No. 46359-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOE SEVERSON,

Appellant.

---

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

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# BRIEF OF APPELLANT

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A. INTRODUCTION

The one-two punch of a brazen prosecutor and inept defense counsel was too much to bear. Appellant Michael Severson did not stand a chance. The trial where he was wrongly convicted of four counts of child molestation allegedly committed against complainants K.C.-J. and her sister J.N.K. was riddled with error and violated Severson's rights to counsel and due process of law.

Defense counsel did not protect the appellant against the prosecutor's misconduct. Defense counsel failed to enforce even the most basic of evidentiary norms. Even if not every error requires reversal on its own, there is no doubt that the cumulative weight of the misconduct and ineffective assistance of counsel calls the jury's verdict into question.

A new, fair trial is needed.

B. ASSIGNMENTS OF ERROR

**Errors committed by the court**

1. The trial court erred in declaring child K.C.-J. competent to testify.

2. The trial court erred in finding K.C.-J.'s out-of-court hearsay statements – one made to her mother, another to a neighbor, and the last to a child interviewer – all to be admissible child hearsay.

3. Trial court findings regarding the child hearsay Ryan factors and competency are not supported by substantial evidence.

4. Over objection, the trial court improperly allowed the prosecutor to denigrate Severson's assertion of innocence by letting the lead detective testify that, in his experience, all child sexual abuse suspects deny what is alleged against them.

**Prosecutorial misconduct**

5. The prosecutor committed misconduct by improperly presenting witness Bill Campbell's feelings and opinions that Severson's behavior toward the complainants was "inappropriate," "concerning," and "creepy."

6. The prosecutor committed misconduct by asking witness Mike Thomas to state his opinion that Severson had been "grooming" the complainants, in violation of a pretrial ruling.

7. The prosecutor committed misconduct in eliciting Thomas' opinion that Severson had abused the children.

8. The prosecutor committed misconduct in closing argument and this violated Severson's constitutional right to a fair trial.

9. The cumulative effect of multiple instances of prosecutorial misconduct prejudiced Severson and deprived him of his right to a fair trial.

**Ineffective assistance of counsel**

10. Defense counsel's concession that six-year-old K.C.-J. was competent deprived Severson of his Sixth Amendment right to effective assistance of counsel.

11. Defense counsel's failure to contest the admissibility of K.C.-J.'s alleged child hearsay statements deprived Severson of his Sixth Amendment right to effective assistance of counsel.

12. Defense counsel's failure to seek exclusion of allegations that Severson had caused complainant K.C.-J. physical harm separate from the charged offenses deprived him of his Sixth Amendment right to effective assistance of counsel.

13. Defense counsel's failure to limit the child interviewer's recitation of what twelve-year-old complainant J.N.K. had said to her from being admitted as substantive evidence deprived Severson of his Sixth Amendment right to effective assistance of counsel.

14. Defense counsel's failure to object to Campbell giving his opinion of Severson's guilt on direct examination, and request that the witness restate this opinion on cross-examination, deprived Severson of his Sixth Amendment right to effective assistance of counsel.

15. Defense counsel's failure to object to the prosecutor asking Thomas to state his opinion that Severson had been "grooming" the complainants, in violation of a pretrial ruling, deprived Severson of his Sixth Amendment right to effective assistance of counsel.

16. Defense counsel's failure to object to Thomas' opinion that Severson abused the complainants deprived him of his Sixth Amendment right to effective assistance of counsel.

17. Defense counsel's failure to object to complainants' mother's testimony that Thomas told her he thought Severson "was grooming [her] children" deprived Severson of his Sixth Amendment right to effective assistance of counsel.

18. Defense counsel's failure to object to the mother discussing other unidentified declarants' contempt toward Severson deprived him of his Sixth Amendment right to effective assistance of counsel.

19. Defense counsel's failure to object to the mother's speculating that Severson had done more to K.C.-J. than what the child said, deprived him of his Sixth Amendment right to effective assistance of counsel.

20. Defense counsel's erroneous concession that the mother's two prior crimes of dishonesty could not be used to impeach her credibility under ER 609, and failure to cross-examine the witness about her convictions, deprived Severson of his Sixth Amendment right to effective assistance of counsel.

21. Defense counsel elicited the lead detective's opinion of Severson's guilt and this deprived him of his Sixth Amendment right to effective assistance of counsel.

22. Defense counsel's failure to object to the prosecutor's misconduct in closing argument deprived Severson of his Sixth Amendment right to effective assistance of counsel.

23. The cumulative effect of defense counsel's multiple failures deprived Severson of his Sixth Amendment right to effective assistance of counsel.

**Cumulative error**

24. Cumulative error deprived Severson of his right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

**Errors committed by the court**

1. Those who lack an understanding of the obligation to speak the truth on the witness stand, or who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly, are not competent to testify. In K.C.-J.'s mind, two mutually exclusive accounts – regarding what Severson supposedly did to her – simultaneously stood for the "truth." The child's descriptions of when, where, and how she was allegedly offended against, were wildly inconsistent, bringing her ability to both form and recall memory, into serious question. Did the trial court commit reversible error in finding the six-year-old child to testify?

2. The child hearsay statute allows for the admission of an out-of-court statement made by a child younger than ten, "describing any act [or attempted act] of sexual contact performed with or on the child by another," if the court finds "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child

testifies at the proceedings. RCW 9A.44.120. The three hearsay statements so offered by the State were obtained under suspect conditions, one of them did not even describe sexual contact, attempted or otherwise, and the child's varying stories cut against any inference of reliability. Did the trial court commit reversible error in admitting K.C.-J.'s statements as evidence for the jury's consideration?

3. Over defense objection, and in the guise of explaining a supposed "interrogation technique," the prosecutor had the lead detective portray Severson as a typical child molester, all because he asserted his innocence and would not confess. Did the trial court commit reversible error in allowing this profile evidence in?

**Prosecutorial misconduct**

4. The trial court ruled that testimony opining as to the credibility of the accusations would be excluded and the prosecutor represented she would follow the ruling: "I never elicit opinion testimony as to the credibility of a witness." RP 29. However, the prosecutor then had witness "Bill" Campbell testify to his opinion that Severson's interactions with the complainants were "inappropriate" and "creepy," and that the witness cut off ties with Severson after the allegations of sexual abuse came out. The prosecutor put on testimony from witness "Mike" Thomas that he believed Severson had abused the complainants. Was it flagrant and ill-intentioned misconduct for the prosecutor to present these implied opinions on guilt in

violation of the pretrial ruling? Did the ensuing prejudice deprive Severson of his constitutional right to a fair trial?

5. The trial court also ruled that the term "grooming" was highly prejudicial and that the state could not present anyone's opinion that Severson had been "grooming" the children, except with a limiting instruction, and only to explain why the mother questioned her daughters. Still, the prosecutor had Thomas express this provocative opinion of guilt. Did the deliberate violation of the motion in limine constitute flagrant and ill-intentioned misconduct that prejudiced Severson's right to a fair trial?

6. In closing, the prosecutor argued Severson committed more crimes than what he had been charged with. The prosecutor argued that the jurors should consider Campbell's and Thomas' opinions – including the supposed "grooming" suspicions – as substantive evidence of Severson's guilt. Was this argument flagrant and ill-intentioned misconduct? Did it deprive Severson of his constitutional right to a fair trial?

7. Did the cumulative effect of this misconduct deprive Mr. Severson of his constitutional right to a fair trial?

**Ineffective assistance of counsel**

8. The accused's Sixth Amendment right to counsel includes the right to effective assistance of counsel. K.C.-J. testified at the child hearsay hearing. The videotape of her earlier prosecution interview was also admitted. Defense counsel did not ask K.C.-J. a single question, but

opined she was competent. Had the child been declared incompetent, her uncorroborated out-of-court claims about Severson would have been inadmissible. RCW 9A.44.120(2)(b). Where the record on the whole shows K.C.-J. was not competent, did defense counsel's concession deprive Severson of his constitutional right to effective assistance of counsel?

9. Defense counsel did not contest the admissibility of child hearsay evidence, even though none of the statements was reliable, and one was plainly outside what is covered under RCW 9A.44.120. Did defense counsel's failure to keep out otherwise inadmissible hearsay deprive Severson of his right to effective assistance of counsel?

10. ER 404(b) bars admission of evidence for the purpose of proving a defendant's character and showing that he acted in conformity with it. If evidence of a prior bad act is admitted under an exception to this general rule of exclusion, the defendant is entitled to a limiting instruction. In the prosecution's videotaped interview with K.C.-J., admitted in full for substantive purposes, the child alleged Severson caused her physical harm different from the charged sexual crimes. Defense counsel never made any motion to exclude prior bad acts of the accused. Did this failure deprive Severson of his constitutional right to effective assistance of counsel?

11. The prosecutor used the child interviewer to impeach twelve-year-old J.N.K. However, defense counsel did not request a limiting instruction

that would have cautioned the jury that the inconsistent statements were only relevant to consideration of J.N.K.'s credibility. Part of the impeachment included an out-of-court claim by J.N.K. that she witnessed Severson abuse her younger sister. Where the testimony should not have been admitted for substantive purposes, did defense counsel's failure to object, and failure to request a limiting instruction, deprive Severson of his Sixth Amendment right to effective assistance of counsel?

