

NO. 63014-8-I

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

REC'D
MAR 09 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RYAN RICHARDSON,

Appellant.

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

The Honorable Deborah D. Fleck, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charges, conviction, and sentence</u>	3
2. <u>Selected trial testimony</u>	4
a. <u>A.C.'s allegations and recantation</u>	4
b. <u>Stephanie's testimony</u>	6
c. <u>Police officers' and polygraphers' testimony</u>	7
d. <u>Richardson's side of the story</u>	10
C. <u>ARGUMENT</u>	13
1. THE ADMISSION OF INADMISSIBLE, HIGHLY PREJUDICIAL OPINION TESTIMONY BY POLICE OFFICERS AND THE POLYGRAPHER DENIED RICHARDSON A FAIR TRIAL.....	13
a. <u>Richardson's counsel stood mute while the State repeatedly elicited inadmissible opinions on Richardson's credibility from police officers and the polygrapher</u>	13
b. <u>Admission of the foregoing testimony was manifest constitutional error that Richardson may raise for the first time on appeal.</u>	16
c. <u>Counsel's failure to object to the foregoing opinion testimony violated Richardson's constitutional right to effective representation</u>	22

TABLE OF CONTENTS (CONT'D)

	Page
2. THE ADMISSION OF INADMISSIBLE, HIGHLY PREJUDICIAL OPINION TESTIMONY BY THE PHYSICIAN WHO INTERVIEWED A.C. DENIED RICHARDSON A FAIR TRIAL.....	24
a. <u>Defense counsel stood mute when the examining physician repeatedly testified the complaining witness was the victim of sexual abuse.</u>	24
b. <u>Admission of the testimony was manifest constitutional error that may be raised for the first time on appeal.</u>	27
c. <u>In the alternative, counsel's failure to object to the doctor's opinion A.C. was sexually abused, the ultimate issue, violated Richardson's constitutional right to effective representation.</u>	29
3. COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IRRELEVANT, PREJUDICIAL OPINION TESTIMONY THAT RICHARDSON'S WIFE DID NOT RESPOND APPROPRIATELY TO HER DAUGHTER'S ALLEGATIONS OF ABUSE.....	30
a. <u>Counsel failed to object when the State elicited improper testimony from Page and Larrison that Stephanie's reaction to A.C.'s disclosure was inappropriate</u>	30
b. <u>Counsel's failure to object on the proper grounds denied Richardson a fair trial</u>	32
4. BASED ON THE FOREGOING, CUMULATIVE ERROR REQUIRES REVERSAL.	35
5. THE JUDGMENT AND SENTENCE CONTAINS THREE ILLEGAL COMMUNITY CUSTODY CONDITIONS THAT SHOULD BE STRICKEN.....	36

TABLE OF CONTENTS (CONT'D)

	Page
a. <u>The conditions requiring the appellant to engage in a substance abuse evaluation and refrain from purchasing or possessing alcohol are invalid and should be stricken</u> .	37
b. <u>The condition prohibiting Internet access is invalid and should be stricken</u>	39
6. RICHARDSON'S JUDGMENT AND SENTENCE SHOULD BE REMANDED FOR CLARIFICATION OF CONTRADICTORY PROVISIONS.....	40
D. <u>CONCLUSION</u>	42

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Grant v. Smith</u> 24 Wn.2d 839, 167 P.2d 123 (1946).....	40
<u>In re Fleming</u> 142 Wn.2d 853, 16 P.3d 610 (2001).....	23
<u>In re Personal Restraint of Davis</u> 152 Wn.2d 647, 101 P.3d 1 (2004).....	22, 32
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	16
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	22
<u>State v. Alexander</u> 64 Wn. App. 147, 822 P.2d 1250 (1992).....	21, 35
<u>State v. Armendariz</u> 160 Wn.2d 106, 156 P.3d 201 (2007).....	40
<u>State v. Badda</u> 63 Wn.2d 176, 385 P.2d 859 (1963).....	35
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	36
<u>State v. Barnett</u> 139 Wn.2d 462, 987 P.2d 626 (1999).....	36
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	16, 28
<u>State v. Borsheim</u> 140 Wn. App. 357, 165 P.3d 417 (2007).....	28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Broadway</u> 133 Wn.2d 118, 942 P.2d 363 (1997)	40
<u>State v. Casteneda-Perez</u> 61 Wn. App. 354, 810 P.2d 74 (1991).....	16, 34
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	35
<u>State v. Demery</u> 144 Wn.2d 753, 30 P.3d 1278 (2001).....	17, 18
<u>State v. Dolan</u> 118 Wn. App. 323, 73 P.3d 1011 (2003).....	34
<u>State v. Farr-Lenzini</u> 93 Wn. App. 453, 970 P.2d 313 (1999).....	17
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	33
<u>State v. Fitzgerald</u> 39 Wn. App. 652, 694 P.2d 1117 (1985).....	16, 26, 28
<u>State v. Grier</u> 150 Wn. App. 619, 208 P.3d 1221 (2009) <u>review granted</u> , 167 Wn.2d 1017 (2010)	23
<u>State v. Guloy</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	20, 29
<u>State v. Hendrickson</u> 138 Wn. App. 827, 158 P.3d 1257 (2007) <u>aff'd</u> , 165 Wn.2d 474, 198 P.3d 1029 <u>cert. denied</u> , __ U.S. __, 129 S. Ct. 2873, 174 L. Ed. 2d 585 (2009)	22
<u>State v. Hudson</u> 150 Wn. App. 646, 208 P.3d 1236 (2009).....	28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Iniguez</u> 143 Wn. App. 845, 180 P.3d 855 (2008) <u>overruled on other grounds</u> , 167 Wn.2d 273, 217 P.3d 768 (2009) ...	40, 41
<u>State v. Jerrels</u> 83 Wn. App. 503, 925 P.2d 209 (1996).....	34
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	38, 39, 40
<u>State v. Kelly</u> 102 Wn.2d 188, 685 P.2d 564 (1984).....	33
<u>State v. King</u> 167 Wn.2d 324, 219 P.3d 642 (2009).....	3, 7, 20
<u>State v. Kirkman</u> 159 Wn.2d 918, 155 P.2d 125 (2007).....	27
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	32
<u>State v. Montgomery</u> 163 Wn.2d 577, 183 P.3d 267 (2008).....	16, 17, 18, 19, 35
<u>State v. O'Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	39
<u>State v. Perrett</u> 86 Wn. App. 312, 936 P.2d 426 (1997).....	35
<u>State v. Saunders</u> 120 Wn. App. 800, 86 P.3d 232 (2004).....	16, 17, 18, 20, 22
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	22, 23
<u>State v. Zwicker</u> 105 Wn.2d 228, 713 P.2d 1101 (1986).....	33

