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Supreme Court No. 99660-1
(CoA No. 79723-9-I)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Plaintiff,

v.

DAVID P. SCHLOSSER,

Petitioner/Defendant

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner, DAVID P. SCHLOSSER, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner SCHLOSSER requests this Court review the Court of Appeals' unpublished opinion entered February 8, 2021, pursuant to RAP 13.4, following the denial of his Motion for Reconsideration by Order entered March 11, 2021. A copy of the opinion is attached hereto as Appendix A. A copy of the order denying the Motion for Reconsideration is attached hereto as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. The constitutional rights of confrontation, compulsory process and to present a defense guarantee a defendant's right to discovery of potentially exculpatory evidence contained in counseling records held by a private party notwithstanding the statutory privilege. The trial court refused an *in camera* review of such records despite the defense's particularized showing that information useful to the defense was likely to be located in the records. The Court of Appeals opinion holding a defendant must establish more is, therefore, inconsistent with the decisions of this Court and presents important constitutional questions.

2. The constitutional rights to due process of law, confrontation, and to present a defense guarantee the right to cross-examine the complaining witness and present evidence which casts doubt on the credibility of the allegations. Evidence the complaining witness did not allege sexual abuse in the context of her ongoing counseling relationship, despite making other allegations of physical and psychological abuse by the defendant and of sexual abuse by a teacher, served to cast doubt of the reliability of evolving allegations presented years later at trial. The trial court forbade cross-examining the complaining witness, as well as her counselor, regarding the nature of their relationship and the substance of their communications regarding the defendant. The Court of Appeals' opinion, that the statutory privilege in the counseling records precluded cross-examining the State's prime witness or her counselor regarding her communications regarding the defendant and failure to disclose the alleged sexual contact to her counselor, is inconsistent with the decisions of this Court and presents an important constitutional question.

3. Washington Constitution art. IV, sec. 16 prohibits judges from commenting on evidence at trial. The trial judge here, however, made comments which implied his views regarding the relevance and materiality of the defendant's testimony. Contrary to the Court of Appeals' opinion, the petitioner was entitled to further relief for this constitutional violation. The opinion is, therefore, inconsistent with the

decisions of this Court and presents a significant question of law of state constitutional law.

4. The accused's right to the meaningful assistance of counsel is guaranteed by both the state and federal constitutions. Where the trial judge engaged in a course of repeatedly cutting off, interrupting and rebuking defense counsel before the jury, petitioner could not receive the effective assistance of counsel. The Court of Appeals' opinion, holding that the court's behavior toward trial counsel did not deny Petitioner his right to counsel, is inconsistent with the decisions of this Court and presents a significant question of constitutional law.

5. The cumulative effect of multiple errors may accumulate to a point that they deny the accused a fair trial. Here the several errors identified by appellant serve to aggravate the jury's fair and unbiased consideration of the evidence to the point that it denied appellant due process. Is the Court of Appeals' opinion that these errors do not violate due process inconsistent with the decisions of this Court and presents a significant question of constitutional law.

D. STATEMENT OF THE CASE

David Schlosser grew up in Massachusetts and joined the army after high school. Following his service, he moved to Seattle in 2000 where he worked as a program manager. RP 569-74. In 2005 he met Stephanie Abbott and her daughter, A.D. Mr. Schlosser and Ms. Abbott

married in 2007 and they had two children together, I.S. and L.S. RP 575-76. They separated in the spring of 2009 after an argument, but subsequently reconciled. RPA 229-32.[1]

In June 2013, Schlosser and Abbott separated again. After an extended and acrimonious custody dispute, the final parenting plan provided the parents would share custody of their two children and the divorce became final in February 2016. RP 572-77.[2]

From January 2014 through December 2015, A.D. engaged in regular counseling with Laurie Franco, LMHC. During this counseling A.D. made allegations of physical and emotional abuse by Schlosser, as well as sexual abuse by a schoolteacher. Franco made a mandatory referral to CPS, but the allegations were determined to be "unfounded."

In October 2016, A.D. alleged for the first time she had been sexually abused by Schlosser. A.D. did so only after her then-boyfriend, C.F., approached her about having sex. A.D. texted him that she did not want to have sex. When pressed, she told him it was because she had been sexually assaulted by her stepfather "more times than [she] could count." RPA 574-82. A.D. had never before mentioned anything about sexual abuse. For the first time, A.D. claimed her stepfather would beat her, make

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[1] Schlosser and Abbott argued and each of them was left with a cut lip. Abbott reported the incident to police but the charge against Schlosser was dismissed. RP 159-62, 248-51, 580-85.

[2] In the midst of this custody fight, and foreshadowing what would follow, Abbott told Schlosser "Don't f**k with me. I can have [A.D.] say things that will prevent you from seeing the kids ever again." RP 578, 671-72.

her work around the house, and forcibly rape her, sometimes multiple times on a single day. RPA 582-85, 588.

A.D.'s best friend since second grade was J.B. and A.D. had told J.B. that Schlosser was "mean" and made her do housework but had never said anything about sexual abuse. RPA 589-97, 609-11. After A.D. broke up with C.F., however, J.B. pressed her as to why. A.D. then asserted Schlosser had raped her "multiple times." RPA 589-606; Ex 1.[3]

When contacted by CPS and a detective at school, A.D. told them the sexual contact occurred "just one time." RP 324-25, 334. A.D. also told the forensic child interview specialist in October 2016 it happened "just once." RP 333-34, 338-39.[4] A.D. reiterated to her mother it was "only once." A.D. also told Ms. Crown "it only happened once." RP 86.

Sixteen months later, A.D. alleged Schlosser assaulted her on other occasions, including one when he came into her bedroom, beat her with a belt and then penetrated her vaginally. RP 715 (Count 2). A.D. then stated that the following day she had experienced the vaginal bleeding which she previously reported as the injury from falling on the stairs. RP 519-22.[5]

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[3] A.D. testified she never intended to talk to police when she told C.F. and J.B. she had been raped. She simply did not expect it to go that far. RP 515-18.

[4] A.D. described the incident as occurring in the master bedroom when she was eight or nine years old. RP 336; RP 748 (Count 3). At trial, A.D. testified Schlosser had invited her to watch television with him and then had removed their pants, got on top of her and put his penis in her vagina. RP 437-40. A.D. did not see a doctor or nurse after this incident. RP 494-95.

[5] In March 2013, A.D. reported she fell down the stairs after getting out of the bath and wrapping herself in a towel. Schlosser was not home at the time, but Ms. Abbott was and saw a tear or cut in A.D.'s vaginal area. RP 6-13, 182-83, 257-58, 612-14. The following day, Dr. Laurie Diem examined A.D., who described having fallen down the

At trial, A.D. testified that Schlosser had begun touching her inappropriately in combination with discipline, alleging he would rub her bottom and then spank her with a belt. RP 414-16. A.D. also then alleged Schlosser would put his hands down her pants once or twice a week, touching her vagina. RP 417-18. Finally, A.D. testified that on another occasion Schlosser walked into the bathroom when she was in the bathtub and put his finger in her vagina. RP 419-22; RP 717 (Count 1).[6]

Mr. Schlosser emphatically that he ever sexually assaulted A.D. RP 626-27. He never gave her a bath, never walked into the bathroom while she was bathing, and never touched her in the bath for any reason.

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stairs and landing a "splits" position. Dr. Diem observed a "very minor" laceration, as well as some bruising and swelling in A.D's vaginal area. Dr. Diem specifically asked if anyone touched her down there, hurt her, or did anything to her she did not want them to do; A.D. said no to each question. A thorough physical examination showed no other injuries or marks. RP 11-14, 25-27, 31-37.

Based on Dr. Diem's referral, Dr. Rebecca Wiester of the Harborview Sexual Assault Center also examined A.D. Dr. Wiester asked if anyone hurt her down there or did anything that was not okay and A.D. said no. RP 378-79. A full examination showed no indications of bruising or whipping. RP 374-77. Dr. Wiester examined A.D.'s vaginal area with a colposcope and based on her observations concluded A.D. suffered a "straddle injury," not sexual abuse. RP 365-66, 371-74, 385-88.

Following A.D.'s subsequent allegations, J.B. specifically asked about the incident when A.D. had fallen down the stairs. J.B. asked A.D. if she had actually been raped and A.D. told her no. RPA 614-16; Ex. 1. A.D. repeated that she had fallen down the stairs in 2013. RP 264-65.

In a meeting with Dr. Rebecca Wiester, following the 2016 allegation, A.D. indicated she was sexually assaulted, but only once. RP 380-84, 390. Dr. Weister did not change her opinion regarding the 2013 straddle injury. Id.

The jury was unable to reach a verdict on this charge and it was dismissed.

[6] A.D.'s allegations of abuse also included claims that Schlosser threw her down the stairs many times, whipped her with a towel, used his belt on her bare bottom, and locked her in the garage or in her bedroom "sometimes for like weeks at a time," only letting her out to go to school. RP 424-27, 429. A.D.'s credibility was challenged, however, by the CPS "unfounded" determination and the trial testimony of her mother. Ms. Abbott testified that she never saw any such behavior, or any evidence A.D. was struck with a belt. RP 266-68. Similarly, despite reporting that her bedroom door was open as she screamed hysterically, her mother was home, but heard nothing and never saw any evidence of beatings or rapes. RP 267-71, 523-35.

RP 610. Although he had spanked her once or twice, he never struck A.D. out of anger, never kicked her, never whipped her with a belt, never called her names, and never reached into her pants. He also never grabbed or touched her buttocks or vagina. RP 597-98.

The jury was unable to reach a verdict on Count 1 (bathtub) and Count 2 (A.D.'s bedroom) which were each dismissed with prejudice. The jury found Schlosser guilty, however, on Count 3, rape of child in the first degree. CP 226-28, 261-62; RP 783-92 (the master bedroom). The Court of Appeals affirmed the conviction but remanded for clarification of several sentencing conditions. Appendix A.

E. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW

1. Failure to conduct *in camera* review of counseling records violated the constitutional right to due process of law and the Court of Appeals' opinion to the contrary is inconsistent with the decisions of this Court.

a. The defense made a particularized showing information *useful* to the case was *likely* to be found in the records.