12. Defense counsel did not object to the prosecutor eliciting Campbell's implied opinion of Severson's guilt. Inexplicably, on cross-examination, defense counsel asked Campbell to restate his confidence in his subjective interpretation of Severson's interactions with K.C.-J. and J.N.K. Defense counsel also did not object when the prosecutor had Thomas state he believed that the appellant had abused the two complainants. Defense counsel did not object when the mother talked about unidentified community members' disdain toward Severson, or when she speculated that, in her opinion, Severson had subjected K.C.-J. to more abuse than the child mentioned. Did these defense counsel failures deprive Severson of his Sixth Amendment right to effective assistance of counsel?

13. Pretrial, defense counsel won a motion to keep out Thomas' opinion that Severson had been "grooming" the complainants. The trial court specified that if there was going to be mention about Thomas telling

the mother what he thought, a limiting instruction would be given to bar the jury from consideration of the opinion for a substantive purpose. When the mother testified, defense counsel did not object, or ask for a limiting instruction, and Thomas' "grooming" opinion came in as substantive evidence. Later, when Thomas testified, defense counsel again sat on his hands, silent, and what should have been excluded, came in as substantive evidence for a second time. Did defense counsel's failures to object and failures to enforce a favorable pretrial ruling deprive Severson of his Sixth Amendment right to effective assistance of counsel?

14. Evidence of prior convictions may be admissible for the purpose of attacking the credibility of any witness under ER 609. Evidence of a prior crime of dishonesty is automatically admissible under the rule. The mother, Shanna Carter, had prior gross misdemeanor convictions for theft and falsification of insurance, but defense counsel agreed with the prosecutor's suggestion that the convictions were unusable under ER 609 "since it's not punishable by greater than a year in jail." RP 18-19. Did defense counsel's erroneous concession and resulting failure to impeach Carter, a critical prosecution witness, deprive Severson of his constitutional right to effective assistance of counsel?

15. Severson's counsel asked the lead detective to share with the jury his opinion that K.C.-J. and J.N.K. had been sexually molested and that Severson had done it. In a case where the stated defense theory was that

no sexual abuse ever occurred, not that the police had rushed to identify the wrong suspect, was Severson deprived of his Sixth Amendment right to counsel, and due process right to a fair trial, by this incomprehensible blunder?

16. Defense counsel did not object (1) when the prosecutor argued that Severson had committed uncharged crimes, (2) when the prosecutor told the jurors to convict because other witnesses believed Severson to be guilty, or even (3) when the prosecutor's argument directly violated a pretrial ruling. Did defense counsel's failure to object deprive Severson of his Sixth Amendment right to counsel?

17. Did the cumulative effect of these failures of defense counsel deprive Severson of his Sixth Amendment right to effective assistance of counsel?

**Cumulative error**

18. Did the overall cumulative effect of all these errors deprive Severson of his Fourteenth Amendment right to a fair trial?

D. STATEMENT OF THE CASE

Michael Severson is a 59-year-old veteran of the United States Army. RP 501. He met the complainants' mother, Shanna Carter, through a mutual acquaintance. RP 75-76. At the time, he was living in a friend's garage; his disability income check was not enough for him to have a place of his own. RP 503, 573. Carter, a single mother working a graveyard shift, needed help caring for her children. RP 504, 507. Initially, Severson would sleep over at the apartment while Carter went to work. When Carter asked Severson to move in, he agreed. RP 506.

Carter, her daughters, and Severson lived like a family for about two years. RP 77. He was like a surrogate grandfather; the girls called him "Mikey." RP 379, 516-517. He played with J.N.K. and K.C.-J., he cooked for them, and he watched TV with them. RP 510, 555-56. Combining incomes allowed them to move from a one-bedroom apartment to a two-bedroom, where Carter would no longer have to share a room with her daughters. RP 517. In both apartments, Severson slept on a living-room couch. RP 384, 508.

Severson gave Carter full access to his debit card. RP 519. She was to pay the bills and rent. RP 78, 519, 574. Carter had been addicted to narcotics. RP 15-17, 399. When the bills went unpaid, and the electricity was shut off, Severson saw a pattern emerging. He had concerns that Carter was abusing opioids, including her methadone. RP 519-520, 527.

The summer of 2012 brought stress and change into the household. Carter lost her job. RP 518. She supposedly quit methadone "cold turkey." RP 392, 524-26. She invited another person, "Bill" Campbell, to live in the apartment. RP 522. Campbell did not pay to live there; he was unemployed. RP 523, 583. Carter had also taken a boyfriend, Campbell's friend "Ant," who would stay over too. RP 388, 440, 524.

On September 3, 2012, Severson confronted Carter over the unpaid bills. RP 523, 527, 534-35.[1] The two fought and Severson left. RP 535.

When Severson returned to the apartment complex, police officers told him that he had been accused of inappropriate touching. RP 534. He just "about passed out." RP 536. After the fight over the money, when he was out of the apartment, Carter reported to the police that she had talked to her daughters K.C.-J. and J.N.K., and that they both said that Severson had done things that made them "uncomfortable." RP 408. Carter alleged the sisters said Severson had been touching their privates. Just like that, Severson was out of the apartment.

Severson called the police and came in for an interview. RP 536-37. Two detectives questioned him, for three hours, without a break. RP 537, 678. The interview was recorded. Severson denied any sexually motivated touching of the girls. RP 551. Hours into the questioning, and

[1] Carter confirmed the fight, but claimed not to recall what it was about. RP 407, 420.

following repeated invitations from the police to speculate whether he had ever had any, in their words, "*oh shit*," moments with the girls, Severson said he may have had some accidental over-the-clothes contact with their genital areas. RP 589-90. (He had wrestled with the kids, they had tickled each other, and he also guessed that he may have put his hand down on them when trying to get up off the sofa, but lost his balance because of a bad knee. RP 539-40, 611, 665-66.) Detective Eggleston testified that the insistence on getting a suspect to talk about possible accidental, non-criminal, touching is a deliberate interrogation technique designed to generate an "admission," of sorts. RP 663-66.

After the interview, the police invited Severson to submit to a Computer Voice Stress Analysis (CVSA) examination, a type of a lie detector test. Severson agreed, took the test, and the police let him go.[2] Charges were not filed until nine months later. CP 1-3.

Pretrial, the State moved to admit, as substantive evidence, three different out-of-court statements made by K.C.-J. CP 7-15. The State argued that each satisfied RCW 9A.44.120 and the Ryan factors. Defense counsel did not file any response. Six-year-old K.C.-J. testified at the child hearsay hearing. At the outset, the child said no one had ever talked with

[2] The available record does not explicitly state that Severson "passed" this polygraph, but the State did not want to jury to know the results. RP 19-20.

her about the difference between a truth and a lie. RP 54.[3] She said it would be "the truth" for the prosecutor to say Mickey Mouse brought her to court. The prosecutor had to ask her follow-up questions to get her to correct this response. RP 56.

The child said she did not know why she was in court. RP 63. When asked if "anything bad ever happened" to her body, she answered no. RP 63. She said she "never" told anyone about bad things that happened to her body. RP 63. When asked if she ever told anyone specifically about Severson "doing bad things" to her body, she said "I never told anybody that." RP 63. She remembered her mother sitting her down and asking "if anything bad ever happened with Mikey." RP 64. She did not remember what she told her mom. RP 65. Defense counsel did not object when the prosecutor led the child: "Did you ever tell your mom that Mikey touched your no-no?" RP 65.

When the child said yes, the prosecutor tried to get her to reconcile her inconsistent testimony:

> Q: "So when I asked you if anything bad ever happened to your body and you said no, were you telling the truth?"
>
> A: "I didn't remember that part."

RP 65.

[3] This was not a true statement. Her mother had talked to her about the difference between a truth and a lie, and so had the child interviewer. RP 87, Exhibit 1.

The prosecutor then followed-up with "Do you like to think about this?" RP 65. K.C.-J. answered "Yes." RP 65. Defense counsel did not ask K.C.-J. any questions. RP 71.

Neighbor "Mike" Thomas also testified at the pretrial hearing. He recalled that K.C.-J. once came over to play with his dog "and started hitting herself in the crotch." RP 98. He said that he asked "why do you want to hurt yourself that way?" and that K.C.-J. answered: "Mikey does it." RP 98. Thomas said that to him, what K.C.-J. did, "it was like male masturbation." RP 98.

The child interviewer, an employee of the prosecuting attorney's office, testified. RP 111. K.C.-J. was four years old at the time of the videotaped interview. RP 118. The recording was admitted as Exhibit 1. RP 118, 120.[4] Defense counsel did not ask the interviewer a single question. RP 122.

The trial court admitted all three hearsay statements; defense counsel did not articulate any reason not to. RP 122. Defense counsel brought up, but did not challenge, competency to testify. The trial court entered written findings. CP 20-22.

The mother, Carter, had two convictions for crimes of dishonesty, but defense counsel said they were not admissible under ER 609. RP 19.

[4] The same recording was later admitted at trial, and also numbered Exhibit 1 there.

Defense counsel moved to exclude witnesses' opinions regarding their interpretation of Severson's interaction with the children, and in particular, any conclusion this was "grooming." CP 16, RP 21-22. The prosecutor represented: "I don't intend to elicit opinion testimony from either Mr. Campbell or Mr. Thomas *do you believe he was grooming the girls*." RP 24. (Emphasis added.) The trial judge ruled: "I will allow you to elicit the word 'grooming' only in the conversation between the witness and the mother with the limiting instruction that it's not being offered for the truth of the matter asserted." RP 26. The judge further ordered that witnesses were not to give "opinions as to the fact that they believed he was grooming these children as part of their general testimony." RP 27.

