicit materials" was also in violation of Mr. Thierry, Jr.'s, due process and First Amendment rights. That portion of the condition provided, "[d]o not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material." CP 222. In Bahl, the relevant condition prohibited the defendant from "possessing or accessing" pornographic materials, "a directed by the supervising Community Corrections Officer." 164 Wn.2d at 754. In finding the condition unconstitutionally vague, the Supreme Court noted that, by delegating to the CCO what falls under the condition, the condition "virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement." 164 Wn.2d at 758.

Similarly, in Sansone, a condition mandated that the defendant not possess or peruse pornographic materials without prior approval, leaving what constituted "pornography" to be "defined by the therapist and/or Community Corrections Officer." 127 Wn. App. at 634-35. The vagueness of the condition was not only shown by the use of the term "pornography," a general, expansive term but also by the delegation to the therapist/DOC to define what amounts to "pornography." 127 Wn. App. at 639. The condition was unconstitutionally vague because it created "a real danger that the prohibition on pornography will ultimately translate to a prohibition on whatever the officer personally finds" offensive, even if it is not legally pornography. Id.

Here, condition 27 suffers from similar infirmities. It does not limit itself to prohibiting "crime-related" behavior, such as possession of child pornography. Instead, the condition prohibits Mr. Thierry, Jr., from possessing or seeing "**any** sexually explicit materials in any medium," regardless whether it is legal, adult pornography unrelated to the crime. Further, it leaves it up to the sexual deviancy treatment provider to define for Thierry, Jr., what amounts to "sexually explicit material," without limiting that definition to material involving children alone. That is hardly "narrowly tailored" to the specific governmental interests involved regarding the protection of children. See Bahl, 164 Wn.2d at 758.

Notably, there is no evidence that possessing "sexually explicit material" involving *adults* - activity protected by the First Amendment - was in way related to the crimes involving the child victim here, nor is there any claim that such material involving children was used, either, so the condition is also not crime-related. This Court should strike the improper conditions in this case.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. Thierry the relief to which he is entitled.

DATED this 26th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief by first-class mail, postage prepaid, to the Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402, and to Mr. Alfred J. Thierry, Jr., Airway Heights CC, P.O. Box 1899, Airway Heights, WA. 99001-1899.

DATED this 26th day of June, 2014.

/s/ Kathryn Russell Selk
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APPENDIX A

The verbatim report of proceedings consists of 18 volumes, which will be referred to as follows:
the proceedings of November 9, 2012, as "1RP;"
February 1, 2013, as "2RP;"
March 1, 2013, as "3RP;"
March 29, 2013, as "4RP;"
April 12, 2013, as "5RP;"
June 7, 2013, as "6RP;"
June 28, 2013, as "7RP;"
July 22, 2013, as "8RP;"
July 23, 2013, as "9RP;"
July 24, 2013, as "10RP;"
July 25, 2013, as "11RP;"
July 29, 2013, as "12RP;"
July 30, 2013, as "13RP;"
July 31, 2013, as "14RP;"
August 5, 2013, as "15RP;"
August 5, 2013, as "16RP;"
August 6, 2013, as "17RP;"
September 20, 2013, as "SRP."

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