The defense sought to discover exculpatory evidence through a subpoena for records from A.D.'s counseling with Laura Franco, LMHC. CP 81-113. Counsel explained the relevance of the records in the context of the defense:

> that A.D. manufactured the allegations in this case in the fall of 2016, and that she did this for multiple reasons, including a deep-seated bias against Mr. Schlosser for

> being a strict disciplinarian and, in her mind, favoring her half-siblings I.S. and L.S. over her when they all lived together in the same household.

CP 84. Schlosser sought evidence in support of this defense in the "notes from counseling sessions" and "any other written reports" referencing Schlosser, describing any abuse by Schlosser, her conversations about sexual activity and allegations of inappropriate behavior or abuse by Schlosser, and other evidence indicative bias for purposes of impeachment. CP 85-86.

The "factual predicate which makes it reasonably likely" the counseling records included evidence for impeachment and bias was based in part on discovery which included CPS reports and A.D.'s claims of "abuse" by Schlosser made to Ms. Franco. CP 86, 99-113. The records of A.D.'s sessions with Ms. Franco were, therefore, highly likely to contain evidence of the existence and depth of A.D.'s bias against Schlosser. CP 87. Given the subsequent CPS "unfounded" determinations regarding these allegations of physical and emotional abuse, the substance and context of the information conveyed to Ms. Franco inevitably established it was highly likely further impeachment evidence would be found in the records. CP 87.

It appeared based on discovery that A.D. never mentioned allegations of sexual abuse by Schlosser prior to the fall of 2016, despite

two years in this therapeutic relationship. CP 89.[7] It was reasonable to conclude that since Ms. Franco was a mandatory reporter that no such allegations was made. Id. That fact and the ability to establish it were significant, but that was only one basis for relevance. Given the nature of the relationship and the allegations of physical and emotional abuse, the absence of allegations of sexual abuse by Schlosser and what is reasonably likely to be at least implicit denials of such abuse in the context of the other disclosures, the records requested were highly likely to have included still more critical impeachment evidence as well as evidence of bias that was necessary to the defense. CP 89-90. The failure to conduct *in camera* review under these circumstances was error. RPA 90-98; CP 122-23.

b. This Court has recognized a constitutionally based right to discovery of potentially exculpatory or impeachment evidence and *in camera* review was necessary to protect that right when it involves privileged records

A criminal defendant's right to present a full defense, including the right to access and present evidence in his own defense, is guaranteed by the Sixth Amendment, in conjunction with the Fifth and Fourteenth Amendments due process clauses.[8] This Court has expressly recognized

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[7] A.D. admitted not telling anyone about these alleged incidents until years later. RP 466-67. A.D. testified she did not tell anyone because she was "scared" even though she did not live with Schlosser after he and Abbott separated in 2013. RP 449, 461-64, 470. Petitioner was entitled to challenge these claims with the evidence available.

[8] See Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (defendant was denied the opportunity to present evidence of a third party's guilt); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297

the constitutional right to due process guarantees anyone accused of a crime "access to material information in the possession of the court or the prosecution, including material impeachment evidence." State v. Gregory, 158 Wn.2d 759, 797, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).[9] In Washington this right is implemented through the application of statues and court rules which provide that if material would be discoverable in the prosecutor's possession, "the court shall issue subpoenas or orders" to make the materials available to the defendant. CrR 4.7(d); State v. Knutson, 121 Wn.2d 766, 770-72, 854 P.2d 617 (1993); see also Appellant's Reply Brief 12-14.

Any potential statutory or common law privilege must then be balanced against the need to ensure the availability of relevant evidence in a criminal trial. United States v. Nixon, 418 U.S. 683, 711-12, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). Because the counseling records are "mental health records," resolution of this tension between the need for confidentiality and disclosure requires the trial court to balance the privacy

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(1973) (a state may not enforce its rules of evidence in a fashion that disallows a criminal defendant from presenting reliable exculpatory evidence); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (Compulsory Process Clause of the Sixth Amendment guarantees the right of defendant to force the attendance of witnesses).

[9] Pennsylvania v. Ritchie, 480 U.S. 39, 56-57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). Ritchie held due process prevails over statutory privilege, requiring *in camera* review to determine if the records contained material, exculpatory evidence, but did not resolve whether the Sixth Amendment rights to compulsory process and confrontation also requires *in camera* inspection. 480 U.S. at 56-57.

interest with the usefulness of the evidence. See CrR 4.7(e); State v. Kalakosky, 121 Wn.2d 525, 547-48, 852 P.2d 1064 (1993).[10]

Defense counsel's detailed record regarding the nature of the evidence of bias and impeachment likely to be found in the counseling records provided the particularized showing this Court has concluded require *in camera* review. CP 99-113.The failure to conduct an *in camera* review was, therefore, error and inconsistent with this Court's decisions.

c. Petitioner made a particularized showing of the potential relevance and materiality of the records sufficient to require *in camera* review because A.D's credibility and the reliability of her evidence was the central issue.

The prosecution against Schlosser came down to a credibility contest between A.D. and himself. See RP 700, 702-06, 709-15, 768. The defense argued no abuse occurred and A.D. initially made up the allegations to discourage her ex-boyfriend's sexual advances, thinking it would go no further. Evidence consistent with that theory was likely to be found in the counseling records. A.D. minimized her claims when questioned, but after two years with Ms. Franco, appears to have found power in the allegations. Evidence of the evolution of her allegations, first of physical and emotional abuse, and then only sometime later evolving to

[10] Because this privilege is created by statute and is not a privilege found in the common law, it is considered to be in derogation of the common law, and the statute must be strictly construed. See Petersen v. State, 100 Wn.2d 421, 429, 671 P.2d 230 (1983) (psychologist-client privilege is created by statute in derogation of the common law and must be strictly construed); Carson v. Fine, 123 Wn.2d 206, 212-13, 867 P.2d 610 (1994) (physician-patient privilege created by statute is strictly construed).

the allegations of ongoing sexual abuse, was all relevant to the defense and likely to be found in the records.

Schlosser's particularized showing in the trial court included the specific and documented assertions that A.D.'s counseling records were also likely to contain outright denials of sexual abuse by Schlosser as well as evidence to support the claim of A.D.'s bias against him. CP 84-88. The significance of these records was in establishing not just that A.D. never asserted she had been raped or molested by Schlosser, but to the extent A.D. asserted she did not report these assaults because she feared Schlosser and did not feel safe, that assertion would have been directly contradicted by evidence that she reported others assaults by Schlosser and troubling sexual contact by a teacher. RP 699-700. Documenting the absence of any allegations of sexual abuse in the therapeutic setting, and likely denials that any sexual contact occurred was, therefore, only one of several theories of relevance.[11]

Particularly in the context of an ongoing relationship in which A.D. felt safe enough to make other accusations of physical and emotional abuse, the record plainly established both the likelihood such evidence

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[11] The State's obligation to disclose evidence that bears on the credibility of a witness includes evidence of poor mental and emotional health. United States v. Pryce, 291 U.S.App.D.C. 84, 938 F.2d 1343, 1345-46 (D.C. Cir. 1991). Disclosure is required if a witness's mental health history raises questions about bias or the reliability of the testimony. Fuentes v. Griffin, 829 F.3d 233, 248 (2d Cir. 2016); Browning v. Trammell, 717 F.3d 1092, 1105-06 (10th Cir. 2013). Evidence that impeaches the witness's ability to recollect or perceive events is also relevant. Benn v. Lambert, 283 F.3d 1040, 1056 (9th

would have been found and also would have been highly useful to the defense. This is exactly what this Court has stated is required

> to justify an in camera inspection, [i.e.] a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records.

Kalakosky, 121 Wn.2d at 550.

Where A.D.'s counseling with Ms. Franco covered nearly two years after Schlosser purportedly molested and raped her, at a time she was readily able to report physical abuse by Mr. Schlosser and sexual contact by a teacher, then this evidence sought goes to directly rebut A.D.'s claims that she did not report sexual contact with Schlosser because she was scared. Evidence of those other disclosures in the context of the ongoing therapeutic relationship was strong evidence indicating the sexual abuse had not occurred as A.D. alleged.

Furthermore, such evidence also indicates A.D. was not being honest when she asserted, she did not disclose because she was scared. Impeachment evidence includes instances of dishonesty and the witness lying both from the witness stand as well as in the community and is highly relevant. Gregory, 158 Wn.2d at 798; Benn v. Lambert, 283 F.3d 1040, 1054-58 (9th Cir. 2002).

The significance of the records surrounding A.D.'s work with Ms. Franco is both in what she did not tell her, i.e., that she was raped and

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Cir. 2002). The evidence need not have been independently admissible to have been

molested by her stepfather, as well as the context of the relationship in which she was provided a safe place in which to make these and other disclosures. It directly rebuts the State's theory about why A.D. did not allege the sexual abuse for years and only after an admittedly acrimonious divorce. The Court of Appeals opinion is at odds with this Court's holding that if it is plausible the records contain exculpatory evidence, the court must conduct an *in camera* review. Kalakosky, 121 Wn.2d at 550.[12]

d. Schlosser's rights were violated by the failure to grant relief, contrary to the decisions of this Court.

This Court has stated clearly that "[e]vidence is material, for purposes of this due process rule, if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" or if the information "probably would have changed the outcome of [the] trial." Gregory, 158 Wn.2d at 797.[13]

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material. Carriger v. Stewart, 132 F.3d 463, 481 (9th Cir. 1997).

[12] See also State v. Blackwell, 801 S.E.2d 713, 725-29 (S.C. 2017) (denying defendant an *in camera* inspection of psychotherapy records impairs confrontation right); Commonwealth v. Barroso, 122 S.W.3d 554, 563 (Ky. 2003) (Sixth Amendment compels pretrial production of exculpatory psychiatric records); In re Doe, 964 F.2d 1325, 1329 (2d Cir. 1992) (preclusion of any inquiry into a witness's psychiatric history during *in camera* review would violate the Confrontation Clause); United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983) (privacy interest of a patient and the societal interest in encouraging the free flow of information between patient and psycho-therapist must yield to the paramount right of the defense to effectively cross-examine adverse witnesses in a criminal case).