Defense counsel moved to prevent witnesses from commenting on the credibility of the complainants. CP 16, RP 29. The prosecutor promised: "I never elicit opinion testimony as to the credibility of a witness." RP 29. The motion was granted.

Both K.C.-J. and J.N.K. testified at the trial. RP 152, 194. J.N.K. said Severson touched her "private," but did not recall seeing anything like that happen with her sister. RP 215. Carter testified and recounted what K.C.J. supposedly said to her. RP 401-02.

Without defense objection, the state used the child interviewer to impeach J.N.K. RP 350. The interviewer testified that J.N.K. did talk about witnessing abuse of her sister, when J.N.K. was interviewed out-of-

court. RP 350. The pediatric nurse practitioner who examined both children said there was no observable physical evidence of injury; the exams were "normal." RP 259-60.

Severson took the stand and testified he was innocent, just as he had told the police. RP 541, 551. The prosecutor cross-examined, primarily about Severson's three-hour police interview, and then recalled Detective Eggleston to talk about it.

The jury convicted on all four counts of child molestation in the first degree.

E. ARGUMENT

**Errors committed by the court**

1. The full record shows that K.C.J. was not competent to testify.

Witnesses, children or adults, "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or relating them truly" are not competent to testify. RCW 5.60.050(2). Competency "depends on the capacity and intelligence of the child, [the child's] appreciation of the difference between truth and falsehood, as well as of [the child's] duty to tell the former." State v. S.J.W., 170 Wn.2d 92, 101, 239 P.3d 568 (2010), quoting Wheeler v. United States, 159 U.S. 523, 524, 16 S.Ct. 93, 40 L.Ed. 244 (1895).

No particular age determines competency, but to testify, the child witness must have:

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

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

"[E]ach element of the Allen test is critical to a determination of competency." Jenkins v. Snohomish Cnty. Pub. Util. Dist. No. 1, 105 Wn.2d 99, 102-03, 713 P.2d 79 (1986) (Reversing finding of competency because record showed child had given two mutually exclusive accounts of accident in question.) In general, a trial court's competency determination is reviewed for an abuse of discretion. State v. Brousseau, 172 Wn.2d 331, 340, 259 P.3d 209 (2011). However, the appellate court will "examine the entire record to review that determination." State v. Avila, 78 Wn. App. 731, 737, 899 P.2d 11 (1995). In addition, if the competency determination was made "on documentary evidence in the record rather than on personal observation of the witness," the court on appeal may review the trial court finding de novo. Jenkins at 102.

Here, the trial court's ruling on K.C.-J.'s competency should be reviewed de novo. Exhibit 1, the video-recording of the child's pretrial interview, captured richer detail than what a "dry" trial transcript typically

reveals. Like the deposition in Jenkins, this Court's access to that evidence is the same as that of the trial court. Further, deference afforded in such matters as witness competency, necessarily presumes that proceedings below included a real adversarial process. Mr. Severson's trial counsel did not cross-examine the child, did not cross-examine the child interviewer, and made no argument with respect to competency whatsoever.[5] As a result, rather than deliberate on the matter, the trial court just accepted the State's position on the issue.

Finally, it was the child's trial testimony that finally revealed that K.C.J. was not competent. Under Avila, this Court reviews the full record and it should do so applying the de novo standard.

a. In K.C.-J.'s undeveloped mind, two mutually exclusive claims – one of rape, one of absence of rape – simultaneously stood for "truth."

The interview contains K.C.-J.'s vivid description of enduring a vaginal-digital rape. The child said Severson put his finger inside her and made "blood come out" of her private. Exhibit 1, 11:58[6]. She said he touched her on the "outside" of her clothes. 11:59-12:00.

[5] As argued below, this was deficient and prejudicial performance in violation of Severson's Sixth Amendment right to effective assistance of counsel.

[6] There is no transcript of Exhibit 1. The time references here follow the minutes of the video's digital clock reading. E.g. 09/07/12 FR 11:43:00, is noted as 11:43.

The interviewer asked the child to explain how, if the touching was over the clothes, could there have been blood? The video shows that K.C.-J. clapped and looked away. Rather than answer, she rambled about being told to go to the bathroom, paused, then resumed: "I saw blood… down on my leg and on my feet and on the ground." 12:01. The child insisted that her "school jeans… they got all bloody." 12:01.

At the pretrial hearing, K.C.-J. said she was telling the truth, and that she had told the truth to her mother, to the child interviewer, and to defense counsel. RP 68. But she did not claim to have been the victim of digital-vaginal rape at the hearing, or at trial. RP 63-65, 167-68, 170. Notably, at trial, the prosecutor led the child, introducing the idea that Severson harmed her. E.g. "Did that bad thing that happened, was that with Mikey?" RP 164. Even so, the child only talked about over-the-clothes touching. RP 167-68, 170, 181.

She testified: "He never touched me on my skin." RP 181. She said he never put anything inside her body. RP 181. She said blood never came out of her private. RP 181. Blood never ran down her leg, onto her pants, or the floor. RP 182.

In fact, the child said *if* she would have told that story – of blood coming out of her private and getting on her pants – to someone else that would not be a true story, *because it did not happen*. RP 182. Minutes earlier, on direct examination, the child had said that when she spoke to

the forensic examiner, she told the truth. RP 171. Just as in the pretrial hearing, no one asked her to reconcile the mutually exclusive versions she believed to be simultaneously true.[7]

K.C.-J.'s adherence to the idea of 'telling the truth,' while giving two mutually exclusive stories regarding a crucial fact, is indistinguishable from how the little boy in Jenkins testified about the accident he witnessed. "In the deposition Lance stated he had warned Jonathan not to go into the substation because there was electricity and it was dangerous. In the same deposition, however, he also stated he did not know about electricity until after the accident." Jenkins at 101. "The trial judge, recognizing the internal contradiction, decided that the contradiction went to the credibility of the evidence rather than to its admissibility, analogizing to the method of analysis with regard to inconsistent evidence given by adults." Id. at 102. The Supreme Court reversed:

> The deposition itself shows that Lance did not have a memory sufficient to retain an independent recollection of the occurrence.
> ...
> [T]he deposition clearly demonstrated that one of the five elements critical to a determination of child competency was absent, as a matter of law Lance [] was incompetent and admission of his deposition was error.

Jenkins, at 102, 103.

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[7] In the interview, K.C.-J. said that her mother was there when she bled: "I tried to get momma, come, but momma wouldn't come." 12:01. At the trial, the mother testified she never saw evidence of this. RP 425. The State made no effort to explain this rape allegation, and never charged Severson with rape.

To establish competency, it is not enough for K.C.-J. to have verbalized a promise to 'tell the truth.' Although witnesses can give accounts that are at times inconsistent, there is a major difference between a competent witness who gives an inconsistent account – and likely tries to explain away the discrepancy – and an incompetent witness who never grasps that what they said was inherently contradictory. A witness who lacks the capacity to see that assertions "*I was raped and bled*," and "*no, I was not raped, and I did not bleed,*" cannot both be the 'truth,' shows a fundamental inability to understand what 'truth' means.

a. The child's inconsistent assertions of when, where, or what happened, call her underlying ability to form a memory, and recollect it, into serious question.

In general, "an inconsistency in the child's testimony goes to the child's credibility and not to admissibility. State v. Woods, 154 Wn.2d 613, 621, 114 P.3d 1174 (2005), as amended (July 27, 2005) citing to State v. Woodward, 32 Wn. App. 204, 646 P.2d 135 (1982); but see State v. Karpenski, 94 Wn. App. 80, 106, 971 P.2d 553 (1999), abrogated by State v. C.J., 148 Wn. 2d 672, 63 P.3d 765 (2003). But inconsistency on key facts can show lack of competency.

In Karpenski, the trial court found that the child-witness had testified as to an event that he could not possibly have recalled, was "confused" regarding "dream versus reality," and "not old enough to be

able to separate that confusion." Id. The unjustifiable trial court finding of competency was reversed on appeal: "we hold that the evidence is insufficient to support a finding that Z was capable of distinguishing truth from falsity, and that Z was incompetent to testify." Id. Similarly, K.C.-J.'s testimony regarding her alleged experience strongly suggested that she never had the mental capacity at the time of the occurrence "to receive an accurate impression of it," and/or lacked "a memory sufficient to retain an independent recollection." Allen, 70 Wn. 2d at 692.

The child was inconsistent about *when* the alleged touching happened. In the interview, she first said she was "two," then changed her mind and said "four." 11:51. When talking about *where* the alleged touching happened, the child was incoherent. K.C.-J. said it happened "outside," but when asked "outside where?" she said "in my room." 12:02. She said it happened in the hallway. RP 11:50. She said it happened "in his room." 12:03. She then said Arnold, the interviewer, was mixed up, as it only happened "in his room." 12:09.[8] When asked directly if it happened in different apartments, or just one, the child said: "some of it happen at the woods… he dragged me at the woods." 12:09.