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Roe v. Flores-Ortega
528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)..... 23

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 22, 23

United States v. Samara
643 F.2d 701 (10th Cir.1981)
cert. denied, 454 U.S. 829 (1981)..... 27

Wiggins v. Smith
539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)..... 23

OTHER JURISDICTIONS

State v. Rimmasch
775 P.2d 388 (Utah 1989)..... 16

State v. Walters
120 Idaho 46, 813 P.2d 857 (1990) 16

RULES, STATUTES AND OTHER AUTHORITIES

5A K. Tegland
Wash. Prac., Evidence, § 292 (2d ed. 1982)..... 27

ER 402 33

ER 403 33

Former RCW 9.94A.030(13)..... 40

Former RCW 9.94A.505(8)..... 40

Former RCW 9.94A.700(5)(d) 39

TABLE OF AUTHORITIES (CONT'D)

	Page
Former RCW 9.94A.700(5)(e) (2003).....	37
Former RCW 9.94A.712.....	36, 37
Former RCW 9.94A.712 (2006).....	18
Laws 2008, ch. 231, § 56.....	37
RAP 2.5.....	18
RCW 9.94A.345.....	36
RCW 9.94A.700.....	37, 38
RCW 9.94A.713.....	38
RCW 9.94B.050.....	37
RCW 9.95.425.....	38
RCW 9.95.430.....	38
U.S. Const. amend. 6.....	21
Wash. Const. art. I, § 21.....	16
Wash. Const. art. I, §, 22.....	16, 21

A. ASSIGNMENTS OF ERROR

1. Appellant was denied a fair trial when the State's witnesses repeatedly expressed their opinions on appellant's guilt and the credibility of appellant and other witnesses.

2. Defense counsel was ineffective for repeatedly failing to object to inadmissible, prejudicial opinions on witness credibility from six State's witnesses.

3. Cumulative error denied appellant a fair trial.

4. The sentencing court exceeded its authority in entering three illegal community custody conditions.

5. The judgment and sentence contains contradictory provisions regarding appellant's contact with his children.

Issues Pertaining to Assignments of Error

1. One police officer stated appellant was "honest" in acknowledging contact with his stepdaughter in a pre-test interview with a polygrapher, despite earlier denials.¹ Another police officer opined appellant was not "honest" during their interview when she asked him direct questions about the charged crimes. The polygrapher testified

¹ By agreement of the parties, the polygrapher was referred to as an "interview specialist" during trial.

appellant's claim of accidental contact "didn't make sense" and he "thought there was more to it than that."

a. Was this improper opinion testimony on appellant's credibility and, thus his guilt?

b. Was counsel prejudicially ineffective for failing to object to such testimony?

2. The examining physician stated five times during her testimony that, in her opinion, the complained-of touching was not accidental and constituted sexual assault.

a. Did the physician offer improper opinion testimony on appellant's guilt?

b. Was counsel prejudicially ineffective for failing to object to the physician's testimony?

3. Was counsel ineffective for failing to object to opinion testimony by a social worker and a longtime family friend that the complaining witness's mother, appellant's wife, did not respond appropriately to her daughter's allegations of abuse, thus conveying their opinions as to the veracity of the complaining witness's allegations and appellant's guilt?

4. Based on the foregoing, did cumulative error deny appellant a fair trial?

5. Where appellant's crime did not involve his use of controlled substances or alcohol, must the court's drug- and alcohol-related conditions be stricken?

6. As a condition of community custody, the sentencing court prohibited appellant from accessing the Internet without approval from his Community Custody Officer (CCO). Where this condition bore no relation to the charged crime, must the condition be stricken?

7. One provision of appellant's judgment and sentence states, consistent with the court's oral ruling, that appellant's lifetime prohibition on unsupervised contact with minors does not apply to his own children. Another provision contains no such exception. Is remand required for clarification of the judgment and sentence?

B. STATEMENT OF THE CASE²

1. Charges, conviction, and sentence

The King County prosecutor charged appellant Ryan Richardson with first degree child rape occurring between February 17, 2006 and February 16, 2007 and second degree child molestation occurring between

² This brief refers to the verbatim report of proceedings as follows: 1RP – 10/2/08 and 1/22/09 (sentencing); 2RP – 10/27/08; 3RP – 10/28/08; 4RP – 10/29/08; 5RP – 10/30/08; 6RP – 11/3/08; 7RP – 11/4/08; and 8RP – 11/5/08.

June 20 and July 11, 2007. CP 64-69. The complaining witness was Richardson's stepdaughter, A.C., born February 17, 1995. 5RP 19.

A jury convicted Richardson as charged. CP 90. The court sentenced Richardson within the applicable standard ranges. CP 35-38; Supp. CP ___ (sub no. 115, Agreed Order Modifying Judgment and Sentence).

2. Selected trial testimony³

a. A.C.'s allegations and recantation

A.C. is the child of appellant's wife, Stephanie, and her ex-husband, a deputy sheriff. In 2006 and 2007, A.C. lived with Stephanie; her younger brother; Richardson; and Stephanie and Richardson's infant daughter. 4RP 72; 5RP 21-23.

Late one night in July 2007, A.C. and Richardson were the last two awake in the living room following a "family movie night." 5RP 22. Richardson gave A.C. three pills because she was having trouble falling asleep. 5RP 29-30. She finally drifted off to sleep on the living room hide-a-bed. 5RP 31. When A.C. awoke, her skirt had ridden up to around her waist and Richardson was using one of his legs to raise her leg. 5RP 34. She felt Richardson's hand pulling her underwear to the side and his penis touching her vagina. 5RP 35. A.C. disentangled herself from

³ Additional trial testimony is set forth in the argument section.

Richardson, went to the bathroom, and then to her room to sleep. 5RP 37-38. When she looked back into the living room, Richardson was sitting on the edge of the hide-a-bed. 5RP 38.

That was not the first time Richardson touched A.C. 5RP 39. A.C. had dry skin on her back and upper arms and often asked for assistance in applying lotion to areas she could not reach. 4RP 75; 5RP 40. On one occasion, Richardson rubbed lotion on A.C.'s stomach, chest, and inside A.C.'s shorts. 5RP 42-44. In the process, Richardson touched her vagina. 5RP 44. At trial, A.C. could not recall if he inserted his finger. 5RP 58. However, when A.C. spoke with child interview specialist Carolyn Webster soon after the hide-a-bed incident, she recalled more details and told Webster that Richardson put his finger in her vagina. 5RP 59-61, 85, 120-21. Portions of the interview were read into the record at trial. 5RP 59-61.