[13] When the motion is brought pretrial, there is no trial outcome against which to weigh the power and effect of such evidence. United States v. Bundy, 968 F.3d 1019, 1043-44 (9th Cir. 2020).

The significance of the defense evidence sought here was both in the absence disclosure, but also in the context in which that occurred given the significant issues that were discussed. While the Court of Appeals concluded that "the record is clear that A.D. did not disclose the rapes to anyone until October 2016 when A.D. told C.F. and J.B.," the evidence sought by *in camera* review was more broadly relevant. Gregory, 158 Wn.2d at 794-95; Ritchie, 480 U.S. at 44.[14]

The Court of Appeal opinion erroneously assumes all the allegations are accurate, then weighs value of the potentially exculpatory evidence against that assumption. In fact, the jury did not convict on two of the three allegations so any such confidence in the veracity of A.D.'s claims is unfounded. For that reason, the law requires considering issues in context of present a defense and effect of excluded evidence on defense theory.

The available impeachment evidence in this case was sufficient raise a doubt within the jury which was unable to reach a verdict on Counts 1 and 2. In these circumstances, the failure to conduct the *in camera* review takes on even greater importance and the potential

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[14] Many other jurisdictions already require *in camera* review when the defendant shows the records "plausibly" contain exculpatory evidence. See Dietrich v. Smith, 701 F.3d 1192, 1196 (7th Cir. 2012); Burns v. State, 968 A.2d 1012, 1025 (Del. 2009); State v. Hummel, 483 N.W.2d 68, 72 (Minn. 1992); State v. Trammell, 435 N.W. 2d 197, 201 (Neb. 1989); State v. Rehkop, 908 A.2d 488, 498 (Vt. 2006). Fuentes v. Griffin, 829 F.3d 233, 241 (2d Cir. 2016), United States v. Sasso, 59 F.3d 341, 351 (2d Cir. 1995); Browning v. Trammell, 717 F.3d 1092, 1095 (10th Cir. 2013) (where there is an

evidence cannot be considered cumulative. See Benn v. Lambert, 283 F.3d 1040, 1055 (9th Cir. 2002).[15] It is reasonably possible that even one piece of withheld evidence could be the tipping point for one juror to find the complaining witness still less credible and thereby vote to acquit.

2. Denial of the request to present evidence through examination of State witnesses violated Petitioner's right to confrontation, compulsory process, to present a defense and to due process, and is contrary to the decisions of this Court

a. The defense sought to cross examine A.D. and Franco regarding the circumstances surrounding her failure to disclose and further evidence of bias.

The defense sought to examine both A.D. and Ms. Franco at trial about the nature and extent of the disclosures regarding Mr. Schlosser during counseling. The evidence was relevant to establishing bias and impeaching A.D. concerning her explanation for not making the allegations for years after Schlosser and Abbott separated. The record established that A.D. told Franco that Schlosser physically and emotionally abused her and that a teacher sexually abused her. Franco reported the allegations to CPS. RPA 207-09, 293-99; CP 385-96, 475-78.

Since Franco did not report allegations that Schlosser raped A.D. presumably, they were not made. Mr. Schlosser sought to prove that was

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evidentiary privilege, the trial court should review the records *in camera* to determine whether disclosure is required).

[15] That there was some impeachment evidence of bias already does not lessen the value of other impeachment evidence emanating from a different source. Banks v. Dretke, 540 U.S. 668, 702-03, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004); United States v. Kohring, 637 F.3d 895, 904 (9th Cir. 2011); Horton v. Mayle, 408 F.3d 570, 579 (9th Cir. 2005).

not because A.D. was scared as she testified, but because it did not happen. The trial judge, however, expanded upon the earlier discovery ruling by prohibiting any evidence or questioning regarding counseling by Ms. Franco. The judge further prohibited questioning A.D. about whether she told Ms. Franco of the alleged abuse. RPA 206-11, 293-300, 392. The judge then categorically barred any evidence regarding A.D.'s counseling with Ms. Franco. RPA 296; CP 215-16, 224.

b. This Court has vigorously enforced the right to confront witness and present a defense in its decisions.

The right to confront and cross-examine adverse witnesses and to present relevant evidence is guaranteed by both the federal and state constitutions. U.S. Const., amends 6, 14; Const., art. I, secs. 3, 22; State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1139 (2002). Ultimately, the right of an accused person in a criminal trial to due process of law is, in essence, the right to a fair opportunity to defend against the State's accusations. Chambers, 410 U.S. at 294; Washington v. Texas, 388 U.S. at 23.

Defense counsel repeatedly cited the 6th and 14th Amendments guarantee of the right to present a defense in the written motions in limine. CP 451-68, 479. Counsel also advanced the 6th Amendment right to cross-examine and present substantive evidence. RPA (4/4/18) 90-98; RPA 295, 297; CP 83-84-84; 479. See also, Const., art. I, sec. 22.

"[T]he right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination." Ritchie, 480 U.S. at 52. It is constitutional error where the defendant was denied the right "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 374 (1974). That has certainly occurred here.

c. Denial of the request to examine A.D. and Franco to solicit impeachment evidence violated the right to confrontation, compulsory process, and to present a defense.

Defense counsel sought to question A.D. as to whether she found this therapeutic relationship safe enough to allege extensive physical and emotional abuse by Schlosser, as well as sexual abuse by another authority figure, a teacher. Did she then tell Ms. Franco about the sexual abuse by Schlosser? Finally, in the context of that therapeutic relationship, did A.D. in fact deny any sexual abuse at home when and if she was asked.

The long-term therapeutic relationship with Ms. Franco provided a unique circumstance and context in which A.D.'s failure to report sexual abuse was a fact from which the jury could appropriately draw inferences regarding her credibility and the plausibility that of the State's theory that she was too afraid to report. This was a central issue in the trial and Mr. Schlosser was constitutionally entitled to inquire.

This Court has noted, "[w]here the defendant's Sixth Amendment right is limited, the State must show a compelling interest in limiting that right." State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); Jones, 168 Wn.2d at 720. In Mr. Schlosser's case, however, the State has made no showing that the evidence would disrupt the fairness of the trial. The prosecutor simply cited the pretrial ruling prohibiting discovery of documents and the trial court declined to revisit that ruling. This was constitutional error, as it denied appellant his right to represent a defense and to compulsory process. Id. The Court of Appeals' opinion is inconsistent with the decisions of this Court and warrants further review.

3. The trial judge's improper comments on the evidence violated that State constitutional prohibition.

The Washington Constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, sec. 16.

> The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted.

State v. Crotts, 22 Wash. 245, 250, 60 P. 403 (1900).

The trial judge's derisive comments in this case cast a long and dark shadow over the jury's consideration of the evidence against Mr. Schlosser. See AOB at 18-23. The exchange with counsel when he requested a break in Schlosser's testimony to allow him to recompose

himself was particularly egregious because it implied the judge had a particular view of the evidence and that defense efforts to recast it during the break were anticipated. See RP 600-05.

This Court also long recognized that an improper comment on the evidence may implied from the conduct of the judge. State v. Vaughn, 167 Wash. 420, 426, 9 P.2d 355 (1932). Moreover, the judge's intentions are not relevant because inadvertent comments may also contravene this constitutional limitation. State v Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968); State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). The trial judge's comments here infringed on these critical constitutional limits.

Where the case turns on the jury's determination of the credibility of the defendant and the complaining witness, the impact of the judge's comments implicitly conveying his opinion regarding merits of the witnesses' testimony is particularly difficult to reverse because "the damage was done when the remark was made, and it was not capable of being cured by the subsequent instruction to disregard." Lampshire, 74 Wn.2d at 892. The judge's admonition to defense counsel when he requested a break for Schlosser to compose himself, the same break granted five times without comment for the state's witnesses, conveyed the clear and unmistakable impression that counsel would use the break to improperly coach the defendant regarding his answers. This conveyed the court's view that the jury should not believe Schlosser's testimony and

prejudice is presumed. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). The jury's failure to reach a verdict on two of the three charges illustrates that this was not a case in which there was a great deal of untainted evidence and the conviction on the remaining charge demonstrates Schlosser was actually and substantially prejudiced.

4. The trial judge's derisive comments regarding defense counsel throughout trial deprived Schlosser of his right to effective assistance of counsel

The trial judge repeatedly derided defense counsel's representation throughout the proceedings, particularly before the jury. The jury heard the trial judge repeatedly demeaned defense counsel, interrupted his questions, cut him off even without an objection, and sustained objections without a basis being stated, and then criticize counsel for asking for a basis. The specifics are detailed in Petitioner's Opening Brief which is incorporated here by reference. AOB at 18-23, citing, *inter alia*, RPA 568-69; RP 17, 36, 232-35, 241-42, 245, 447-48, 580-88, 599-605, 692-95.[16]

The right to counsel is constitutionally guaranteed. U.S. Const. amend 6, 14; Const., art., I, sec. 22; United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The aid of counsel is guaranteed by the Constitution to every person accused of crime, and this is

[16] The events surrounding the request for a break during Schlosser's testimony was particularly egregious because the trial court granted multiple recesses when the State's witnesses requested them. RP 207, 268-69 (Abbott); RP 435, 492, 526 (A.D.). The defense moved for a new trial based on the court's comments when counsel requested a break during Mr. Schlosser's testimony, on the grounds that the court commented on the evidence. CP 272-313. The court denied the motion. CP 314-16.

universally recognized as one of the surest safeguards against injustice and oppression." State v. Phillips, 59 Wash. 252, 109 Pac. 1057 (1910).

> Persons accused of crime have the right to be represented by counsel whose usefulness shall not be impaired by any unfavorable remark or critical attitude on the part of the trial judge in the presence of the jurors....

State v. Moneymaker, 100 Wash. 463, 464, 171 P. 253 (1918).[17] As this Court has made clear, "When a trial judge discredits counsel for the defense in a criminal case he, to a certain extent, discredits the defense, and thus deprives a defendant of a constitutional right." Moneymaker, 100 Wash. at 464; State v. Collins, 66 Wn.2d 71, 400 P.2d 793 (1965).