The child was all over the place when talking about the number of alleged incidents. At trial, when the prosecutor asked "how many times,"

[8] Severson did not have a bedroom in either apartment the family lived in. RP 384, 508.

the child said "like once" but then said she "meant more than once." RP 172, 180. She did not know how often. RP 173. (See also RP 181, 183-184.) The prosecutor asked: "how come now you're saying it happened almost every day, and before you said it happened once or twice or a couple of times." RP 184. The child could not see the inconsistency of her testimony: "I don't know." RP 184. On re-cross, defense counsel asked the child to explain "what does 'a couple' mean," and the child said "like a few," then "one," then "a few" again. RP 188. When asked "is almost every day more than a few," she answered "no." RP 188.

The child's inability to grasp these inconsistencies evidenced her lack of competency. Jenkins, supra; Matter of Dependency of A.E.P., 135 Wn.2d 208, 234, 956 P.2d 297 (1998) ("A.E.P.'s competence to testify was not properly established, due to the absence of the critical information regarding when the alleged abuse occurred.")

K.C.-J. account of *what* happened was equally hard to pin down. In the interview, after delivering a speedy narrative that starts with "Mikey was a nasty boy," she alleged an attempted touching "with his thing," but quickly veered off into an accusation that Severson physically assaulted her when she was riding her bicycle. 11:51-11:54. She complained that Severson "used to be nice," but was "nasty," because "he had my chips and he never bring them back" and also took her radio. 12:04.

In the pretrial hearing, she said nothing bad ever happened to her and denied ever talking with anyone about bad things that happened to her body. RP 63. When led, she agreed with the prosecutor that she told her mom about Severson touching her. RP 65. Later, during her trial testimony, she said Severson never touched on her skin. RP 181. She also said she never saw his "private." RP 182.[9]

There is no question that if an adult witness gave such contradictory testimony, lawyers for both sides would be asking about it, to clarify, or to put the witness through the rigor of a completed impeachment. But here, no one asked K.C.-J. to explain why she told the child interviewer she was digitally raped, but disavowed that account at trial. No one asked her to explain why she claimed in the interview to have been chased by the appellant and "his thing," but then testified under oath she never saw it. RP 182. No one asked about the woods, chips, radio, or any bicycle incident. The handful of times that the lawyers did try to get the six-year-old to account for the conflicts in her stories, K.C.-J. simply could not do it. RP 65, 184, 188.

[9] The child was equally unreliable when asked about her sister. RP 175. She first said: "Yes. The same – the same thing happened." But when the prosecutor followed-up with "is that something you saw," she immediately changed her answer to "No." RP 175.

b. The trial court committed reversible error in finding the six-year-old competent.

This Court should review the trial court ruling regarding competency de novo, but the trial court erred even if the ruling is reviewed under the abuse of discretion standard. "Factual findings are reviewed under the substantial evidence standard, under which there must be a sufficient quantum of evidence in the record to persuade a reasonable person of the truth of the declared premise." Barker v. Employment Sec. Dep't of State of Wash., 127 Wn. App. 588, 592, 112 P.3d 536 (2005). The trial court's findings do not stand up. CP 21. K.C.-J. was not competent; a new trial must be ordered. Jenkins 105 Wn. 2d at 103.

2. The trial court should have excluded K.C.-J.'s out-of-court statements.

a. A child's hearsay statements are admissible only when reliable.

In specific circumstances, what a young child said outside of court may be admissible at trial if the statement is determined to be reliable. RCW 9A.44.120. The reliability is assessed according to nine factors articulated in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). These factors must be "substantially met." The relevant part of the statute reads:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the

child by another that results in substantial bodily harm… is admissible in evidence in… criminal proceedings... if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the **time, content, and circumstances** of the statement provide sufficient indicia of reliability; and

(2) The child either:
(a) Testifies at the proceedings; or
(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120.[10] (Emphasis added.)

The statutory language of time, content, and circumstances controls the inquiry. In order to assess the reliability of child hearsay, the trial court must consider: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. Ryan, 103 Wn.2d at 175-76.

[10] Because K.C.-J. was not competent, she was "unavailable," and corroboration – not present here – would have had to have been established. RCW 9A.44.120(2)(b).

No single factor, taken alone, is decisive. State v. Kennealy, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). However, "the factors must be 'substantially met' before a statement is demonstrated to be reliable." Id. A trial court's decision to admit child hearsay statements is reviewed for an abuse of discretion. State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005).[11]

What the State offered to use against Severson has much in common with Ryan, where "the initial statements of the children were made to one person, although subsequent repetitions were heard by others." Ryan at 176. Just as here, the statements "were not made spontaneously, but in response to questioning." Id. Moreover, K.C.-J.'s mother, like the mothers in Ryan, had also "been told of the strong likelihood that the defendant had committed indecent liberties upon their children before the mothers questioned their children." Id.

b. Like in Ryan, K.C.-J.'s statements to her mother were suspect, not reliable.

It is important to note that while the child remembered her mother sitting her down and wanting to know if "anything bad ever happened" with Severson, K.C.J. did not recall the substance of the conversation. RP 64-65, 216. Like in Ryan, this was an upset mother questioning her

[11] Again, just as with competency issue, the proceedings below were one-sided, with defense counsel taking no action to contest the prosecution's motion. The State won by default and this Court must keep that in mind when reviewing the trial court's ruling.

nervous children. Carter testified she asked K.C.-J. "if Mikey ever made her feel uncomfortable," but the child did not understand. RP 84. There was nothing spontaneous about this interaction; the mother "had to explain to [K.C.-J.] what 'uncomfortable' meant." RP 84. The relationship between the child and the mother, and the leading questions, both cut against any suggestion of reliability.

Critically, the timing of the statement does as well. Earlier that day, Carter argued with Severson. RP 407. Then, neighbor Thomas told her he thought Severson was "grooming" her children. RP 397. Like the parents in Ryan, Carter was "predisposed to confirm what [she] had been told." Ryan, at 176. Like the parents in Ryan, Carter's "relationship to [her] child[] is understandably of a character which makes [her] objectivity questionable." Id.

Sending K.C.-J. into her room, Carter first spoke with J.N.K., who allegedly disclosed inappropriate touching. RP 399. The children saw their mother was increasingly disturbed. Twelve-year-old J.N.K. testified her mother "looked like she was mad." RP 216. The pediatric nurse practitioner who saw K.C.-J. about a week later, reported the younger child felt her mom was "super mad." RP 264.[12] In those emotionally charged moments, K.C.-J would have had an understandable desire to

[12] Two years later, K.C.-J. recalled her mother looked sad. RP 173. The mother's recollection was that K.C.-J. was "scared, nervous." RP 85.

please her visibly angry parent, a parent angry at, and asking leading questions about, Severson. That urge fits under the "motive to lie" Ryan factor.

The children in Ryan were incompetent to testify, and this took away from any reliability of their alleged statements. Ryan, at 176. The Supreme Court has stated that testimonial competency at the time of the out-of-court hearsay declaration is not a prerequisite to a finding of reliability. State v. C.J., 148 Wn. 2d 672, 685, 63 P.3d 765 (2003). However, C.J. did not hold that evidence of a child's immaturity is to be ignored. Even if this Court disagrees with the assertion that K.C.-J. was not competent to testify, the evidence of the "general character" of this declarant, a very young child unable to give a consistent narrative, must be considered. "[C]ommon sense must not be a stranger in the house of the law." B.B. v. Com., 226 S.W.3d 47, 51 (Ky. 2007) ("[I]t is impossible to guarantee the trustworthiness of the out-of-court statements of [a child] whose lack of understanding of the concept of truthfulness rendered her incompetent to testify.")

Finally, like in Ryan, what K.C.-J. allegedly said to Carter was only heard by one person. In fact, this case calls for particular caution because of the mother's claim to the contrary. Carter said that Campbell was a "witness" to her talking with her daughters. RP 82, 398, 401. But Campbell testified, at trial, that the mother did not question the girls in his

presence. RP 301, 302. He recalled being there when Carter talked to J.N.K., but only at some point after the police got involved, and he did not hear what was said. RP 302-303, 316-317.[13] Since Carter said she questioned the girls one after the other, Campbell could be honestly mistaken about when he heard Carter talk to J.N.K., but that does not change the fact that he did not hear her talk to K.C.-J. RP 399.

c. The later-in-time videotaped interview likewise lacks reliability.

The video-recorded interview was not a spontaneous utterance. K.C.-J. was brought there for the purpose of a law enforcement investigation and after having already been questioned by her angry mother. Certainly the child's motive to please would have endured. Furthermore, the recording evidences a likely taint from the mother's prior questioning.

Close to its outset, the child blurted-out a paragraph-long script of what supposedly happened. Even the interviewer appeared surprised by the narrative and testified the blurt-out showed the child knew why she was there. RP 360. The child's visible inability to explain herself, or answer follow-up questions, discussed above, weakened the reliability of the videotaped account. To the extent the Ryan analysis is to include a

[13] The trial court never considered this contradiction between Carter's claims and Campbell's testimony, as Campbell testified at trial, but not at the child hearsay hearing. The trial court was also not asked to consider Carter's prior convictions for crimes of dishonesty in ruling on the State's motion.

consideration of whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement, the child's mutually exclusive stories are flat-out alarming.

d. The "Mikey does it" statement relayed by witness Thomas is outside the purview of the child hearsay statute altogether.