A.C. disclosed the hide-a-bed incident to her friend after a few days had passed. 5RP 50. Despite the friend's promise to keep a secret, the friend told her mother, Heidi Page,⁴ a longtime friend of A.C.'s parents. 5RP 51. Page told Stephanie that night. 5RP 52. Stephanie

⁴ Page's testimony is set forth in the argument section below.

appeared angry and frustrated. She asked A.C. several questions and stated to A.C. that Richardson sometimes “did stuff” in his sleep. 5RP 54.

For the first time the following day, A.C. disclosed the “lotion” incident. That day, A.C. was questioned by her biological father, a deputy sheriff. 4RP 81; 5RP 48. The father scheduled an interview with child interview specialist Webster. 4RP 147; 5RP 48, 56-57. A.C. later discussed the allegations with a pediatrician at Harborview Medical Center.⁵ 5RP 58.

A few months later, however, A.C. wrote a letter to her advocate stating Richardson was asleep during the hide-a-bed incident and retracting her claim Richardson inserted his finger during the lotion incident.⁶ 5RP 64-65. Soon after, A.C. provided a similar statement to a defense investigator. 5RP 68-80, 126-27. At the time of trial, A.C. believed the contact was intentional, but acknowledged changing her mind in that respect. 5RP 79-80, 127-30.

b. Stephanie’s testimony

Stephanie and Richardson were legally separated at the time of trial. 4RP 71. Stephanie became agitated when Page told her of A.C.’s

⁵ The pediatrician’s testimony is set forth in the argument section below.

⁶ Stephanie believed A.C. wrote the letter after stumbling upon the police report in Stephanie’s drawer. 4RP 114-15.

disclosure not because she was angry at A.C. but because she found her daughter's reticence frustrating. 4RP 80-81. A.C. disclosed only the hide-a-bed incident that night.⁷ 4RP 81. Stephanie did not specifically recall asking A.C. if Richardson was asleep during the incident, but agreed that in the past Richardson had kissed Stephanie and made sexual advances while asleep. 4RP 83, 109-12. Stephanie did not contact the authorities following A.C.'s disclosure but expected Page would contact A.C.'s father, the deputy, although she was reluctant to contact him herself because of their past conflicts. 4RP 84.

c. Police officers' and polygrapher's testimony

King County detective Chris Knudson watched A.C.'s interview with Webster through a one-way mirror. 3RP 45-46. Later that evening, Knudson and three detectives went to the family's home. 3RP 51. Richardson submitted to an audiotaped interview in Knudson's squad car. 3RP 51; Ex. 5.

Richardson acknowledged falling asleep with A.C. while watching a movie and confessed that he sometimes "humped" his wife in his sleep. 3RP 55. Thus, while he did not recall engaging in such behavior with A.C., he did not doubt it could have occurred. 3RP 55. Richardson also

⁷ Stephanie did not learn about the lotion incident allegations until she spoke with a social worker who had observed A.C.'s interview with Webster. 4RP 98.

acknowledged providing two melatonin⁸ pills to A.C. 3RP 56-57; 5RP 18-19.

Richardson also acknowledged he applied lotion to A.C.'s severely dry skin on a number of occasions but denied any sexual contact and found the thought "disgusting." 3RP 55-56; Ex. 5 at 9-11, 14-15. Knudson suggested that Richardson demonstrate he was telling the truth by speaking with an "interview specialist," Jason Brunson. 3RP 56. Knudson then arrested Richardson and followed when another officer drove him to the Regional Justice Center (RJC) to wait for Brunson to arrive for their after-hours interview. 3RP 59; 4RP 5-8.

Knudson's opinions on Richardson's credibility during the interviews, including the Brunson interview, are set forth below in the argument section.

While waiting to speak with Brunson, Richardson was held in a small interview room. 3RP 57. Detective Wendy Billingsley noticed Richardson sitting with his head in his hands and asked if he felt all right. 4RP 35. When Richardson tearfully protested he was not a rapist,

⁸ Melatonin is a sleep-inducing chemical produced naturally by the pineal gland; a manufactured version may be purchased without a prescription. See <http://en.wikipedia.org/wiki/Melatonin> (last accessed March 1, 2010).

Billingsley expressed sympathy and asked Richardson to tell her more. 4RP 35-36. They spoke for nearly an hour. 4RP 44, 61.

Richardson reiterated he did not recall the hide-a-bed incident but that A.C. was not a liar and he knew from his wife that on occasion he tried to have sex with her while sleeping. 4RP 36. As for the other incident, he acknowledged putting lotion on A.C. at a time when she was probably wearing shorts and no shirt. 4RP 39. When Billingsley asked Richardson if he was leaving something out, he grew flushed, rubbed his face, and repeatedly denied he was a rapist. 4RP 39. Richardson also rejected Billingsley's suggestion he accidentally touched A.C.'s vagina while applying the lotion. 4RP 40.

Undeterred, Billingsley informed Richardson that, in her experience, abusers' conduct ran the gamut from putting an entire hand inside a child's vagina to mere touching; she then suggested Richardson's behavior probably fell closer to the lesser range of conduct. 4RP 40-42. Richardson looked down and nodded, but remained mute. 4RP 42, 60.

Like Knudson, Billingsley also recounted her observations of Richardson's interview with Brunson. 4RP 45-51. She also recounted a brief conversation after the Brunson interview. 4RP 52-53. Billingsley's opinion testimony on Richardson's credibility during her interviews is set forth below in the argument section.

Polygrapher Brunson, a former police officer, testified he works as an “interview specialist” for the sheriff’s office. 6RP 82-83. After confirming Richardson was physically capable of going through the “interview,” Brunson and Richardson discussed A.C.’s allegations. 6RP 91-92. Richardson said he applied lotion to A.C.’s legs up to her thighs and stated he may have brushed A.C.’s vagina with his hand. 6RP 93. Brunson then asked if Richardson ever inserted his finger. 6RP 93-94. With tears in his eyes, Richardson slumped forward. 6RP 95. Richardson admitted his finger slid in accidentally after A.C. unexpectedly shifted her body. 6RP 95-96. Brunson suggested it was “not the time to . . . minimize,” but Richardson continued to maintain the contact was accidental. 6RP 95. Brunson’s opinion as to Richardson’s credibility is set forth below in the argument section.

d. Richardson’s side of the story

Richardson, a security guard who worked nights, was stunned when his wife called and told him A.C. claimed he had “pushed up on” A.C. while watching movies. 7RP 29-30. Upon returning home, Richardson went to A.C.’s room to talk to her, but she would not speak to him. 7RP 32.