The trial judge's conduct compromised the jury's ability to objectively evaluate the credibility of the witnesses and thereby the sufficiency of the evidence, contrary to the decisions of this Court and the constitutional right to the effective assistance of counsel.

5. Cumulative Error deprived Schlosser of a fair trial.

Reversal of a criminal conviction is required where the cumulative effect of multiple errors accrue such a degree of prejudice and uncertainty regarding the fairness and propriety of the result that a new trial is required. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).[18]

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[17] See also State v. Whalon, 1 Wn.App. 785, 796-800, 464 P.2d 730 (1970) (reversed where trial court rebuked defense counsel in front of the jury, accusing counsel of improperly seeking the jury's sympathy).

[18] The Court of Appeals opinion is also inconsistent with other opinions of the Court of Appeals. RAP 13.4. See State v. Venegas, 155 Wn.App. 507, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010) (multiple errors turned on witness credibility); State v. Perrett, 86 Wn.App. 312, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997)

Cumulative error is particularly likely to have compromised the fairness of the proceedings where the factual issues turn on the credibility of a key witness.

F. CONCLUSION

Mr. Schlosser requests this Court grant review of the unpublished opinion of the Court of Appeals and hold that his conviction be reversed, and the case remanded to the superior court for further proceedings.

Respectfully submitted this 12th day of April 2021.

David L. Donnan (WSBA 19271)
Attorney for Petitioner SCHLOSSER

(multiple errors required reversal); State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992) (vouching, hearsay and prosecutor's improper questions and closing argument required reversal); State v. Whalon, 1 Wn.App. at 804 (improper admission, exclusion and rebuking defense counsel required reversal).

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APPENDIX A

FILED
2/8/2021
Court of Appeals
Division I
State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. DAVID PHILLIP SCHLOSSER, Appellant.	No. 79723-9-I UNPUBLISHED OPINION

BOWMAN, J. — David Phillip Schlosser appeals his jury conviction for rape of a child in the first degree. Schlosser argues the trial court erred when it refused in camera review and inspection of counseling records, violated his right to confrontation, improperly commented on the evidence, deprived him of his right to effective assistance of counsel, violated his right to a fair trial by committing cumulative error, and imposed invalid and unconstitutional conditions of community custody. We affirm the conviction but remand to clarify a community custody condition.

FACTS

Stephanie is the mother of A.D., born in October 2003.[1] Schlosser and Stephanie began dating when A.D. was about a year old and married in 2007.

[1] We use the initials of the minors named in this opinion and refer to the adult relatives of the victim by first name only to protect the privacy of the minors and the victim, and mean no disrespect by doing so.

Citations and pin cites are based on the Westlaw online version of the cited material.

They had two children together, I.S. and L.S. The family dynamic was tumultuous, marked by instances of physical abuse, domestic violence, and multiple contacts with Child Protective Services (CPS). Stephanie said that Schlosser was the "primary disciplinarian" for the children and "very harsh" on A.D., including "hitting and kicking her." When Stephanie tried to intervene, Schlosser told her she "didn't know what good parenting was."

A.D. said that for as long as she could remember, Schlosser "didn't really like me, and wasn't very nice to me." At first, he "just" yelled at her, called her names like "moron," or "ma[d]e fun of how" she looked. If she cried, he locked her in the garage with the lights off. After the age of five, the "discipline increase[d]" and became "more violent," including shoving her, pinning her against the wall, sitting on top of her, slapping her in the face, and punching her all over her body. Schlosser also used a belt or wet towel to hit A.D. "a few times a week." A.D. said that "[i]t felt like everything I did kind of like he would get mad at me about just the smallest things."

According to A.D., at some point in 2009 when she was about six years old, Schlosser began "weird[ly]" rubbing her buttocks with his hands, and then things "kind of like escalated." She recalled an instance when Schlosser "got mad" at her, "pinned [her] against the wall," then "reached down [her] pants" and "touched [her] vagina." A.D. said that "a touch like that" started "just occasionally," then it escalated to "once or twice a week." A.D. never told Stephanie about Schlosser inappropriately touching her because she was

"scared" of what would happen if she did, especially getting "wors[e] punishment or more punishment."

A.D. also described a 2011 incident after the family moved from an apartment to a three-level house in Issaquah. Schlosser walked into the bathroom while she was bathing and digitally penetrated her vagina. Schlosser had not touched her like that before. A.D. said Schlosser "told me not to tell my mom."

One night in March 2013, A.D. walked upstairs from her first-floor bedroom as she had done many times before. She was crying and wanted to sleep on the third floor of the house with "everybody else." A.D. described Schlosser "screaming at me to shut up, and go back to my room." When she did not immediately leave, Schlosser grabbed A.D.'s arm "hard," walked her down to her room, and "told [her] to pull off [her] pants." A.D. was on the ground on her hands and knees. A.D. said Schlosser "started whipping me with the belt like he would do." And then he raped her for about 10 minutes. When A.D. used the bathroom later that night, "it hurt" and she noticed she was bleeding from her vaginal area. Because A.D. "was scared," she did not tell Stephanie.

The next day, A.D. took a bath and "started bleeding again." A.D. wanted her mother to look at the injury and "make sure that [she] was okay," so A.D. told Stephanie that "I had fallen down the stairs, and that I hurt myself." A.D. stated that she could not tell Stephanie "what actually happened" because Schlosser "would get in trouble," and she was "worried about . . . everybody in my

house . . . being safe." Stephanie then took A.D. to see pediatrician Dr. Laurie Diem. A.D. also told Dr. Diem that she fell down the stairs.

Dr. Diem observed a laceration and bruising in A.D.'s vaginal area, noticed no other injuries on A.D.'s body, and believed falling down the stairs conflicted with A.D.'s injuries. She then reviewed A.D.'s "whole medical history" and "saw several previous emergency room visits for fractures" and "broken bones." The number of A.D.'s injuries "was another red flag" in Dr. Diem's opinion. Because of suspicions of sexual abuse, Dr. Diem reported the injuries to CPS.

Days later, A.D. underwent another examination with pediatrician and child abuse specialist Dr. Rebecca Wiester. Dr. Wiester concluded that the vaginal laceration injury she observed reflected a "straddle injury." Dr. Wiester believed that A.D.'s injuries "can be accidental," including "an awkward fall," with "no other visible signs of injury." A.D. did not tell either doctor that Schlosser sexually assaulted her.

Within a month of the rape in A.D.'s bedroom, Schlosser told A.D. to join him in the master bedroom so they could watch television together, which he had done before. The two were home alone. After A.D. lay on the bed, Schlosser raped her. Schlosser told her that "this is what dads and daughters do."

In the two months that followed, life was "[a]wful" for Stephanie. Schlosser "was berating [her] everyday" and "treat[ing] [A.D.] horribly" because "[n]othing was ever good enough." Schlosser and Stephanie separated in June 2013 and she moved out of the house. They completed their divorce in February 2016. At

first, they shared custody of the three children. But soon, A.D. "wanted nothing to do with that" and stopped seeing Schlosser entirely.

In October 2016, A.D.'s boyfriend C.F. approached her about having sexual intercourse. A.D. text messaged C.F. that she did not want to have sex with him because Schlosser had raped her "more times than [she] could count." That same month, A.D. had a text message conversation with her best friend J.B. about why she broke up with C.F. She eventually told J.B. that she "was raped" but did not tell J.B. who did it. J.B. guessed "it was Dave," and A.D. admitted Schlosser had raped her "multiple times."

J.B. was "very upset" and told her mother Deb. Deb then called A.D.'s grandmother Jillian and told her about the rapes. Jillian told her counselor about Deb's call, who then made a mandatory report to CPS. The next day, Jillian told A.D. that she knew Schlosser had sexually abused her,[2] and A.D. started to cry. A.D. admitted that Schlosser sexually assaulted her and later told Stephanie too.

The police and CPS interviewed A.D. and several family members and friends. At first, A.D. disclosed only the 2013 rape in the master bedroom. Eventually, she disclosed that before raping her, Schlosser had repeatedly grabbed her buttocks and vagina for years. Dr. Wiester also met with A.D. again after her 2016 disclosure. During the second interview, A.D. told Dr. Wiester that Schlosser raped her one time.

In November 2016, the State charged Schlosser with rape of a child in the first degree (count 1) and child molestation in the first degree (count 2) for

[2] Jillian told A.D. only that "I know" and did not discuss any details of the sexual abuse at that time.

sexually assaulting A.D. from 2011 to 2013 when she was between the ages of 8 and 10 years old. Schlosser pleaded not guilty. After more interviews, A.D. disclosed the 2009 incident in the bathtub and the 2013 rape in her bedroom. The State added another count of rape of a child in the first degree (count 3) and amended the charging period on all counts from 2009 to 2013 when A.D. was between 6 and 10 years old.

During pretrial discovery, Schlosser issued a notice of intent to subpoena A.D.'s mental health counseling records from licensed mental health counselor Laura Franco.[3] Schlosser specifically sought "[a]ny and all records related to A.D." and "any other written reports which contain any of the following":

a. Any reference to the defendant David Schlosser, [REDACTED], as well as any reference to [REDACTED];
b. Any reference to statements made by A.D. describing any alleged acts of abuse of A.D. by David Schlosser; and
c. Any reference to any other statements made by A.D. about David Schlosser; and
d. Any reference to any times A.D. has been dishonest or has lied to anybody; and
e. Any reference to I.S. or L.S.; and
f. Any reference to any conversations A.D. had with anybody else about abuse; and
g. Any reference to any conversations A.D. had with anybody about sex and boundary issues; and
h. Any reference to any allegations of inappropriate behaviors or abuses committed against A.D. by anyone other than David Schlosser.[4]

A.D. moved for a protective order, arguing that Schlosser lacked a "sufficient 'factual predicate' " for the records and that "[t]he notices contain

[3] Schlosser also issued a similar notice for all of A.D.'s educational records, which the trial court allowed and is not at issue on appeal.

[4] Alterations in original.

categorical, generalized descriptions of records which could apply to any case and are essentially dragnets trolling for any mention of enumerated key words."