Unlike the hearsay relayed by the mother, or recorded in the video interview, the words Thomas claimed to have heard K.C.-J. utter simply do not describe molestation or attempted molestation, as required by statute. RCW 9A.44.120, RP 98. His statement does not describe any act of sexual contact, or "touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2)

Even assuming his subjective interpretation of what he says K.C.-J. did and said is correct[14], an individual who masturbates in front of a child potentially commits the non-contact offense of indecent exposure, a gross misdemeanor under RCW 9A.88.010(2)(b), but they do not commit any contact-based act of child molestation. This "Mikey does it," statement was not reliable, and it was not admissible under RCW 9A.44.120.

[14] No one asked K.C.-J. about what Thomas said, but at trial, she testified she never saw Severson's private. RP 182.

e. The trial court's error in admitting each of the three separate statements requires reversal.

A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is prejudicial where, within reasonable probabilities, the outcome would have differed but for it. Bourgeois, 133 Wn.2d at 403. Reversal is required for the wrongful introduction of any one of these statements.[15] Given that the admission of the out-of-court hearsay allowed K.J.-C.'s allegations to be reiterated throughout the trial, there is a reasonable probability the outcome of the trial would have been different if not for the error.

3. The trial court erred in allowing the state to profile the appellant as a typical child molester in violation of Severson's constitutional right to a fair trial.

a. Perpetrator profile testimony is patently improper.

"As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." State v. Braham, 67 Wn. App. 930, 936, 841 P.2d 785 (1992), amended (Jan. 4, 1993) (Reversible error for expert to testify about the recantation of allegations of abuse

[15] Part of the problem with the record below is that the three statements were lumped together. This was error. Each was "heard" under different circumstances, by different people. On review, the Ryan reliability analysis must be done separately for each.

made by children and how child molesters establish a relationship with the intended victim); State v. Maule, 35 Wn. App. 287, 667 P.2d 96 (1983) (Reversible error for expert to testify that "the majority" of child sexual abuse cases involve "'a male parent-figure."); State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) (Error for expert to testify that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know," even under the guise of explaining delayed reporting.)

Broadly speaking, such profile – or comparison – evidence is improper because it "invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child sexual abuse, it is more likely the defendant committed the crime." Maule at 293. The profile testimony is improper because it "carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act, and therefore did it in this case too." Braham, 67 Wn.App. at 939 n. 6.

b. Defense counsel objected to the lead detective likening Severson to other child molesters he interrogated in his law enforcement career.

The State called the detective who interviewed Severson to testify, but the State did not introduce Severson's statements – where he denied molesting either K.C.-J. or J.N.K. – for the jury to consider. Severson testified in his own defense. In rebuttal, the prosecution recalled the detective to talk about interviewing Severson, who had just told the jury

that he had not done anything wrong. The detective testified: "It's been my experience in doing these types of interviews, it's very difficult for someone to come right out in the beginning and admit to any alleged inappropriate sexual contact with a child." RP 664.

Defense counsel objected. RP 664. The prosecutor argued this testimony – about the detective's career of interviewing other suspects – was relevant because it "provides context for the statements, and it establishes the rapport between the defendant and Detective Eggleston." RP 665. The judge allowed it. RP 665.[16]

The prosecutor returned to the topic on re-direct, asking: "How uncommon is it for individuals who are being investigated for sexually abusing children to deny their crimes?" RP 684. The detective answered that denying their crimes is just what sex offenders do:

> I will tell you that in every case I've had except for one when I've asked about if there's been inappropriate sexual contact, only one person in all the hundreds and hundreds and hundreds of interviews that I've done has admitted to that contact in the very beginning.

RP 684.

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[16] The prosecutor had the detective say that at the beginning of the interview, Severson "denied any type of intentional contact" but "he did eventually admit to some accidental contact." RP 666. The detective said this did not happen until "two and a half to two hours and 45 minutes" into the interrogation. RP 667. The prosecutor did not play the recording of the interview and she did not use a transcript. RP 648. At one point, the detective said "[i]t's kind of hard for me to remember verbatim," what Severson said. RP 671. It was also hard for Severson to remember the interview, especially since defense counsel did not review it with him before trial. RP 632-33.

The court's error resulted in the jury hearing, from a twenty-year veteran of the police force, that Severson's denials meant that he was just like other child sexual abuse suspects: guilty, but unwilling to fess-up.[17]

c. The detective's testimony that all but one person he ever investigated for sexually abusing children denied their crimes improperly profiled Severson as just another child molester unwilling to own up to what he did.

This testimony created two errors. First, Severson was likened to all the other suspects of child sexual abuse the detective had ever investigated. Painting him like "hundreds and hundreds and hundreds" of others who harmed children, invited the jurors to conclude that he must be guilty because he is indistinguishable from those suspected sex offenders. Second, the statements elicited by the prosecutor, with judicial approval, denigrated Severson's right to be presumed innocent and right to testify.

d. This error requires reversal.

The improper introduction of this evidence, profiling Mr. Severson constitutes reversible error. Braham, Maule. To make matters worse, the trial court overruling the timely objection "lent an aura of legitimacy" to what was otherwise improper. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). This constitutional error requires reversal, because the State cannot establish beyond a reasonable doubt the error "did not

[17] The prosecutor went on to ask the detective: "How frequently do these cases, sexual abuse of young children, have eyewitnesses?" and the witness said "almost never." RP 685. The detective continued to talk about unrelated investigations and said that in "the majority of the cases" physical evidence and DNA is not present. RP 685.

contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

**Prosecutorial misconduct**

1. The prosecutor committed misconduct by soliciting witness opinions as to guilt.

    a. Misconduct by the prosecutor can violate a defendant's constitutional right to a fair trial.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Const. art. 1, §§ 3, 21, 22. "The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008); see id. at 589 ("The concept of the jury as the arbiter of disputed facts appears to predate recorded history."). Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. Montgomery. at 591. Witnesses "may not testify as to the guilt of defendants, either directly or by inference." State v. Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). Such testimony invades the exclusive province of the jury and violates the accused's constitutional right to a trial by jury. Id. at 533.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id. See also State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969); State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

b. Pretrial, the prosecutor promised: "I never elicit opinion testimony as to the credibility of a witness," but had one witness describe Severson as "creepy," and had another express the opinion the complainants had been "abused."

Pretrial, the trial court granted a motion to prohibit witnesses from opining that the complainants had been sexually abused. CP 16, RP 29. The ruling would be violated by implied or express assertions that K.C.-J. and J.N.K. were truthful, and by implied or express assertions that Severson was guilty. The prosecutor promised to follow the ruling. RP 29.

In trial, however, the prosecutor asked for and presented opinions of Severson's guilt. First, the prosecutor called witness "Bill" Campbell and asked him to share with the jury his opinions about Severson's interactions with the children. The prosecutor focused on Campbell's

thoughts and the witness said he was concerned, even "kind of creeped out about it." RP 290-93. Campell said, "in my opinion, it was inappropriate." RP 294.

The prosecutor kept asking witness to give his opinion. RP 296-99. In response, Campbell reiterated: "I thought that was inappropriate and kind of creepy." RP 299. The prosecutor concluded Campbell's direct examination by juxtaposing Campbell's decision to maintain a relationship with the mother and the children, with his decision to cut ties with Severson. RP 303.

The opinion of guilt was improper even though it was implied. Olmedo, 112 Wn. App. at 530. The prosecutor was more blatant in the questioning of witness "Mike" Thomas, but the general approach was the same. First, the prosecutor had the witness state that he had concerns about Severson's interactions with the complainants, and that those concerns were "over grooming." RP 460, infra. Next, she ended her direct examination by having Thomas say he thought the sisters were victims:

> Q: Even in your mention of the defendant's name, would that cause the girls to be upset?
> A: Well, they would make faces and didn't want to talk about him.
> Q: Okay. **Because it didn't make them happy to talk about being abused?**
> A: **That's the way it seemed, yes.**
> Q: I have nothing further.

RP 481 (Emphasis added.)

Finally, on redirect, the prosecutor had Thomas say he no longer had any respect for Severson, much as she had Campbell say he cut ties with him.[18] RP 484. This trilogy – *you thought he was grooming the girls, you agree the girls were abused, and you no longer have any respect for him* – was misconduct that violated the court's in-limine ruling.

c. The misconduct was flagrant, ill-intentioned, and the ensuing prejudice was not curable.

Defense counsel did not object to the opinion testimony prosecutor elicited from Campbell and Thomas. Where a defendant raises the issue of prosecutorial misconduct for the first time on appeal, "the defendant must also show 'that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.'" State v. Walker, __ Wn.2d ___, 341 P.3d 976, 985 (2015), quoting In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012).

This was purposeful and flagrant misconduct. Not only did the prosecutor violate a pretrial ruling, the prosecutor appears to have been developing this improper witness opinion testimony for use in closing

[18] At the end of cross-examination, defense counsel asked Mr. Thomas about his conversations with the mother: "[Y]ou couldn't believe this happened because you knew Mr. Severson right?" RP 484. The witness answered "Yes," and added: "And I respected him as a Marine." RP 484. Defense counsel had nothing else, but the prosecutor seized the opportunity to put on still more opinion testimony: "You still have that respect?" and Thomas answered "Not for him, no." RP 484.

argument, where she talked about it again and again. Infra, RP 709-712, 723-724, 749.[19]

d. The prosecutor also committed misconduct by flouting a pretrial motion against the use of witness Thomas' opinion that Severson was "grooming" the sisters.