Richardson said he was shocked to learn of A.C.’s second allegation during his conversation with Detective Knudson. 7RP 39. But

because he had slept little and was stressed during the time,⁹ Richardson recalled few specifics of his conversations with Knudson, Billingsley, and Brunson. 7RP 39, 111, 114-15.

Richardson provided the following testimony as to the lotion incident: He was applying lotion to A.C.'s dry skin while he laid on her back on the couch. When Richardson reached for the lotion bottle, which was propped between the couch cushions, A.C. unexpectedly rolled over onto her stomach. 7RP 43-44. Richardson's hand touched her vagina outside her clothing, and his finger did not penetrate her vagina. 7RP 44. Surprised by the contact, both jumped up. 7RP 44. Richardson immediately spoke with Stephanie, who spoke to A.C. and confirmed that A.C. understood the touching was an accident.¹⁰ 7RP 45.

Regarding the hide-a-bed incident, Richardson testified as follows: Following family movie night, A.C. had trouble sleeping because she was

⁹ Richardson slept very little the previous days and was again unable to sleep that day because he feared the police would arrive at any moment. 7RP 36-37.

¹⁰ At trial, Stephanie could not recall the conversation with her husband about accidentally touching A.C.'s genital area. 4RP 121-23. However, Richardson testified Stephanie previously told Richardson and his mother, Jan Miller, that she recalled the incident. 7RP 61. Richardson's mother confirmed his testimony. 7RP 15-17, 19.

afraid of ghosts and begged Richardson to stay up with her.¹¹ 7RP 48. They watched a light comedy, but the movie did not calm A.C.'s nerves, so she asked for one of Richardson's melatonin pills. 7RP 49. A.C. had taken melatonin previously with Stephanie's approval. 7RP 50.

When A.C. feigned sleep, Richardson tried to go to bed, but A.C. complained she knew he would leave if she pretended to be asleep. 7RP 51. Richardson let A.C. select another movie and acquiesced to her request for another melatonin pill. This time, Richardson crushed the pill in A.C.'s tea because she complained the pills tasted bad. 7RP 51-52. Richardson fell asleep during the movie and woke up to find A.C. gone. 7RP 54-55.

Although asleep at the time, Richardson doubted the hide-a-bed incident could have occurred as A.C. described it because he was clothed when he woke up and still in the position where he fell asleep. 7RP 76, 81, 134. Richardson was unaware of the details of the allegation when he told the police A.C. was probably telling the truth. 7RP 79.

¹¹A.C. confirmed she had trouble sleeping because she made herself afraid by telling ghost stories, but she did not recall if she asked Richardson to stay with her that night. 5RP 70-71.

C. ARGUMENT

1. THE ADMISSION OF INADMISSIBLE, HIGHLY PREJUDICIAL OPINION TESTIMONY BY POLICE OFFICERS AND THE POLYGRAPHER DENIED RICHARDSON A FAIR TRIAL.

Defense counsel failed to object to multiple instances of opinion testimony from police officers and the polygrapher, whom jurors learned was a former police officer. The admission of the testimony, set forth below, was manifest constitutional error that Richardson may raise for the first time on appeal. Alternatively, counsel was prejudicially ineffective for failing to object to the testimony. In either event, this Court should reverse Richardson's convictions.

- a. Richardson's counsel stood mute while the State repeatedly elicited inadmissible opinions on Richardson's credibility from police officers and the polygrapher.

Defense counsel failed to object to police testimony opining Richardson was more "honest" during those portions of interviews in which he made incriminating statements. This testimony is set forth as follows:

As stated above, Detective Billingsley testified Richardson said he did not doubt what A.C. said about the hide-a-bed incident but denied touching A.C.'s vagina during the lotion incident. Billingsley then told Richardson she had seen a "spectrum" of sex offenses, and Richardson

looked down and shook his head “yes” but did not respond audibly. 4RP

40-42. Billingsley then testified about Richardson’s demeanor:

Q. In general what was his demeanor and what were his emotions such that you could see?

A. He was nervous. He was upset, which was very understandable given the allegations; . . . he was very upset and audibly crying . . . and he had tears on his face. Other times where he just looked very nervous or stressed out where he would be sweating. *At other times I felt he wasn’t being as forthright or as honest. He wouldn’t make eye contact with me. His voice would get softer. He would just keep his eyes turned away from me.*

4RP 42-43 (emphasis added). Billingsley also commented Richardson’s eye contact was poor when she asked if he accidentally touched A.C.’s vagina, when he acknowledged the possibility of contact with A.C. while sleeping, and when explaining why his story may have changed between interviews. 4RP 43; 4RP 52-53.

Detective Knudson testified he watched most of Richardson’s interview with Brunson. Without objection, Knudson testified Richardson was “a bit more honest” than in his earlier interviews in that he acknowledged his finger accidentally penetrated A.C.’s vagina. 3RP 61.

Polygrapher Brunson testified, without objection, that he commented to Richardson he did not think the claim his finger accidentally entered A.C. made sense. The testimony occurred as follows:

Q. Did you [talk] with him about how likely you thought it was that he had accidentally [put his finger in A.C.'s vagina]?

A. I expressed to him that I did not feel it was likely that it was an accidental slip. . . He told me he would never admit that he did it intentionally

Q. [How did you express that to him?]

A. [I]t was more disbelief . . . I [explained] I have been a detective, I have investigated a lot of, you know, similar types of cases, and it didn't make sense to me that you're applying lotion to this girl's . . . leg, she moved and your thumb slipped into her vagina. It didn't make sense to me. I thought there was more to it than that.

6RP 97-98.

The State later asked Brunson whether “accidentally inserting your finger into a child’s vagina is a little bit ridiculous?” 7RP 126. The court sustained an objection to that question.¹²

¹² Brunson also testified that immediately before Richardson admitted to accidental contact with A.C.'s genitals, he was sitting in a “closed off” position. But “[a]s we started talking further, then he got more opened up as his arms kind of came together he somewhat leaned forward, had tears in his eyes, things that would indicate that he’s thinking very strongly about, you know, the accusations and that he’s probably about [ready] to tell what happened.” 6RP 94. On redirect, Brunson offered that he did not think Richardson slumped forward because he was tired. Instead,

It appeared to me he was [again] dealing with stress and was about ready to tell the truth, that’s something that is very, very common, I’ve seen it time and time again, is that people tend do open up, lean forward and tell the truth. Or at least tell a closer version to the truth than what they have been.