Schlosser responded, saying he "believes" the counseling records "will likely have references" to reported CPS incidents, will "possibly" reference "additional incidents in which A.D. believes" he "abused or neglected" her, and will "contain evidence of A.D.'s bias against" him. Schlosser also believed that A.D. "never mentioned the allegations of sexual abuse at issue in this case prior to the fall of 2016 to anybody, including Ms. Franco, to whom she reported other alleged abuses." Schlosser acknowledged, "Obviously, defense counsel cannot prove that these records contain evidence of A.D.'s bias against [him]," which is why he asked to "review them or, at the very least, for the Court to review them in camera."

After considering the pleadings and oral argument, the trial court issued an order granting A.D.'s motion for a protective order as to her counseling records, denying Schlosser's motion for in camera review, and quashing the subpoena for those records. During consideration of the parties' motions in limine, the court expanded its ruling to prohibit any questioning of A.D. about whether she told Franco of the sexual assaults.

The case proceeded to jury trial in November 2018. Several witnesses testified, including A.D., Stephanie, Jillian, C.F., J.B., Dr. Diem, Dr. Wiester, a child interview specialist, three Issaquah Police Department detectives, and Schlosser. Schlosser testified he never had sexual intercourse with A.D., never walked into the bathroom while she was bathing, never invited her to watch

television in his bed, never called her names, never struck her out of anger, and never grabbed her buttocks or vagina.

In closing, defense counsel emphasized Schlosser's theory that A.D. was not credible, that her claims "are unreasonable," and that A.D.'s testimony "can't possibly amount to proof beyond a reasonable doubt." Counsel highlighted inconsistent statements A.D. gave to several friends, relatives, law enforcement, and medical professionals about the number of times Schlosser raped her. Counsel then argued, "[T]he most important thing you need to remember about [A.D.] is that she had no hesitation lying to all these different people about what had happened."

The jury found Schlosser guilty of rape of a child in the first degree as charged in count 3 but could not reach a verdict on the remaining charges. The trial court declared the jury deadlocked as to the charges in counts 1 and 2, ordered a mistrial on those two charges, and granted the State's motion to dismiss those counts. Schlosser then moved for a new trial, claiming the trial judge made an improper comment on the evidence when the judge "admonished defense counsel" in front of the jury and "instructed him not to discuss Mr. Schlosser's testimony during a court recess." The court denied Schlosser's motion.

At sentencing, the trial court imposed an indeterminate sentence within the standard range, lifetime community custody, a lifetime no-contact order with A.D. and "[a]ny minors without supervision," and several crime-related conditions of community custody. Schlosser appeals.

ANALYSIS

Schlosser seeks reversal of his conviction, arguing the trial court (1) erred when it refused in camera review of A.D.'s counseling records, (2) violated his right to confrontation when it forbade cross-examining A.D. about not telling her counselor that Schlosser raped her, (3) improperly commented on the evidence, (4) deprived him of effective assistance of counsel, (5) violated his right to a fair trial because of cumulative error, and (6) imposed invalid and unconstitutional conditions of community custody.[5]

In Camera Review of Counseling Records

Schlosser argues the trial court abused its discretion and violated due process and the rules of discovery by denying in camera review of A.D.'s counseling records. The State argues the trial court properly denied review because Schlosser's request did not include a "particularized showing that the records were likely to contain material facts useful to his defense." We agree with the State.

Due process assures a criminal defendant "a right of access to evidence that is 'both favorable to the accused and material to guilt or punishment.' " State v. Knutson, 121 Wn.2d 766, 772, 854 P.2d 617 (1993) (quoting Pennsylvania v.

[5] In his opening brief, Schlosser also asserts the trial court denied him his right to a fair and impartial jury by permitting a biased juror to be seated (assignment of error 1), erred by denying his motion for new trial (assignment of error 6), and violated his right to appeal because it failed to preserve a record of jury selection adequate for appellate review (assignment of error 7). Schlosser later conceded that the juror he alleged to be biased "was not seated on this jury." The record reflects defense counsel removed this juror from the jury panel with a peremptory challenge. The record and Schlosser's concession resolve the issues related to assignments of error 1 and 7. We also do not reach assignment of error 6 because Schlosser fails to support it with argument or authority. See RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). But mental health counseling records are privileged under RCW 5.60.060(9),[6] requiring the court to balance the privacy interest in those records with the usefulness of the evidence. See CrR 4.7(e); State v. Kalakosky, 121 Wn.2d 525, 547-48, 852 P.2d 1064 (1993) (instructing that the Victims of Sexual Assault Act, chapter 70.125 RCW, "clearly requires that the defendant make some statement showing need for the counseling notes before the victim's right to privacy is overcome").

"[T]o obtain in camera review of privileged records a defendant must establish that the records are at least material." State v. Diemel, 81 Wn. App. 464, 468, 914 P.2d 779 (1996); see Ritchie, 480 U.S. at 57; Kalakosky, 121 Wn.2d at 550. This involves a " 'plausible showing' " that the evidence is both material and favorable. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006)[7] (quoting Ritchie, 480 U.S. at 58 n.15), overruled in part on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Evidence is material only if there is a "reasonable probability" that it will impact the outcome of a trial. Gregory, 158 Wn.2d at 791. "A reasonable probability is probability sufficient to undermine confidence in the outcome." Gregory, 158 Wn.2d at 791. A defendant must show more than a mere possibility of materiality. Knutson, 121 Wn.2d at 773. "A claim that privileged

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[6] In pertinent part, RCW 5.60.060(9) states:

> A mental health counselor . . . may not disclose, or be compelled to testify about, any information acquired from persons consulting the [counselor] in a professional capacity when the information was necessary to enable the [counselor] to render professional services to those persons.

This provision identifies several exceptions, but none of them includes subpoenas in criminal matters. See RCW 5.60.060(9)(a)-(e).

[7] Internal quotation marks omitted.

files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." Diemel, 81 Wn. App. at 469.

We review a trial court's decision whether to conduct in camera review of evidence for abuse of discretion. Diemel, 81 Wn. App. at 467. A court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Vars, 157 Wn. App. 482, 494, 237 P.3d 378 (2010). This standard of review allows the trial court to act within a range of acceptable choices. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). We will not find an abuse of discretion just because we may have decided the issue differently. L.M. v. Hamilton, 193 Wn.2d 113, 134, 436 P.3d 803 (2019). Here, the trial court's decision to deny in camera review of A.D.'s counseling records was within a range of acceptable choices.

Schlosser claims that the "significance of A.D.'s work with Laura Franco is what [A.D.] did not tell her: that she was repeatedly raped and molested by her stepfather."[8] But the record is clear that A.D. did not disclose the rapes to anyone until October 2016 when A.D. told C.F. and J.B. She then told Jillian, Stephanie, and Dr. Wiester. A.D. admitted that at first, she disclosed only the 2013 rape in the master bedroom to authorities. A.D. testified that she did not disclose the incident in the bathtub until a May 2017 interview with police. She

[8] Quoting Gregory, 158 Wn.2d at 795, Schlosser also argues that in camera review " 'might have led to witnesses that could confirm or refute' A.D.'s claim that [Schlosser] raped her in 2013" or that A.D. "did not feel safe enough to tell anyone until after her mother's divorce was final." But Schlosser offers no plausible explanation why he expects the records would yield such information.

also admitted that she did not disclose the rape in her bedroom until an interview in February 2018. So counseling records from sessions in 2014 and 2015 showing that A.D. did not disclose Schlosser repeatedly raped and molested her would have been of little value to his defense. Schlosser had ample evidence to argue his theory of the case and to impeach A.D. based on the timing and details of her disclosures. The trial court did not abuse its discretion in denying Schlosser's request for in camera review of A.D.'s counseling records.[9]

Right to Confrontation

Schlosser claims the trial court violated his constitutional right to confrontation by not allowing him to cross-examine A.D. about whether she told Franco that Schlosser sexually abused her. We disagree.

We review a trial court's decision to admit or exclude evidence and its limitation on the scope of cross-examination for manifest abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Both the federal and state constitutions guarantee the right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; Darden, 145 Wn.2d at 620. But the right to cross-examination is not absolute. Darden, 145 Wn.2d at 620. "The confrontation right and associated cross-examination are limited by general considerations of relevance." Darden, 145 Wn.2d at 621. A trial court may reject lines of questions "that only remotely tend to show bias or

[9] Schlosser also argues that the State should have disclosed A.D.'s counseling records under CrR 4.7(a)(3) or CrR 4.7(d). Because he did not raise this argument in his pleadings for in camera review or at oral argument below, we decline to address it under RAP 2.5(a). See also CrR 4.7(e)(2) (trial court's discretion to deny disclosure).

prejudice." State v. Kilgore, 107 Wn. App. 160, 185, 26 P.3d 308 (2001). The more important the witness is for the prosecution's case, the more latitude the defense should have to explore issues of motive, bias, and credibility. Darden, 145 Wn.2d at 619.

Here, Schlosser sought to ask A.D., "[Y]ou did not tell anyone — you did not tell your counselor, Laura Franco, about this incident, did you." The trial court ruled that Schlosser could not ask A.D. the question "based upon [the prior judge]'s ruling, which did not allow the disclosure of any of the conversations" between A.D. and Franco.

Schlosser argues that the court should have permitted him to question A.D. about his suspicion that she failed to disclose the abuse to her counselor because "[u]nlike individual doctors she saw years earlier, [A.D.] had a long-term relationship with this counselor" and was more likely to have disclosed to Franco if Schlosser sexually assaulted her. But as already discussed, A.D. admitted that she did not disclose the rapes to anyone until 2016, which was well after the 2014 to 2015 period of counseling. A.D. testified that before 2016, she did not disclose the sexual assaults to her mother, other family members, doctors, friends, or anyone else because she was "scared" Schlosser would hurt her worse than he had already, and she was "worried" about the effect it would have on "everybody in my house" because Schlosser "would get in trouble." Even after A.D. disclosed the rapes to J.B. in October 2016, the evidence and testimony established that she insisted J.B. "keep that a secret."

Eliciting testimony that A.D. did not tell Franco about the sexual abuse would have added little probative value when considered in the context that she did not disclose the abuse to anyone. We cannot say that the trial court made its decision to exclude Schlosser's question on untenable grounds or for untenable reasons.