Pretrial, defense counsel moved to preclude the State from eliciting witness opinion regarding "grooming." CP 16, RP 24. The prosecutor wanted to have Thomas say that he told the mother he thought Severson was "grooming" the girls in order to have the mother explain why she questioned her daughters. RP 24-25. The court ruled this was improper and prejudicial opinion testimony, and granted the defense motion. RP 27.[20]

Just before Thomas took the stand, the prosecutor told the trial judge there was no need to warn him not to say anything about "grooming," because Thomas did not remember using the term. RP 448. Indeed, the witness did not use the word until the prosecutor, on her own, asked: "[D]id you express any concern over grooming?" RP 458.

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[19] She argued: "Mike Thomas and Bill Campbell… came to the conclusion that something was off with the defendant. There was something that just wasn't quite right about Grandpa Mikey…" RP 709-710. "And [Thomas] told you about the defendant's possessiveness with the girls. Think about that. Why is he so possessive? This is not the harmless grandpa looking out for their grandchildren. This is a man who looks at these little girls as sexual beings, as things that he can use as his sexual toys. And that's why Mike Thomas' radar went off, and that's why Bill Campbell's radar went off." RP 711.

[20] The court ruled that a limiting instruction would be given, and barred witnesses from: "giving opinion as to the fact that they believed he was grooming these children [or] making conclusions just willy-nilly based on their observations because a lot of that's for the jury to make those conclusions or make those opinions." RP 27.

The misconduct was ill-intentioned. The prosecutor chose to use the term, deliberately put it before the jury, making it seem as if it came from the witness himself. This was a particularly inflammatory means of presenting the witness' opinion of Severson's guilt. Notably, the mother had already explained that she questioned her daughters after speaking with Thomas. RP 396. To the extent the prosecutor argued pretrial that the "grooming" information was needed to explain the mother's actions, that point had been made.

The misconduct was flagrant. Pretrial, the prosecutor said: "I don't intend to elicit opinion testimony from either Mr. Campbell or Mr. Thomas *do you believe he was grooming the girls*," but that is precisely what she did. RP 24, 458. The prosecutor made a promise, and the trial judge made a ruling. Then, the prosecutor broke both.

In motions, the trial judge noted just how prejudicial this particular expression of an opinion of guilt is:

> **grooming is the buzz word**… it is an inflammatory word and it could lead the jury to prejudice beyond what the actual meaning is in terms of weighing a verdict one way or the other. **It's like gang affiliation**…

RP 28.

In the prosecutor's closing argument, the "grooming" opinion took center stage:

> **Mike Thomas nailed it on the head when he said, *hey, I'm worried that he's grooming your children,*** because that is exactly

> what the defendant was doing from the minute he moved in. The minute he moved in, Shanna was on methadone. She was in her room. This is the perfect opportunity for a sexual predator.

RP 723. (Emphasis added.)

e. The prosecutor repeatedly committed additional flagrant and ill-intentioned misconduct in closing argument.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger, 295 U.S. at 88. References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009), citing to State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). While a prosecutor is permitted to argue reasonable inferences from the evidence, he may not misstate the evidence or argue facts not admitted at trial. Belgarde; RPC 3.4(e); Monday, 171 Wn.2d at 678; American Bar Association Criminal Law Section, Standards for Criminal Justice: Prosecution Function, Standard 3-5.8 (3rd ed. 1993).

Referring to uncharged crimes during closing argument is improper. State v. Boehning, 127 Wn. App. 511, 519–23, 111 P.3d 899 (2005). But the prosecutor did that too. She told the jury to convict because Severson was probably guilty of what he was charged, *and then some*:

> And remember, as [the child interviewer] told you, disclosing sexual abuse, it's not a moment in time. You don't disclose and it's over. It's a process. It's an ongoing process. **And you probably haven't even heard everything the defendant did because it is a**

> **process**, and it's a process that these two little girls are going to have to live with for the rest of their life.

RP 699. (Emphasis added.)

Much like what happened in Boehning, this was reversible, and incurable, misconduct. In that closing argument, the prosecutor also referenced uncharged criminal conduct, suggesting, as was done in Severson's trial, that the complainant was uncomfortable making a full disclosure in a courtroom setting. Boehning, 127 Wn. App. at 519. On appeal, this Court held: "Such argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds. This error alone compels reversal." Id. at 522.

As discussed above, Thomas and Campbell's opinions of guilt played a vital role in the prosecutor's closing argument. RP 709-12, 723-24, 749.

> But it's not just Bill Campbell, it's Mike Thomas, who is the defendant's friend. They talked every single day. They're both former military. Mike Thomas **was** the defendant's friend. **And even he began to think, you know what, there's something a little bit off.** And he told you he didn't want to believe it. He told you he didn't want to jump to the conclusion of his friend. But then the day came where he saw [K.C.-J.] basically making a masturbatory gesture, punching her vagina. And so Mike told her what are you doing, [K.C.-J.]? And what was her response? Mikey does it. Mikey does it. **And at that moment, Mr. Thomas knew, yeah, there's something definitely off.**

RP 711 (Emphasis added.)

The prosecutor used the witnesses' opinions of Severson to characterize him as a calculating predator:

> This is a man who looks at these little girls as sexual beings, as things that he can use as his sexual toys. And that's why Mike Thomas' radar went off, and that's why Bill Campbell's radar went off.

RP 711; See also 723.

The prosecutor asked the jurors to base their verdicts on the witnesses' opinions of guilt:

> When you look at each and every thing the defendant has done, **and you consider Mike's concerns and you consider Bill Campbell's concerns**, and you consider what these girls who loved the defendant have described enduring, **it all adds up to the same thing. The defendant is guilty of molesting those little girls.**

RP 724. (Emphasis added.)

The prosecutor favored this theme so much, that she returned to it in rebuttal:

> Where there's smoke, there's fire. Guess what? There is a lot of smoke from Mr. Severson. **There's smoke in the form of Bill Campbell and Mike Thomas, and they just knew something was off.**

RP 749. (Emphasis added.)

f. The misconduct – and certainly the cumulative weight thereof – was uncurable and had a substantial likelihood of affecting the jury's verdict.

Defense counsel did not object to any of the prosecutor's misconduct. This Court must therefore determine if the misconduct was so

flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Belgarde, 110 Wn.2d at 508.

A curative instruction is not a guarantee that the prejudice caused by prosecutorial misconduct is, in fact, cured. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). If misconduct is so flagrant that no instruction can cure it, a mistrial and a new trial is the only and the mandatory remedy. Id.; State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor had elicited defendant's other bad acts in cross-examination of defendant's character witnesses); State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury).

Moreover, the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. State v. Case, 49 Wn.2d 66, 76, 298 P.2d 500 (1956); State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

There is a substantial likelihood the jury verdict was affected by the prosecutor's many improper arguments, denying Severson a fair trial. Not only did the prosecutor's "process" comment reference uncharged

crimes, in the same breath the prosecutor told the jurors to think about the permanent impact of the alleged harm: "and it's a process that these two little girls are going to have to live with for the rest of their life." RP 699. This was reversible, incurable, error. Boehning at 522.

Despite claims that the charged crimes occurred in plain sight, for an extended period of time, there were no witnesses, aside from the complainants themselves. Despite a claim of digital-vaginal rape, there was no physical evidence. In a case without evidence substantiating what the children said, by focusing on Campbell and Thomas's opinions of guilt, of "grooming," the prosecutor manufactured the appearance of corroboration. By emphasizing, and re-emphasizing, that Campbell and Thomas believed Severson molested K.C.-J. and J.N.K., the prosecutor changed the shape of the courtroom discourse. The prosecutor moved the jurors away from a strict consideration of the facts and into the prohibited arena of personal opinions.

The prosecutor in State v. Jungers, 125 Wn. App. 895, 903-05, 106 P.3d 827 (2005), also drew attention to a police officer's opinion about the defendant's credibility in testimony, and then "raised the issue twice more during closing argument." Id. This Court reversed:

> We cannot say the jury probably would have reached the same conclusion—finding Jungers guilty of methamphetamine possession—without the prosecutor's improper comments. The **State's improper argument resurrected Officer Mettler's**

**stricken inadmissible opinion about Jungers' and Hodgkins' respective credibilities.**

Id., at 905. (emphasis added.)

The improper references permeated the argument. They were not isolated. Even if any single instance of prosecutorial misconduct present here, standing alone, did not deprive Severson of his right to a fair trial, the cumulative effect certainly did. Jones, 144 Wn. App. at 301. Viewed cumulatively, no instruction could have cured the resulting prejudice. Glasmann, 175 Wn.2d at 707. The misconduct affected the verdicts and deprived Severson of his right to a fair trial. The convictions should be reversed.

**Ineffective assistance of counsel**

1. Severson was deprived of his constitutional right to effective assistance of counsel.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two–prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80

L.Ed.2d 674 (1984)). U.S. Cons. Amend. VI. Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995).

To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show: (1) the absence of a legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made; and (3) the result of the trial would have differed if the evidence had not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

a. Defense counsel was deficient in conceding that K.C.-J. was competent.

Defense counsel said that he did not "have any specific objections" to the finding that K.C.-J. is competent. RP 123. But he also said "competency is always an issue, I believe, when you have a child testifying, especially one who is six years old." RP 129. Then, he said "So I didn't file a brief. I didn't make any formal motion that she is not competent." RP 129.[21] To the extent defense counsel's conduct was a concession, this constituted deficient performance. As explained above,

[21] Defense counsel's one page of motions, filed on the day of trial, does not respond to the State's motion regarding child hearsay and it does not address competency. CP 16. Defense counsel did not ask K.C.-J. any questions at the child hearsay hearing. RP 71.