- b. Admission of the foregoing testimony was manifest constitutional error that Richardson may raise for the first time on appeal.

The role of the jury is to be held "inviolable." Wash. Const. art. I, §§ 21, 22. The jury's fact-finding role is essential to the constitutional right to trial by a jury of one's peers. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). Therefore, "No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion on guilt, even by mere inference, invades the province of the jury. State v. Montgomery, 163 Wn.2d 577, 594, 183 P.3d 267 (2008); State v. Casteneda-Perez, 61 Wn. App. 354, 362, 810 P.2d 74 (1991); State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). Moreover, there is no reason to believe that experts are any more qualified to render such opinions than are jurors. State v. Walters, 120 Idaho 46, 55, 813 P.2d 857, 866 (1990) (citing State v. Rimmasch, 775 P.2d 388 (Utah 1989)).

Here, the opinion testimony was nearly identical to that offered in State v. Saunders, where the police officer testified Saunders's answers to questions "weren't always truthful." 120 Wn. App. 800, 812, 86 P.3d 232

6RP 107. By agreement of the parties, the court struck redirect examination in its entirety after Brunson violated an order in limine not to mention the polygraph. 6RP 108, 114-18.

(2004). The Saunders court applied the test from State v. Demery and considered the totality of the circumstances including (1) the type of witness, (2) the nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Saunders, 120 Wn. App. at 812-13 (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). In concluding the testimony was an improper opinion, the Court noted police witnesses have an "aura of reliability," the testimony dealt directly with the defendant's credibility, and the charges were very serious. Saunders, 120 Wn. App. at 813.

As in Saunders, the testimony in Richardson's case occurred through police officers and a former police officer, "interview specialist" Brunson.¹³ While police officers' testimony carries an "aura of reliability," Demery, 144 Wn.2d at 765, their opinions on guilt have low probative value because their area of expertise is in determining when an arrest is justified, not whether there is guilt beyond a reasonable doubt. Montgomery, 163 Wn.2d at 595; cf. State v. Farr-Lenzini, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) ("The expert testimony of an otherwise

¹³ Even absent any references to a polygraph, Brunson was referred to as an interview specialist, suggesting he had special abilities to discern the truth. See, e.g., 3RP 56 (Detective Knudson's testimony that he told Richardson he could demonstrate he was telling the truth by speaking to Brunson).

qualified witness is not admissible if the issue at hand lies outside the witness' area of expertise").

The other Demery factors also show this testimony was improper. In Saunders, the impermissible opinion unfairly undermined the defendant's alibi; here, opinion testimony that Richardson was more "honest" at certain points during the series of interviews eviscerated his defense that any contact with A.C. was accidental and that his hand did not penetrate her vagina.

As in Saunders, the charge here is very serious. First degree child rape is a class A felony, and Richardson was sentenced to a minimum sentence of 130 months in prison and community custody for life. Former RCW 9.94A.712 (2006); CP 96. As in Saunders, the Demery factors show this testimony was impermissible opinion on credibility.

Also as in Saunders, the improper opinion testimony is preserved for review despite defense counsel's failure to object. Improper opinion testimony may be manifest constitutional error that can be raised for the first time on appeal. Saunders, 120 Wn. App. at 811, 813 (citing Demery, 144 Wn.2d at 759); RAP 2.5(a). Saunders held the officer's statement "was improper opinion testimony, and that the admission of this evidence was constitutional error." Saunders, 120 Wn. App. at 813. The error here was likewise constitutional.

Manifest constitutional error occurs when the error causes actual prejudice or has "practical and identifiable consequences." Montgomery, 163 Wn.2d at 595. The court noted "would not hesitate to find actual prejudice and manifest constitutional error" if there were indications the opinions influenced the jury's verdict. Id. at 596 n. 9.

In Montgomery, the defendant was charged with possession of pseudoephedrine with intent to manufacture methamphetamine. Id. at 583. A detective testified he "felt very strongly" that Montgomery and a companion were buying ingredients to manufacture methamphetamine. Defense counsel later cross-examined the detective, asking, "[T]his is an assumption on your part that this is intent, correct?" Id. at 587-88. Another detective testified that based on his training and experience the items were purchased for manufacturing. Id. at 588. A forensic chemist testified the combined purchases of Montgomery and his companion "are all what lead me toward [the conclusion that] this pseudoephedrine is possessed with intent." On cross examination, however, the chemist conceded he would not be able to come to a conclusion based on Montgomery's purchases alone and agreed when defense counsel asked, "this is an assumption on your part that this is intent, correct?" Id. at 588-89.

Although the Montgomery court held the testimony amounted to improper opinions on guilt, it found Montgomery suffered no practical consequences or actual prejudice. Id. at 594-96. Here, in contrast, the opinion testimony had practical and identifiable consequences because in each case it went unchallenged. In Montgomery, cross-examination dulled the impact of the opinions that Montgomery acted with intent by pointing out the witnesses' testimony was mere speculation. Id. at 588-89. But here was no such cross-examination available to blunt the impact. Indeed, such cross-examination would have been dangerous given (1) the officers' obvious willingness to offer credibility opinions and (2) the possibility, eventually realized, that Brunson would let slip the interview was part of a polygraph examination. 6RP 108, 114-18; note 12, supra.

This Court should therefore find this was manifest constitutional error and apply a constitutional harmless error test. See State v. King, 167 Wn.2d 324, 333 n. 2, 219 P.3d 642 (2009) (reversing on other grounds but stating that if a claim is truly constitutional, the court should examine the effect the error had on the defendant's trial according to the constitutional harmless error standard).

Constitutional error is presumed prejudicial, and the State bears the burden of proving it was harmless. Saunders, 120 Wn. App. at 813 (citing State v. Guloy, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985)). The State

cannot meet its burden in Richardson's case. While this case and Saunders are similar in some respects, they diverge at the harmless error analysis. The court affirmed Saunders's conviction because overwhelming untainted evidence supported the verdict. Saunders, 120 Wn. App. at 813. Moreover, the Court found only one instance of improper opinion testimony in that case. Id. at 811-13.