Schlosser also contends that the trial court's decision violated his constitutional right to present a defense. Again, we disagree.

"In some instances regarding evidence of high probative value, 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and [Wash.] Const. art. I § 22.' " State v. Arndt, 194 Wn.2d 784, 812, 453 P.3d 696 (2019) (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). Determining whether the exclusion of evidence qualifies as a violation of the Sixth Amendment right to present a defense is a legal question that we review de novo. Arndt, 194 Wn.2d at 797-98.

Here, the trial court prevented Schlosser from cross examining A.D. on a discrete topic. Its ruling did not deprive Schlosser of his right to present a defense. The state's interest in protecting A.D.'s privileged counseling information is compelling. Under the circumstances of this case, Schlosser's need to ask the question he desired does not outweigh the state's interest. As discussed above, the testimony would have added little probative value given all of the other testimony. The jury did not need to hear A.D. admit once more that she failed to disclose the sexual assaults prior to October 2016.

Judicial Comment on the Evidence

Schlosser contends that the trial court improperly commented on the evidence when it "[a]ccused" his lawyer "of [i]ntending to [c]oach" his testimony in front of the jury. We disagree.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. A court comments on the evidence "if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). "It is sufficient if a judge's personal feelings about a case are merely implied." State v. Sivins, 138 Wn. App. 52, 58, 155 P.3d 982 (2007).

We apply a two-step analysis to determine if reversal is required due to a judicial comment on the evidence. State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). First, we examine the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence. Sivins, 138 Wn. App. at 58. If we conclude the court made an improper comment on the evidence, we presume the comment is prejudicial, "and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Levy, 156 Wn.2d at 723.

Schlosser argues the trial court commented on the evidence when defense counsel requested a break during Schlosser's testimony:

> Q. David, you saw your daughter [I.S.] when she testified here in court?

A. Yes.
Q. Prior to her coming into the courtroom last week, when was the last time you saw her?
A. I haven't seen her in two years.
Q. As far as you know has [I.S.] been living with Stephanie those last two years?
A. Yes.
Q. You heard Stephanie's testimony?
A. Yes.
Q. Did you hear Stephanie testify that she had — you hear Stephanie admit that she had been saying disparaging things about you to the children?

[PROSECUTOR]: Objection.
THE COURT: Sustained.

EXAMINATION BY [DEFENSE COUNSEL]:

Q. Did you hear Stephanie testify?
A. I heard her. And she said she —

[PROSECUTOR]: Objection.
THE COURT: Sustained.

EXAMINATION BY [DEFENSE COUNSEL]:

Q. You need a break right now, David?
A. Yeah, that would be better.

[DEFENSE COUNSEL]: Can we have a break?
THE COURT: This isn't a deposition. Does he need a break?
[DEFENSE COUNSEL]: I asked him that, yes, your Honor. May we have a break?
THE COURT: You may not discuss your testimony during the break.
[DEFENSE COUNSEL]: I don't intend to, your Honor.
THE COURT: Okay. All right. Please leave your notebooks in the chairs.

The jurors then left the courtroom. Before taking a recess, Schlosser's attorney complained that the court was not treating him fairly:

> [DEFENSE COUNSEL]: I find it very difficult to put on my case with the Court making the kinds of comments that the Court has made in front of the jury. You have constantly, from the beginning of this trial, made comments to the jury criticizing me, making suggestions on what I should do. And this last comment where you suggested in front of the jury that I might be wanting to

confer with my client, and go over his testimony because he wanted a break because he broke down when he talked about his children left all of these jurors with the impression that I am trying to do something inappropriate and I greatly resent that. It's very difficult for me to go forward in that context.

THE COURT: That's the only specific you have given [defense counsel], and it is my impression that you transparently asked for a break like somebody would in a deposition when they want to talk to their client. Mr. Schlosser got upset, but then he recovered. And I saw no reason why you were asking for the break, and it looked like you were stumped as to what question to ask next because I sustained an objection, and that is why I did that. I have never done that before, [defense counsel], in 20 years.

[DEFENSE COUNSEL]: You didn't have to do it in front of the jury, your Honor.

THE COURT: All right. Well, [defense counsel], if you need a break, it would be better to do a side bar, and ask for a break [for your client], if you need that. But that is what happened. Other than that, the only interruptions I have been doing, [defense counsel], is I need to protect the court reporter, and I think for both counsel there have been times when I have stopped both of you in order to make sure that the witnesses were fairly reported. I have stopped [the prosecutor], and I have stopped you during different times. I know you took umbrage this morning when I said wait for Mr. Schlosser to answer the questions because I saw you angry, but it's my job to make sure that the record is protected. So that is why I did that this morning.

[DEFENSE COUNSEL]: I understand that. I don't have a complaint about that at all.

THE COURT: Well, that's what I'm hearing you complain about that.

[DEFENSE COUNSEL]: Well, yeah, because of the way you do it in front of the jury. You criticize me. You make it clear to the jury that you are upset with me. Now, I don't know how to respond to an objection that has no basis. When someone says objection without giving a basis, I cannot respond. Objection. Sustained. That's not an appropriate objection, your Honor. An objection needs to have a basis stated because otherwise I have no way to respond. I asked for a side bar because I wanted to make that point so that I could understand the basis of the objection, and when I did that you said — you explained the basis you need to have personal knowledge to me, and instructing me on the law in front of the jury. So, yes. I — think —

THE COURT: And I would do that with any lawyer, [defense counsel], to explain the basis of my ruling. Now, you asked him to comment on the veracity of Stephanie . . . and I

> sustained the objection. And then you asked him about whether or not she had made a particular statement. So, you know, I think that's pretty obvious. I think the objection is pretty obvious.
>
> [DEFENSE COUNSEL]: It wasn't obvious.
>
> THE COURT: It's common place in many trials for lawyers to make an objection without giving a basis. If I understand what the objection is, I rule instantly. And it's very common.
>
> [DEFENSE COUNSEL]: It's not appropriate. It's not appropriate.
>
> THE COURT: Well, I disagree with you, [defense counsel].
>
> [DEFENSE COUNSEL]: Well, it's your courtroom.

When the parties returned from the recess, the court told defense counsel it would "tell the jury to disregard any comment that I make, that they should only be paying attention to the witness's testimony, considering the credibility of the witnesses." Schlosser's attorney then moved for a mistrial, stating, "I believe that I have been irreparably damaged." He told the court:

> [DEFENSE COUNSEL]: . . . I have been irreparably damaged, and I don't believe that that can be recovered from without a more explicit instruction to the jury.
>
> THE COURT: What instruction would you like me to give?
>
> [DEFENSE COUNSEL]: I think the Court should instruct the jury that you should not have made the suggestion that I had an improper motive and — and to disregard that comment. I think because that's clearly the impression that they have.
>
> [PROSECUTOR]: No objection.
>
> THE COURT: Okay. I will so instruct the jury.
>
> [DEFENSE COUNSEL]: Thank you, your Honor.

The jury returned to the courtroom and the court gave the curative instruction requested by Schlosser's attorney:

> THE COURT: Please come in and be seated. You may all be seated. Members of the jury, let me just repeat my earlier instructions to disregard anything that I say, what the lawyers say. The evidence is the testimony of witnesses, any documents, as you can see there are a number of documents piled up there, that you may receive in evidence to consider. And specifically I should not have made a comment about the motives of [defense counsel] as a

> lawyer. So please disregard that comment by me. We are now going to continue the testimony of Mr. Schlosser.
> [DEFENSE COUNSEL]: Thank you, your Honor.

The court's order to Schlosser not "to discuss your testimony" during the break did not amount to a judicial comment on the evidence. The statement did not reveal "the court's attitude toward the merits of the case" or reflect the court's personal opinion of any disputed issue before it. Lane, 125 Wn.2d at 838; see Sivins, 138 Wn. App. at 58. And even if the jury inferred that the court directed its statement toward the motives of Schlosser's attorney, the statement does not warrant reversal unless Schlosser can show that "prejudice resulted, or could reasonably be presumed to have resulted, from such error." State v. Levy, 8 Wn.2d 630, 644, 113 P.2d 306 (1941). Here, there is little likelihood that the court's order not to discuss testimony during a break in the course of a seven-day trial "put the judge's thumb on the credibility scales for the jury . . . against the defense" as claimed by Schlosser. And defense counsel's request for "a more explicit [curative] instruction to the jury," which the court granted, alleviated any potential prejudice caused by the statement. We presume the jury followed the court's instructions. State v. Kalebaugh, 183 Wn.2d 578, 586, 355 P.3d 253 (2015).

Right to Effective Assistance of Counsel

Schlosser claims we should reverse his conviction because the trial court repeatedly interrupted defense counsel, interjected itself, and sustained objections without a stated basis, depriving him of effective assistance of counsel.

"A trial court may exercise reasonable control over the orderly presentation of argument and evidence." Sanders v. State, 169 Wn.2d 827, 851, 240 P.3d 120 (2010). "When considering a procedure 'not regulated or covered by statute, formal rule or precedent,' we review in light of that 'wide discretion.' " Sanders, 169 Wn.2d at 851 (quoting State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969)). However, when a trial court disparages an attorney in front of the jury, it may deprive the defendant of his or her constitutional right to counsel:

> The aid of counsel is guaranteed by the Constitution to every person accused of [a] crime, and this is universally recognized as one of the surest safeguards against injustice and oppression. Any conduct or statement on the part of the court that tends to impair the influence or destroy the usefulness of counsel is palpable and manifest error.

State v. Phillips, 59 Wash. 252, 259, 109 P. 1047 (1910). Again, even when such conduct does occur, reversal is not warranted unless prejudice results. Levy, 8 Wn.2d at 644.