K.C.-J. was not competent to testify and that is what defense counsel should have argued.

b. The concession that K.C.-J. was competent prejudiced Severson.

Under State v. Johnston, 143 Wn. App. 1, 18, 177 P.3d 1127 (2007), a claim of ineffective assistance of counsel for failure to request a competency hearing succeeds upon "an affirmative showing that the trial court would have likely found" the witness incompetent. Defense counsel could have successfully argued that K.C.-J. was not competent. supra. A favorable ruling would have prevented the State from calling her as a witness. Her uncorroborated hearsay would have been excluded too. RCW 9A.44.120(2)(b); RP 129-30. Severson could have relied on his Sixth Amendment right to confrontation to shield himself from any hearsay deemed corroborated.[22] The result at trial would have been different.

c. Defense counsel's failure to contest the proffered child hearsay constituted deficient performance.

At the child hearsay hearing, required under RCW 9A.44.120, defense counsel made no counter arguments to the State's recitation of why, in their view, the Ryan factors had been met. RP 122-123. As discussed above, none of K.C.-J.'s out-of-court statements should have

[22] The State could not introduce the forensic child interview, a testimonial statement, without running afoul of the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 39, 124 S. Ct. 1354, 1357, 158 L. Ed. 2d 177 (2004).

been admitted as child hearsay. This failure of counsel was deficient performance because there was no legitimate strategic or tactical reason for defense counsel to allow this hearsay to be introduced as evidence of Severson's alleged wrongdoing.[23]

d. Severson was prejudiced by defense counsel's failure to contest the admissibility of the child hearsay evidence.

The prejudice from the erroneous admission of the child hearsay is self-evident. But for counsel's deficient performance, Carter would not have been allowed to testify about what K.C.-J. supposedly said to her, Thomas' recitation of the "Mikey does it," statement would have been excluded, and so would the videotaped interview. While there is some overlap between the analysis of competency to testify, and child hearsay reliability, the two are different. This Court should reverse upon finding of in favor of the appellant on either issue.

e. Defense counsel rendered deficient performance by failing to object to the introduction of K.C.-J.'s statement that Severson committed a serious uncharged physical assault against the child.

Under ER 404(b), evidence of other bad acts and crimes is inadmissible to prove that a person has a propensity to commit a crime. ER 404(b) is a "categorical bar to admission of evidence for the purpose

[23] Defense counsel's on-the-record statements suggest confusion. He said, "I intend to object to the entirety of the forensic interview being admitted," and, "I don't object to the entire interview being heard by the jury." RP 128. No such promised objection, to any portion, let alone "the entirety," of the interview ever came.

of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). See e.g., State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986) (premise of "once a thief, always a thief," is not legally relevant under ER 404(b)).

The video interview includes K.C.-J.'s claim that Severson seriously harmed her when she was on her bicycle. Exhibit 1, 11:51-11:54. (K.C.-J. describing being "choked," pulled down to the ground, her brain hurting, and crying.) The prosecution did not charge any physical assault. Defense counsel did not identify this as prior bad act evidence, move to exclude, or otherwise limit the purpose of admissibility of this alleged wrongdoing.

ER 404(b) evidence may be admissible for a non-propensity purpose, but the trial court must (1) find that the act occurred, (2) identify the legitimate purpose of the evidence, (3) determine that the evidence is relevant, and (4) weigh the probative value against any unfair prejudicial effect. See Gresham, 173 Wn.2d at 420-21. There is nothing in the record, besides the child's accusation, to suggest that the event actually happened. An objection under ER 404(b) would have resulted in exclusion.

Even if the trial court had found, by a preponderance of the evidence that the act occurred, there would be no legitimate purpose for admitting it. And, even if admitted for some speculative purpose, the

assault evidence would have been subject to a limiting instruction warning the jurors not to consider the assault for propensity. Either way, Severson would have been better off. It was deficient performance for defense counsel to allow this harmful evidence to come in, without any limitation as to its use. "A defendant must be tried for the offenses charged, and evidence of unrelated conduct should not be admitted unless it goes to the material issues of motive, intent, absence of accident or mistake, common scheme or plan, or identity." State v. Sutherby, 165 Wn.2d 870, 887, 204 P.3d 916 (2009) (Reversing, on ineffective assistance of counsel grounds, for counsel's failure to move to sever charges for possession of child pornography from charges for child rape and molestation.)

f. The failure to defend against an uncharged physical assault prejudiced Severson.

The prejudicial effect of the child talking about an uncharged physical assault has to be assessed in light of what the child's mother said and what the prosecutor argued. Certainly the child did not testify in court about the assault, but the video recording was admitted for substantive purpose. Carter suspected K.C.-J. endured more harm from Severson than K.C.-J. said to her.[24] RP 406. In closing, the prosecutor argued that Severson subjected K.C.-J. to more harm than what he was charged with. RP 699. In sum, the failure to object, or ask for a limiting instruction,

[24] Defense counsel's failure to object to this speculation and improper opinion testimony was also ineffective assistance of counsel. Infra.

permitted the jurors to conclude that if Severson was capable and willing of choking a four-year-old, then he was also willing to molest her and her older sister.

g. Defense counsel rendered deficient performance in failing to keep impeachment evidence from being admitted for a substantive purpose.

Impeachment evidence goes to a witness's credibility and is not proof of the substantive facts encompassed in such evidence. Prior inconsistent statements may not be used as evidence that the facts contained in the statements are substantively true. State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). Where impeachment evidence is admitted, an instruction cautioning the jury to limit its consideration of the statement to its intended purpose is both proper and necessary. State v. Johnson, 40 Wn.App. 371, 377, 699 P.2d 221, 226 (1985) (internal citations omitted).

On direct examination, J.N.K. was asked: "Did you ever see anything happen with [K.C.-J.]," and she said "no." RP 215. When the child interviewer, testified, the prosecutor asked her about J.N.K.'s unsworn, out-of-court statements. RP 350. Defense did not object. The interviewer, Arnold, told the jury J.N.K. "disclosed witnessing some abuse with [K.C.-J.], as though [sic] it was different, to some degree, from what [K.C.-J.] disclosed." RP 350.

If defense counsel had objected, a limiting instruction would have been "proper and necessary." Johnson. There was no legitimate strategic or tactical reason to allow the prosecution to turn inadmissible hearsay into substantive evidence. This was deficient performance.

h. The failure to limit the child interviewer's testimony prejudiced Severson.

Because of the failure to object, J.N.K.'s out-of-court hearsay report that she observed Severson abuse her younger sister, was admitted for the jury's consideration, as substantive evidence. K.C.-J.'s young age compromised her reliability as a witness. But with the interviewer's testimony, the jury gained a reason to find K.C.-J. credible – *it must be true, her big sister saw it.* (J.N.K.'s sworn testimony was that she had not seen anything, but Arnold presented just the opposite.) Had it not been for defense counsel's failure, there would have been no corroboration to K.C.-J.'s claims of abuse. There is a reasonable probability that, except for this error, the result of the proceeding would have been different.

i. Defense counsel rendered deficient performance in failing to object to repeated instances of multiple witnesses opining on guilt and in eliciting such impermissible opinions himself.

As discussed above, witnesses "may not testify as to the guilt of defendants, either directly or by inference." Olmedo, 112 Wn. App. at 530. The pretrial motion to keep out improper opinion of credibility of the complainants was correctly granted. RP 29.

"An improper statement as to an opinion of guilt may be implied from a testimonial opinion that a child claiming sexual abuse is telling the truth." State v. Borsheim, 140 Wn. App. 357, 374, 165 P.3d 417 (2007), citing State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). "Whether an opinion of guilt is expressed directly or through inference, such opinion is equally improper and equally inadmissible because it invades the province of the jury." Jungers, 125 Wn. App. at 901. Because testimony concerning an opinion on guilt violates a constitutional right, it generally may be raised for the first time on appeal. State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994); But see State v. Kirkman, 159 Wn.2d 918, 938, 155 P.3d 125 (2007) (Unobjected-to opinion is manifest error only when witness makes "an explicit or almost explicit" statement on an ultimate issue of fact).

Four different witnesses expressed their opinions of guilt. Some were implied, others express. Some were elicited by the prosecutor and not objected to, and others, inexplicably, were elicited by defense counsel himself. As discussed earlier, defense counsel failed to object when the prosecutor had witnesses Campbell and Thomas give their opinions of Severson's guilt. RP 290-299, RP 481, 484. With Campbell, defense counsel had the witness restate for the jury his opinion of Severson. RP

300.[25] Defense counsel did not object when Carter said unidentified people did not like how Severson talked with her kids or when she speculated that the appellant had done more to K.C.-J. than she said. RP 396, 406. Defense counsel did not object when Carter said that Thomas thought Severson was "grooming" the girls and defense counsel did not object when the prosecutor had Thomas confirm that is what he thought. RP 460.[26]

Besides these three lay witnesses, the sole law enforcement officer to testify at trial also expressed his personal opinion that he believed K.C.-J. and J.N.K. and that Severson was responsible. Tragically, defense counsel asked for this: "You thought you had your guy; you wanted to get a confession out of Mr. Severson?" RP 681. Even the detective hesitated to give his opinion at first: "I'm trying to see how I can answer this for you… So I don't mean to go off the grid here, but the victims in this case pointed out that it was Mr. Severson that did this to them. So it wasn't me feeling as though I had my man. It was the victims stating that Mr. Severson had done this." RP 682.