Here, there were multiple instances of improper opinion testimony. Indeed, such testimony pervaded the trial. The only evidence untainted by the preceding opinion testimony was A.C.'s account of the crimes. A.C.'s account, however, wavered.¹⁴ Moreover, the officers' testimony severely undermined Richardson's claim that any admissions were largely the result of extreme sleep deprivation. Finally, as in most sexual abuse cases, credibility was a central issue here because the testimony of A.C. and Richardson conflicted. State v. Alexander, 64 Wn. App. 147, 152, 158, 822 P.2d 1250 (1992). The State therefore cannot demonstrate the pervasive testimony opining which of Richardson's statements were "honest" was harmless beyond a reasonable doubt.

¹⁴ A.C.'s testimony was, in addition, tainted by the pediatrician's opinion testimony that the events she described constituted sexual abuse and the irrelevant, prejudicial testimony by a social worker and Page disapproving of Stephanie's reaction to A.C.'s claims. These claims are discussed below.

- c. Counsel's failure to object to the forgoing opinion testimony violated Richardson's constitutional right to effective representation.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). An accused receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices him. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

More specifically, failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998); see also State v. Hendrickson, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (failure to object to testimony that was inadmissible hearsay and violated the confrontation clause was ineffective assistance), aff'd, 165 Wn.2d 474, 198 P.3d 1029, cert. denied, ___ U.S. ___, 129 S. Ct. 2873, 174 L. Ed. 2d 585 (2009).

Richardson recognizes the decision whether to object may be deemed tactical. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). But to defeat a claim of ineffective assistance of counsel, "tactical" or "strategic" decisions by defense counsel must be reasonable and legitimate. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); State v. Grier, 150 Wn. App. 619, 640, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010). Counsel's repeated failure to object was objectively unreasonable: Considering the defense theory, there was no strategic reason to allow, repeatedly, police officers and an "interview specialist" to express their opinions Richardson was honest and open when admitting misconduct and dishonest when denying it. See Thomas, 109 Wn.2d at 228 (counsel's failure to take steps consistent with defense theory of the case deemed deficient).

To show prejudice, Richardson need not show counsel's deficient performance more likely than not altered the outcome of the proceeding. Id. at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." In re

Fleming, 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (quoting Strickland, 466 U.S. 668).

Any objection or motion to strike was likely to have been granted, as the testimony was demonstrably inadmissible opinion evidence. Moreover, the detectives' and Brunson's testimony damaged Richardson's defense beyond repair. Defense counsel's repeated failure to shield Richardson from the prejudice of such inadmissible testimony undermined his defense and denied him a fair trial.

2. THE ADMISSION OF INADMISSIBLE, HIGHLY PREJUDICIAL OPINION TESTIMONY BY THE PHYSICIAN WHO INTERVIEWED A.C. DENIED RICHARDSON A FAIR TRIAL.

Counsel also failed to object to multiple statements by Dr. Rebecca Wiester, a pediatrician at the Harborview Medical Center sexual assault clinic, opining A.C.'s version of events did not reflect accidental touching but rather sexual abuse. Under the circumstances, the doctor's opinion that sexual abuse occurred was a direct opinion on Richardson's guilt. The testimony therefore constituted manifest constitutional error that Richardson may raise for the first time on appeal. Alternatively, counsel was ineffective for failing to object to this highly prejudicial testimony.

- a. Defense counsel stood mute when the examining physician repeatedly testified the complaining witness was the victim of sexual abuse.

The court ruled before trial that Dr. Wiester could testify as to Stephanie's belief that contact between Richardson and A.C. was accidental. Such testimony was admissible, not for the truth of the matter asserted, but to demonstrate Stephanie's state of mind at the time.¹⁵ 2RP 6-12. However, the State went further and elicited Wiester's "concerns," and ultimately her opinion, about A.C.' and Stephanie's statements.

Wiester testified she generally speaks with both the child and the parent as part of a sexual assault examination.¹⁶ A.C., who was very hesitant throughout the interview, acknowledged she was there because "a couple of incidents" occurred. 6RP 50. Wiester asked A.C. if either incident caused her pain or discomfort. A.C. nodded and pointed to her crotch. 6RP 51. When Wiester asked for more detail, A.C. explained Richardson started putting lotion on her back and then "to her belly and down," i.e. inside her underwear. When Wiester asked where he put his hand, A.C. said, "my private." Wiester asked, "[W]hat was it that made it hurt?" A.C. replied, "[H]is finger." 6RP 52.

Wiester also offered the following objectionable instances of opinion testimony. First, Stephanie told Wiester she thought the lotion

¹⁵ Stephanie's beliefs supported the State's theory as to why A.C. made a variety of inconsistent statements between her initial disclosure and trial.

¹⁶ A.C. declined a physical examination. 6RP 49.

incident was an accident and that Richardson was asleep during the hide-a-bed incident. RP 46. But Wiester “was concerned because what [Stephanie] was describing seemed more consistent with sexual abuse than an accident.” 6RP 44.

Later, the State asked Wiester why she did not explicitly rule out accidental touching during her conversation with A.C. Wiester testified that based on A.C.’s story, “I can’t personally come up with an explanation that would make this an accidental event.” 6RP 60; see also RP 61 (similar testimony).

Wiester testified she told Stephanie “I felt differently about the description of the events than . . . she did because of the information that I had from [A.C.] . . . I found the description by [A.C.] of what had gone on to be far more concerning for child sexual abuse than accidental events.” 6RP 63.

Defense counsel did not object to the foregoing testimony.

Later, on cross-examination, defense counsel asked whether Wiester could say for sure A.C. was sexually assaulted. Wiester, unsurprisingly, answered as follows, “I think what I can say is that the information that [A.C.] gave me I would find to be concerning for child sexual abuse and not consistent with accidental events.” 6RP 73-74. Again, defense counsel did not object or move to strike the testimony.

- b. Admission of the testimony was manifest constitutional error that may be raised for the first time on appeal.

“An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.” Fitzgerald, 39 Wn. App. at 656-67 (quoting 5A K. Tegland, Wash. Prac., Evidence, § 292 n. 4 at 39 (2d ed. 1982); United States v. Samara, 643 F.2d 701, 705 (10th Cir.1981), cert. denied, 454 U.S. 829 (1981)).

The admission of opinion testimony is manifest constitutional error when it is an explicit or nearly explicit witness statement on the ultimate issue of fact. State v. Kirkman, 159 Wn.2d 918, 938, 155 P.2d 125 (2007). The doctor’s statements at issue in Kirkman were determined not to be manifest constitutional error. But they bear little resemblance to Dr. Wiester’s testimony in this case, which conveyed her opinion A.C. suffered sexual abuse and the touching was not, as Richardson claimed, accidental.