Here, Schlosser argues the trial court "denigrated" defense counsel, "repeatedly demean[ed] counsel, interrupt[ed] his questions, cut him off even without an objection, and sustain[ed] objections without a basis being stated — then criticize[d] counsel for asking for a basis." For instance, he points to the following exchange during defense counsel's opening statement:

> Two years went by from the time of that 2016 until you know, here we are today. And during that time [A.D.]'s story changed. [A.D.]'s story was enhanced. . . .
>
> And as the story changes, as the story evolves, in February of this year, of 2018, [A.D.] approaches . . . the prosecutor, and has a meeting with him and says oh, you know what? There's something else that happened. And then she describes the thing — the — the other thing that happened. She says you know that — that vaginal injury that I had when I fell down the stairs? That didn't

> really happen. She will tell you — she will come into this courtroom and she will tell you, I lied about it to Doctor —
>
> [PROSECUTOR]: Objection, argumentative.
>
> THE COURT: It is argumentative.
>
> [DEFENSE COUNSEL]: She —
>
> THE COURT: Counsel, you've got to —
>
> [DEFENSE COUNSEL]: It's the State's —
>
> THE COURT: — be careful.
>
> [DEFENSE COUNSEL]: It's the evidence, Your Honor. The State — this is what she's going to say. She says she lied.
>
> THE COURT: The objection is sustained. Please —
>
> [DEFENSE COUNSEL]: All right. I'll move on.
>
> THE COURT: — stay with the facts. Yes.

Schlosser points to the emphasized language as the court being critical of his attorney. We disagree. The record shows that the court was exercising reasonable control over the evidence by instructing counsel not to argue his case to the jury during opening remarks.[10]

Schlosser also complains that while he was testifying and his attorney was about to show him a recently marked exhibit, the court interrupted by instructing his attorney to "[s]how it to [opposing] counsel." His attorney told the court that he had done so. The court responded, "All right. Thank you." While the record does not reflect when Schlosser's attorney showed the prosecutor the exhibit or whether the court witnessed him do so, this exchange suggests the court did not see it occur. Schlosser again fails to show how the trial court's effort to exercise control over the orderly presentation of evidence impugned his attorney.

[10] See State v. Gallagher, 15 Wn. App. 267, 268, 549 P.2d 499 (1976) (purpose of opening statement is to inform jurors how they can follow and understand the evidence as it unfolds during trial, not to argue the merits of the case).

Finally, Schlosser claims the court disparaged his attorney during cross-examination of Stephanie when the court interrupted without an objection by the State:

> Q. Okay. Was 2013 the worst year of your life?
> A. I would say that the years I lived in [the three-level house in Issaquah] with [Schlosser] were the worst years of my life.
> Q. Okay. Well —
> A. Some of them.
> Q. The specific reason that 2013 was a bad year was because you had been — let me rephrase that. Isn't it true that —
>
> THE COURT: Didn't I just rule on this, counsel? Or is there something that — that I don't —
>
> [DEFENSE COUNSEL]: I'm sorry?
>
> THE COURT: Didn't I just rule on this, counsel? Or is there something else that I don't —
>
> [DEFENSE COUNSEL]: I think you did, but I'm just trying to make sure I'm consistent with your ruling, your Honor.
>
> THE COURT: You can't address the topic.
>
> [DEFENSE COUNSEL]: May we have a conference?
>
> THE COURT: We just discussed this. Unless it's something new you have. If there's something new, yes. But if there is not, I ruled you and [the prosecutor]. But I'm happy to hear more if there's more.
>
> [DEFENSE COUNSEL]: Well, I'm really at fault by this, your Honor. I just want to be clear that I'm consistent with the ruling. Just a side bar.
>
> THE COURT: All right.
>
> [DEFENSE COUNSEL]: Thank you.
>
> THE COURT: All right.

The parties then discussed the issue at sidebar.[11]

Schlosser's complaint again lacks merit. The court's comment did not disparage Schlosser's attorney. Instead, the court interrupted Schlosser's attorney to prevent Schlosser from violating a prior ruling.

[11] Five pages earlier in the transcript, Schlosser wanted to question Stephanie on cross-examination about her drug usage during 2013. The court disallowed the inquiry unless Schlosser could establish "some kind of a nexus."

While Schlosser's attorney clearly perceived some of the court's conduct to be too critical and denigrating, the record shows that the court properly managed the proceedings in a manner fair to both parties. For example, the trial court acted on defense counsel's general objections, interrupted both parties to prevent witnesses and counsel from talking over each other, instructed the prosecutor to "slow down" while examining witnesses, and granted both the prosecutor's and defense counsel's requests for breaks.

The trial court's comments did not deprive Schlosser of effective assistance of counsel because they were an exercise of the court's authority to control the orderly presentation of evidence and argument in the courtroom. And to the extent that the jury perceived the court's comments as directed toward Schlosser's attorney, Schlosser fails to show any prejudice. Schlosser's attorney vigorously defended him, attacked A.D.'s credibility, and his advocacy successfully defeated two of the State's three charges.

Cumulative Error

Schlosser contends cumulative error denied him a fair trial. The cumulative error doctrine applies "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because Schlosser has not identified multiple errors, there cannot be cumulative error.

Conditions of Community Custody

Schlosser contends that the trial court erred by imposing conditions of community custody that interfere with his fundamental right to parent, that are not crime-related, and that are unconstitutionally vague.[12] He challenges these conditions:

> **NO CONTACT**: For the maximum term of Life defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: A.D. [and]
> [X] Any minors without supervision of a responsible adult who has knowledge of this conviction.
>
> . . . .
>
> 15. [X] Have no direct or indirect contact with minors.
>
> . . . .
>
> 17. [X] Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by [the Department of Corrections] or the [community corrections officer].

As part of any sentence, a trial court may impose and enforce crime-related prohibitions. RCW 9.94A.505(9); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).[13] A "crime-related prohibition" is an order of the court prohibiting conduct that directly relates to "the circumstances of the crime" for which the offender has been convicted, and may include orders prohibiting

---

[12] The State argues Schlosser waived these challenges under RAP 2.5(a)(3) for failing to object to them at sentencing. As much as Schlosser argues that the conditions are not crime-related, we agree with the State. See State v. Casimiro, 8 Wn. App. 2d 245, 249, 438 P.3d 137 (2019) (whether a condition of sentence is crime-related is a question of fact that we will not review for the first time on appeal). We will however consider contentions that solely present questions of law. See State v. Bahl, 164 Wn.2d 739, 751-52, 193 P.3d 678 (2008).

[13] Warren cites former RCW 9.94A.505(8) (2003). The legislature renumbered the relevant subsection to (9) in 2015. LAWS OF 2015, ch. 287, § 10.

contact. RCW 9.94A.030(10); see Warren, 165 Wn.2d at 33-34. Generally, we review sentencing conditions for abuse of discretion. Warren, 165 Wn.2d at 32. "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." In re Pers. Restraint Petition of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010) (citing State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007)).

Careful review is required however when sentencing conditions may "interfere with a fundamental constitutional right." Warren, 165 Wn.2d at 32. "Conditions that interfere with fundamental rights must be reasonably necessary to accomplish the essential needs of the [s]tate and public order." Warren, 165 Wn.2d at 32. Such conditions "must be narrowly drawn" and "[t]here must be no reasonable alternative way to achieve the [s]tate's interest." Warren, 165 Wn.2d at 34-35.

A. No Contact with Minors

Schlosser argues that the trial court violated his "fundamental constitutional right to the care, custody, and companionship of [his] children" because the court ordered that he have no contact, "direct or indirect, with his own children" so long as they are minors.

Natural parents have a fundamental right in the "care, custody, and management" of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). A trial court may not impose a no-contact order between a parent and child without addressing on the record whether the order is reasonably necessary in scope and duration to prevent harm to the child.

Rainey, 168 Wn.2d at 381-82; State v. DeLeon, 11 Wn. App. 2d 837, 840-41, 456 P.3d 405 (2020).

Here, the trial court's judgment and sentence prohibits Schlosser from contact with "[a]ny minors without supervision of a responsible adult who has knowledge of this conviction." But "Appendix H" to the judgment and sentence precludes "direct or indirect contact with [all] minors." We remand for the trial court to clarify the condition of sentence.

B. Stay Out of Areas Where Children's Activities Occur

Schlosser also argues that conditions 15 and 17 are unconstitutionally vague "because they do not define [the words] 'minor,' 'children' or 'youth.' " We disagree.

The guarantee of due process requires that laws not be vague. U.S. CONST. amend. XIV, § 1; WASH. CONST. art I, § 3; City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A condition is unconstitutionally vague if it (1) does not sufficiently define the prohibition so that an ordinary person can understand it or (2) does not provide sufficiently ascertainable standards to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53. But impossible standards of specificity are not required. Douglass, 115 Wn.2d at 179. "If 'persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.' " Bahl, 164 Wn.2d at 754[14] (quoting Douglass, 115 Wn.2d at 179).

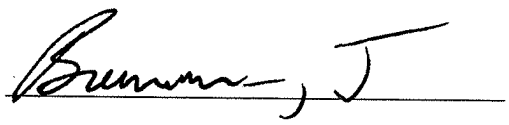
[14] Alterations in original.

The word "minor" is defined in chapter 9.68A RCW concerning the sexual exploitation of children. See RCW 9.68A.011(5) (defining "minor" as "any person under [18] years of age"). But relevant statutes do not define the words "children" or "youth." When a statute does not define a term, the court may consider its plain and ordinary meaning as in a standard dictionary. State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001). The dictionary defines "children" as the plural of "child," a "young person of either sex esp[ecially] between infancy and youth" and "a person who has not yet come of age." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 388 (2002). The statutes define coming of age in the state of Washington as 18 years old. See RCW 26.28.010 (defining the "age of majority" as 18 years old). The dictionary defines "youth" as "the time of life when one is young; esp[ecially] : a young [person] between the ages of adolescence and maturity." WEBSTER'S, at 2654.