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[25] Q: "You think you got it right?" A: "I don't know if I got it right, but I got a feeling." Q: "In your own opinion?" A: "My own opinion. I think I'm right, yeah." RP 300.

[26] With respect to the "grooming" opinion of guilt, defense counsel was guaranteed to at least get a limiting instruction in front of the jury, but failed to ask for it. RP 26, 396, 460.

Defense counsel did not let this go. He had the detective confirm there were no other suspects in the detective's mind. "You weren't thinking that Mr. Campbell did this, were you?... Or Mr. Thomas, right?" RP 682. Then, defense counsel asked for the ultimate opinion of guilt:

> Q: You thought Mr. Severson, did this?
> A: In that sense, yes.

RP 682.

This was not a case where the defense blamed the adequacy of the police investigation, otherwise argued a "rush to judgment," or suggested someone else was responsible. Pretrial, defense counsel said, "Our position is nobody did it; they're making this up." RP 20-21. It should go without saying that a defense attorney who asks the lead detective to tell the jury his client is guilty rendered deficient performance.

In State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998), this Court had to correct a similar mistake. There, on direct examination, defense counsel elicited his client's prior felony drug conviction, an otherwise inadmissible prior. "[C]ounsel not only failed to object, he brought out the conviction himself. In doing so, counsel's performance fell below an objective standard of reasonableness." Id.[27]

[27] In State v. Jones, 144 Wn. App. 284, 295, 183 P.3d 307 (2008) this Court soundly recommended that when defense counsel steers a case toward constitutionally-improper opinion of guilt testimony, the "prosecutor's proper course of action [is] to object."

j. Severson was prejudiced by the improper opinion of guilt testimony.

As discussed earlier, the opinion of guilt testimony was extremely prejudicial and undoubtedly affected the jury's verdict. E.g. RP 28. (Trial court acknowledging "grooming" opinion as so inflammatory as to prejudice a jury's verdict, comparing it to gang membership allegation.) The State built its closing argument around the Thomas and Campbell opinions of guilt.

Expert testimony implying guilt is unduly prejudicial *and* inadmissible. Braham, 67 Wn. App. at 937. In Braham, the prosecution presented expert testimony regarding "grooming," and just as in Severson's case, "exhorted the jury to infer guilt" from it. Id. at 789. The expert in Braham discussed "techniques that child molesters use to establish a relationship with the victim" in general terms, not specifically saying that was what Braham had done, but the Court still reversed because "some of the components of grooming described" resembled what the defendant had done. Id. In part because the state's case was relatively weak, that error was held to have materially affected the outcome of Braham's trial. The same logic applies to this case.

The Braham court further explained that "grooming" evidence was prejudicial because it turned information about the "affectionate

relationship between defendant and the victim" on its head, giving it a "sinister cast that it would not otherwise have had." Id. at 940.

The prosecutor used the same approach here, casting the positive aspects of Severson's relationship with K.C.-J. and J.N.K. as evidence of perversion: "This is not the harmless grandpa looking out for their grandchildren. This is a man who looks at these little girls as sexual beings, as things that he can use as his sexual toys." RP 711; (Tying "[e]verything that this defendant has done with these little girls," to Thomas' opinion, to arrive at the label "sexual predator." RP 723.) ("He's training everybody to get used to them seeing these girls draped all over him, which, again, is part of his grooming." RP 743.)

k. Defense counsel was deficient in conceding Carter could not be impeached with her prior crimes of dishonesty and in failing to cross-examine her in accordance with ER 609(b).

Evidence of prior convictions may be admissible for the purpose of attacking the credibility of a witness, including a criminal defendant, under ER 609. State v. Bankston, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000). In pretrial motions, the prosecutor talked about Ms. Carter's criminal history and said "[s]he has a theft from Tac[oma] Muni[cipal]." RP 18. Defense counsel noted that Ms. Carter had another conviction, for "falsification of insurance… looks like a crime of dishonesty as well." RP 19.

But then defense counsel said: "I don't see any crimes that are admissible under 609." RP 19. This was error. Under ER 609, evidence that a witness previously committed a crime of dishonesty is categorically admissible for impeachment purposes. State v. Jones, 101 Wn.2d 113, 117, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). "[C]rimes of theft, per se, involve dishonesty." State v. Ray, 116 Wn.2d 531, 545-46, 806 P.2d 1220 (1991). State v. Farnsworth, 184 Wn. App. 305, 340 P.3d 890 (2014), amended on denial of reconsideration (Jan. 13, 2015).

Defense counsel's ignorance of the basic evidentiary concept that the mother could be impeached with her prior convictions for crimes of dishonesty, and the failure to carry out that impeachment, was deficient performance. Accord State v. Horton, 116 Wn. App. 909, 920, 68 P.3d 1145 (2003) (Reversing rape of a child convictions, on ineffective assistance grounds, where defense counsel's failure to comply with ER 613(b) kept counsel from impeaching the complainant.)

1. Severson was prejudiced by defense counsel's failure to impeach Carter.

Shanna Carter's credibility was critical to the State's case against Severson. The jury had to first believe Carter in order to believe what she claimed K.C.-J. said. Carter also gave her own first-person observations of Severson, and he of her. The two argued on the same day that Carter

contacted the police, but Carter said she did not recall why. RP 407, 420. She had access to Severson's money, but bills had gone unpaid. Defense counsel made an effort to challenge what Carter said against Severson and argued that her methadone use made her an absent parent and an unreliable witness. Defense counsel argued the children were influenced, or suggested, to accuse Severson. These arguments would have been stronger, had defense counsel understood ER 609 and impeached Carter with her priors of dishonesty.

m. Defense counsel rendered deficient performance in failing to object to prosecutorial misconduct.

As explained above, the prosecutor engaged in repeated misconduct during closing argument, but defense counsel failed to object. The instant case is indistinguishable from State v. Horton, 116 Wn. App. at 921, where this Court held defense counsel performed deficiently by not objecting to [] flagrantly improper argument," and reversed Horton's rape of a child and child molestation convictions.

n. Severson was prejudiced by defense counsel's failure to object to prosecutorial misconduct.

As discussed above, prosecutor's arguments appealed to the passions and prejudices of the jury. The arguments relied on improper opinion of guilt. One argument suggested that Severson had committed uncharged crimes. Had defense counsel objected, the court would have reined the prosecutor in.

o. Taken together, the repeated failures prejudiced Severson and require a reversal.

To the extent that a violation of the Sixth Amendment right to effective assistance of counsel requires proof of prejudice under Strickland, the record shows Severson was in fact prejudiced by each of defense counsel's deficiencies described above. In addition, when a case involves more than one deficiency in counsel's conduct, "prejudice may result from the cumulative impact of multiple deficiencies," obviating the need to examine the individual prejudicial impact of each deficiency. Harris v. Wood, 64 F.3d 1432, 1438–39 (9th Cir.1995).

This record strongly supports the conclusion that the aggregate effect of multiple deficiencies in defense counsel's performance prejudiced Severson. Defense counsel is supposed to be a zealous advocate, contesting and challenging the prosecution's case. Severson's lawyer, on the other hand, literally introduced witness opinion of his client's guilt. He let the prosecution turn impeachment that should have detracted from J.N.K.'s credibility into evidence that K.C.-J.'s claims were corroborated. He sat idle while witnesses said that Severson's treatment of the children constituted "grooming," when a favorable ruling guaranteed that an objection to such testimony would have been sustained. He mistakenly agreed that Carter, the critical witness he wanted the jury to believe had suggested to the children what to say, could not be impeached

under ER 609. Rather than cross-examine K.C.-J. – and confront her with the inconsistencies in her videotaped interview, her pretrial hearing testimony – defense counsel asked no questions, and wrongly conceded competency and admissibility of unreliable child hearsay. Defense counsel made no attempt to stem serious and repeated prosecutorial misconduct.

The "plethora and gravity" of these deficiencies "rendered the proceeding fundamentally unfair." Harris, at 1438.

**Overall cumulative error**

1. Cumulative error deprived Mr. Severson of a fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together, the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3; e.g., Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668, 678 (1984); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

The errors analyzed above, do merit reversal standing alone, and also when viewed together. The trial court should not have overlooked the glaring competency problems with K.C.-J., and the lack of reliability of the proffered hearsay. The detective should not have been allowed to profile Severson as just another child molester in denial. The jurors should not have been put in the position of deciding the case on the basis of a host of improperly elicited personal opinions. The prosecutor should not have let her zeal to win override her responsibility of fairness. Defense counsel should have done more, starting with enforcing the most basic of evidentiary rules, as both a shield and a sword.

F. CONCLUSION

Severson did not get a fair trial. The convictions must be reversed.

DATED this 17th day of April, 2015.

Respectfully submitted,

*/s/ Mick Woynarowski*

_____

Mick Woynarowski – WSBA #32801
Washington Appellate Project
Attorney for Appellant

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>MICHAEL SEVERSON,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | NO. 46359-8-II |

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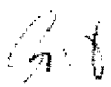

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# WASHINGTON APPELLATE PROJECT

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