The two consolidated child rape cases in Kirkman involved four instances of opinion testimony, including two by an examining physician. First, the physician, Dr. Stirling, testified the child gave “a very clear history with lots of detail, a clear and consistent history of sexual touching . . . with appropriate affect” and that “[t]he physical examination doesn’t really lead us one way or the other, but I thought her history was clear and

consistent.” Id. at 929. In the other case, Dr. Stirling testified, “to have no findings after receiving a history like that is actually the norm rather than the exception.” Id. at 932.

The court concluded:

Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that [the accused] was guilty, nor did he opine that C.M.D. was molested or that he believed C.M.D.'s account to be true. Dr. Stirling testified only that he was able to communicate with C.M.D. because she “had good language skills for her age, she spoke clearly,” . . . His testimony was content neutral, focusing upon the clear communication, rather than the substance of matters discussed. The doctor's testimony did not constitute manifest error.

Id. at 933.

Here, in stark contrast, Dr. Wiester offered her opinion A.C. suffered sexual abuse rather than accidental touching. This was not testimony about interview protocols or scientific evidence that indirectly supported an inference of witness credibility or guilt. It was a statement of opinion that A.C. was sexually abused and, under the circumstances, a statement that Richardson was guilty of the charged crimes. The testimony was thus manifest constitutional error. Black, 109 Wn.2d at 348; State v. Hudson, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009); see also Fitzgerald, 39 Wn. App. at 656-67 (pediatrician's testimony that, based on her interviews with complaining witnesses, she believed they had

been molested an impermissible opinion on witnesses' credibility); cf. State v. Borsheim, 140 Wn. App. 357, 375, 165 P.3d 417 (2007) (where doctor's diagnosis of sexual abuse relied largely on the diagnosis of the 11-year-old complaining witness's sexually transmitted disease, "testimony conveyed only the witness's opinion that sexual abuse had occurred, not that the witness believed [complaining witness's] assertion that Borsheim was the party guilty of that abuse").

The State cannot demonstrate the error was harmless beyond a reasonable doubt. Guloy, 104 Wn.2d at 425-26. Unlike in Borsheim, Wiester's assertion that sexual abuse occurred left no doubt that she believed Richardson committed a crime. 140 Wn. App. at 375. The testimony bolstered A.C.'s testimony that despite her earlier inconsistent statements, she had concluded the touching was not accidental. It also severely undermined Richardson's defense that his contact with A.C. was accidental or unconscious. For this reason too, reversal is required.

- c. In the alternative, counsel's failure to object to the doctor's opinion A.C. was sexually abused, the ultimate issue, violated Richardson's constitutional right to effective representation.

Similar to the reasons set forth in the preceding section, there was no reason to fail to object to such damaging testimony. The court was likely to sustain any objection or motion to strike, as the testimony was

obviously inadmissible. Moreover, for the reasons set forth above, Dr. Wiester's testimony damaged Richardson's defense. Defense counsel's failure to protect Richardson from such testimony undermined his defense and denied him a fair trial.

3. COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IRRELEVANT, PREJUDICIAL OPINION TESTIMONY THAT RICHARDSON'S WIFE DID NOT RESPOND APPROPRIATELY TO HER DAUGHTER'S ALLEGATIONS OF ABUSE.

While not direct opinions on guilt, defense counsel again stood mute while a family friend and a social worker testified Stephanie responded inappropriately to A.C.'s allegations. The jury could easily draw an inference from such testimony that these witnesses believed Richardson was guilty. Once again, counsel's failure to object constituted ineffective assistance.

- a. Counsel failed to object when the State elicited improper testimony from Page and Larrison that Stephanie's reaction to A.C.'s disclosure was inappropriate.

Stephanie's longtime friend Page testified that Stephanie reacted angrily to A.C.'s disclosure and suggested to A.C. that Richardson was

sleeping at the time of the hide-a-bed incident.¹⁷ 3RP 23-24. When the State asked for Page's opinion of Stephanie's reaction, Richardson objected, contending such testimony would be speculative. The court sustained the objection on relevance grounds. 3RP 31.

The State then asked Page whether Stephanie was consistent in her reaction to the charges. Page testified Stephanie went back and forth between believing Richardson's conduct was intentional and accidental. 3RP 32. The State then asked, "Did there come a time when you stopped associating with [Stephanie] . . . and *why?*" 3RP 32 (emphasis added). This time, the defense did not object. Page stated, "When I found out that she was going to visit Richardson in jail I quit communicating with her." 3RP 32.

Social worker Melinda Larrison testified the State filed a petition alleging A.C. was a dependent child¹⁸ based on the abuse allegations and doubts Stephanie could protect A.C. 4RP 176-77. Larrison was concerned about Stephanie's lack of "moral outrage" to the abuse

¹⁷ Stephanie, Richardson, and Richardson's mother testified that Richardson had a history of talking, walking, and making amorous advances in his sleep. 4RP 109-12, 120; 7RP 17-18, 78.

¹⁸ Defense counsel initially moved to exclude all references to a dependency. CP 31. The State agreed, provided the prohibition cut both ways, and the court granted the motion. 1RP 103. Later, defense counsel did not object when the State informed the court it would call two social workers. 4RP 102-06.

allegations. 4RP 181. The court sustained counsel's foundation objection. 4RP 181. Larrison then testified that in her 25 years as a caseworker, she had observed that most parents of children who made sexual abuse allegations reacted to abuse allegations with "moral outrage," whereas Stephanie did not. 4RP 183; 5RP 9-11.

b. Counsel's failure to object on the proper grounds denied Richardson a fair trial.

The preceding testimony, while not a direct opinion on guilt or on A.C.'s credibility, prejudiced Richardson. Even assuming Stephanie's reaction to A.C.'s disclosures was pertinent to a fact of consequence at trial, Larrison and Page's opinion on Stephanie's reaction was irrelevant and unfairly prejudicial.

Again, failure to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. Davis, 152 Wn.2d at 714. Here, in each case, counsel initially objected but failed to lodge continuing objections when the State persisted in presenting the evidence. Thus, while counsel obviously did not want such testimony before the jury, it seems she did not quite know how to prevent it. This falls below the threshold of minimal competence: Effective assistance

includes knowledge of relevant law. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) ("Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.").

Moreover, there was no tactical reason to admit such evidence. One can conceive of a reason to admit evidence of the dependency: to explain Stephanie's trial testimony that she and Richardson had separated and that she no longer recalled discussing the lotion incident with Richardson immediately after it happened. 4RP 71, 121-23. Indeed, counsel earlier stated she did not object to evidence of the dependency, provided such evidence was tightly circumscribed. 4RP 102-06. But the testimony of Page and Larrison went far beyond any purpose consistent with the defense theory.