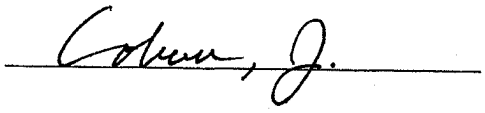
The words "minor" and "children" sufficiently define the scope of prohibited conduct as avoiding areas where the activities of persons under the age of 18 commonly occur. The word "youth," standing alone, does not sufficiently define the scope of the prohibited conduct. But, in deciding whether a term is unconstitutionally vague, we do not consider it in a vacuum; rather, we consider the term in the context in which it is used. Douglass, 115 Wn.2d at 180. Here, condition 17 uses the term "youth" in the context of a conviction for rape of a child. Additionally, the term is used along with the word "children's," which is a commonly understood and easily ascertainable term, and it immediately precedes a description of areas and activities that would commonly be linked to

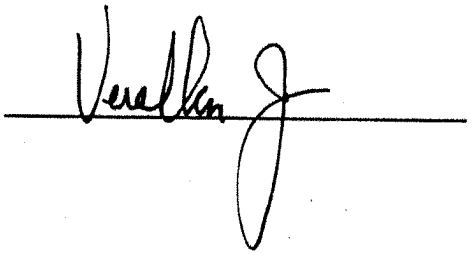
children or minors—"parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, [and] arcades." Considered in context of the entire prohibition, an ordinary person would understand that "youth" refers to minors or children, and the term provides a sufficiently ascertainable standard to protect against arbitrary enforcement.[15]

We affirm Schlosser's jury conviction of one count of rape of a child in the first degree but remand for clarification of one condition of community custody.



WE CONCUR:





[15] Citing Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, 1737, 198 L. Ed. 2d 273 (2017), Schlosser also claims that condition 17 violates his constitutional right to travel freely because it is not " 'narrowly tailored and directly related to the goals of protecting the public.' " We disagree. The cited quote from Packingham actually reads that the State may "enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor." Packingham, 137 S. Ct. at 1737. Condition 17 is narrowly tailored to serve the important public interest of prohibiting sex offenders from engaging in conduct that often precedes a sexual crime against children—contacting minors in areas where they commonly congregate.

APPENDIX B

FILED
3/11/2021
Court of Appeals
Division I
State of Washington

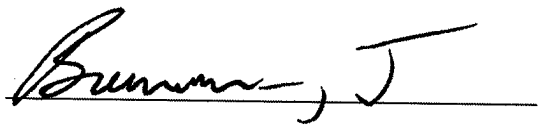
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. DAVID PHILLIP SCHLOSSER, Appellant.	No. 79723-9-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant David Phillip Schlosser filed a motion for reconsideration of the opinion filed on February 8, 2021. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



Judge

APPENDIX C

RCW 70.02.060 - Discovery request or compulsory process.

(1) Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days since the date of service or delivery to the patient and the health care provider of the foregoing. Thereafter the request for discovery or compulsory process shall be served on the health care provider.

(2) Without the written consent of the patient, the health care provider may not disclose the health care information sought under subsection (1) of this section if the requestor has not complied with the requirements of subsection (1) of this section. In the absence of a protective order issued by a court of competent jurisdiction forbidding compliance, the health care provider shall disclose the information in accordance with this chapter. In the case of compliance, the request for discovery or compulsory process shall be made a part of the patient record.

(3) Production of health care information under this section, in and of itself, does not constitute a waiver of any privilege, objection, or defense existing under other law or rule of evidence or procedure.

RULE CrR 4.7 - DISCOVERY

(a) Prosecutors Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) Defendant's Obligations.

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

(i) appear in a lineup;
(ii) speak for identification by a witness to an offense;
(iii) be fingerprinted;
(iv) pose for photographs not involving reenactment of the crime charged;
(v) try on articles of clothing;
(vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;
(vii) provide specimens of the defendant's handwriting;
(viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;
(ix) state whether there is any claim of incompetency to stand trial;
(x) allow inspection of physical or documentary evidence in defendant's possession;
(xi) state whether the defendant's prior convictions will be stipulated or need to be proved;
(xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;
(xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;
(xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) Additional Disclosures Upon Request and Specification. Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

(1) Specified searches and seizures;
(2) The acquisition of specified statements from the defendant; and
(3) The relationship, if any, of specified persons to the prosecuting authority.

(d) Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary Disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv).

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) Medical and Scientific Reports. Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) Regulation of Discovery.

(1) Investigations Not To Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) Continuing Duty To Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

(i) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

[Amended effective September 1, 1986; September 1, 2005; September 1, 2007.]

Comment Supersedes RCW 10.37.030, .033; RCW 10.46.030 in part.

RCW 5.60.060 - Who is disqualified—Privileged communications.

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to a criminal action or proceeding against a spouse or domestic partner if the marriage or the domestic partnership occurred subsequent to the filing of formal charges against the defendant, nor to a criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian, nor to a proceeding under chapter 71.05 or 71.09 RCW: PROVIDED, That the spouse or the domestic partner of a person sought to be detained under chapter 71.05 or 71.09 RCW may not be compelled to testify and shall be so informed by the court prior to being called as a witness.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

(3) A member of the clergy, a Christian Science practitioner listed in the Christian Science Journal, or a priest shall not, without the consent of a person making the confession or sacred confidence, be examined as to any confession or sacred confidence made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

(4) Subject to the limitations under RCW 71.05.217 (6) and (7), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

(5) A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure.

(6)(a) A peer support group counselor shall not, without consent of the peer support group client making the communication, be compelled to testify about any communication made to the counselor by the peer support group client while receiving counseling. The counselor must

be designated as such by the agency employing the peer support group client prior to the incident that results in counseling. The privilege only applies when the communication was made to the counselor while acting in his or her capacity as a peer support group counselor. The privilege does not apply if the counselor was an initial responding first responder, department of corrections staff person, or jail staff person; a witness; or a party to the incident which prompted the delivery of peer support group counseling services to the peer support group client.

(b) For purposes of this section:

(i) "First responder" means:

(A) A law enforcement officer;

(B) A limited authority law enforcement officer;

(C) A firefighter;

(D) An emergency services dispatcher or recordkeeper;

(E) Emergency medical personnel, as licensed or certified by this state; or

(F) A member or former member of the Washington national guard acting in an emergency response capacity pursuant to chapter **38.52** RCW.

(ii) "Law enforcement officer" means a general authority Washington peace officer as defined in RCW **10.93.020**.

(iii) "Limited authority law enforcement officer" means a limited authority Washington peace officer as defined in RCW **10.93.020** who is employed by the department of corrections, state parks and recreation commission, department of natural resources, liquor and cannabis board, or Washington state gambling commission.

(iv) "Peer support group client" means:

(A) A first responder;

(B) A department of corrections staff person; or

(C) A jail staff person.

(v) "Peer support group counselor" means:

(A) A first responder, department of corrections staff person, or jail staff person or a civilian employee of a first responder entity or agency, local jail, or state agency who has received training to provide emotional and moral support and counseling to a peer support group client who needs those services as a result of an incident in which the peer support group client was involved while acting in his or her official capacity; or

(B) A nonemployee counselor who has been designated by the first responder entity or agency, local jail, or state agency to provide emotional and moral support and counseling to a peer support group client who needs those services as a result of an incident in which the peer support group client was involved while acting in his or her official capacity.

(7) A sexual assault advocate may not, without the consent of the victim, be examined as to any communication made between the victim and the sexual assault advocate.

(a) For purposes of this section, "sexual assault advocate" means the employee or volunteer from a community sexual assault program or underserved populations provider, victim assistance unit, program, or association, that provides information, medical or legal advocacy, counseling, or support to victims of sexual assault, who is designated by the victim to accompany the victim to the hospital or other health care facility and to proceedings concerning the alleged assault, including police and prosecution interviews and court proceedings.

(b) A sexual assault advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. Any sexual assault advocate

participating in good faith in the disclosing of records and communications under this section shall have immunity from any liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this section, the good faith of the sexual assault advocate who disclosed the confidential communication shall be presumed.

(8) A domestic violence advocate may not, without the consent of the victim, be examined as to any communication between the victim and the domestic violence advocate.

(a) For purposes of this section, "domestic violence advocate" means an employee or supervised volunteer from a community-based domestic violence program or human services program that provides information, advocacy, counseling, crisis intervention, emergency shelter, or support to victims of domestic violence and who is not employed by, or under the direct supervision of, a law enforcement agency, a prosecutor's office, or the child protective services section of the department of children, youth, and families as defined in RCW **26.44.020**.

(b) A domestic violence advocate may disclose a confidential communication without the consent of the victim if failure to disclose is likely to result in a clear, imminent risk of serious physical injury or death of the victim or another person. This section does not relieve a domestic violence advocate from the requirement to report or cause to be reported an incident under RCW **26.44.030**(1) or to disclose relevant records relating to a child as required by RCW **26.44.030**(15). Any domestic violence advocate participating in good faith in the disclosing of communications under this subsection is immune from liability, civil, criminal, or otherwise, that might result from the action. In any proceeding, civil or criminal, arising out of a disclosure under this subsection, the good faith of the domestic violence advocate who disclosed the confidential communication shall be presumed.

(9) A mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter **18.225** RCW may not disclose, or be compelled to testify about, any information acquired from persons consulting the individual in a professional capacity when the information was necessary to enable the individual to render professional services to those persons except:

(a) With the written authorization of that person or, in the case of death or disability, the person's personal representative;

(b) If the person waives the privilege by bringing charges against the mental health counselor licensed under chapter **18.225** RCW;

(c) In response to a subpoena from the secretary of health. The secretary may subpoena only records related to a complaint or report under RCW **18.130.050**;

(d) As required under chapter **26.44** or **74.34** RCW or RCW **71.05.217** (6) or (7); or

(e) To any individual if the mental health counselor, independent clinical social worker, or marriage and family therapist licensed under chapter **18.225** RCW reasonably believes that disclosure will avoid or minimize an imminent danger to the health or safety of the individual or any other individual; however, there is no obligation on the part of the provider to so disclose.

(10) An individual who acts as a sponsor providing guidance, emotional support, and counseling in an individualized manner to a person participating in an alcohol or drug addiction recovery fellowship may not testify in any civil action or proceeding about any communication made by the person participating in the addiction recovery fellowship to the individual who acts as a sponsor except with the written authorization of that person or, in the case of death or disability, the person's personal representative.

[2020 c 302 § 113; 2020 c 42 § 1; 2019 c 98 § 1; 2018 c 165 § 1. Prior: 2016 sp.s. c 29 § 402; 2016 sp.s. c 24 § 1; 2012 c 29 § 12; 2009 c 424 § 1; 2008 c 6 § 402; 2007 c 472 § 1; prior: 2006 c 259 § 2; 2006 c 202 § 1; 2006 c 30 § 1; 2005 c 504 § 705; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

MERYHEW LAW GROUP

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