In addition, the court was likely to sustain an objection had one been lodged on the proper grounds. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant

evidence is inadmissible, however, if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Every opinion must be based on knowledge. Proper lay opinion is based on personal knowledge, while proper expert opinion is based on scientific, technical, or specialized knowledge. State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003). The opinions offered here were not based on either type of knowledge. Hence, they were inadmissible.

Among other failings, Page's opinion as to Stephanie's reaction to A.C.'s disclosure was irrelevant. But as a longtime family friend and mother of A.C.'s best friend, such opinion was also quite prejudicial because it conveyed her belief Stephanie should not have supported Richardson and thus her belief A.C. was telling the truth. Cf. State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) (finding prosecutor committed misconduct in soliciting mother's opinion on whether child was telling the truth).

Larrison's loaded testimony was not only speculative, but it also had no relevance to any matter of consequence in the proceedings. At the same time, however, it conveyed Larrison's professional belief in the truth of A.C.'s allegations and therefore Richardson's guilt. It was therefore inadmissible. Casteneda-Perez, 61 Wn. App. at 362.

The credibility of the complaining witness was the linchpin of the State's case, and Richardson's credibility was the key to his defense. Alexander, 64 Wn. App. at 152. There is thus a reasonable likelihood the improper opinion testimony swayed the jury.

4. **BASED ON THE FOREGOING, CUMULATIVE ERROR
REQUIRES REVERSAL.**

“The combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (so holding). Reversal is required whenever cumulative errors deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997).

Richardson's counsel failed to object to the numerous instances of opinion testimony set forth above. As in Montgomery, the jury was instructed it was the sole judge of witness credibility and was not bound by expert witness testimony. CP 72, 78. But unlike in that case, cross-examination did not dull the impact of such testimony. And unlike in that case, improper opinion testimony pervaded the State's case and cast its long shadows on the testimony of nearly all witnesses, both lay and expert.

This prejudicial, irrelevant opinion testimony cumulatively denied Richardson a fair trial.

5. THE JUDGMENT AND SENTENCE CONTAINS THREE ILLEGAL COMMUNITY CUSTODY CONDITIONS THAT SHOULD BE STRICKEN.

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). Illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A defendant convicted of first degree child rape for a crime committed in 2006 and 2007 was sentenced under former RCW 9.94A.712(1)(a)(i). See RCW 9.94A.345 (“Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”). That statute provides that when a defendant is so convicted, the trial court must impose a minimum term within the standard sentencing range and a maximum term equal to the statutory maximum. It also requires the trial court to impose community custody for any time the defendant is released before the expiration of the maximum sentence.

Some conditions of release are mandatory, while the trial court has discretion in imposing other conditions. Under former RCW 9.94A.712(6)(a), the trial court could order the defendant to “perform

affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” Under former RCW 9.94A.700(5)(e) (2003),¹⁹ the trial court could also order the defendant to “comply with any crime-related prohibitions.”

- a. The conditions requiring the appellant to engage in a substance abuse evaluation and refrain from purchasing or possessing alcohol are invalid and should be stricken.

As a condition of community custody, the court ordered Richardson to “undergo a substance abuse evaluation[] at your expense and follow any recommended treatment” if directed by his sexual deviancy treatment provider or CCO. CP 101 (condition 18). The court also ordered Richardson not to “purchase, possess, or use alcohol (beverage or medicinal), and submit to testing and reasonable searches of your person, residence, property and vehicle by the [CCO] to monitor compliance.” CP 101 (condition 20). But condition 18 and those portions of condition 20 prohibiting purchase and possession of alcohol are illegal and likewise should be stricken.

¹⁹ RCW 9.94A.700 was recodified as RCW 9.94B.050 by Laws 2008, ch. 231, § 56, effective August 1, 2009.

Under former RCW 9.94A.712(6)(a),²⁰ the sentencing court may order the defendant to “perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community.” And RCW 9.94A.607(1) authorizes a judge to require an offender to participate in rehabilitative programs for chemical dependency as a condition of the sentence where “the court finds that the offender has a chemical dependency that has contributed to his or her offense.” But RCW 9.94A.700(5)(c) allows the court to impose “crime-related treatment or counseling services” only if the evidence shows the problem in need of treatment contributed to the offense. State v. Jones, 118 Wn. App. 199, 208, 76 P.3d 258 (2003) (condition of alcohol treatment impermissible because unrelated to the offense).

There was no evidence Richardson consumed alcohol or controlled substances, let alone evidence showing these contributed to commission of

²⁰ Former RCW 9.94A.712(6)(a)(i) states

Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

his offense. The court made no such finding. The court therefore wrongly imposed the substance abuse evaluation and treatment condition.

Moreover, as discussed above, under former RCW 9.94A.700(5)(e), the trial court may order the defendant to “comply with any crime-related prohibitions.” And former RCW 9.94A.700(5)(d) specifically permits the court to order a defendant to “not consume alcohol.” However, the sentencing court went further in this case and required that Richardson “not purchase [or] possess alcohol” and submit to monitoring of that prohibition. CP 101 (Condition 20).

Again, there is no evidence and no finding Richardson consumed alcohol or controlled substances. The court therefore wrongly imposed the condition that he not purchase or possess alcohol and submit to monitoring of that prohibition. Jones, 118 Wn. App. at 212.

- b. The condition prohibiting Internet access is invalid and should be stricken.

The court also prohibited Richardson from accessing the Internet without prior approval of his CCO or sex offender treatment provider. In State v. O'Cain, however, this Court held an identical bar to Internet access in rape case was an improper prohibition because it was not crime-related. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). Here there is no

indication the crimes had any connection to the Internet, and the condition should likewise be stricken.

6. RICHARDSON'S JUDGMENT AND SENTENCE SHOULD BE REMANDED FOR CLARIFICATION OF CONTRADICTION PROVISIONS.

Trial courts may impose crime-related prohibitions as part of a sentence. State v. Armendariz, 160 Wn.2d 106, 108, 156 P.3d 201 (2007) (citing former RCW 9.94A.030(13), former RCW 9.94A.505(8)). Crime-related prohibitions may include orders prohibiting contact with victims or witnesses for the statutory maximum term. Armendariz, 160 Wn.2d at 108.

“A sentence must be ‘definite and certain.’” State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). This court has authority on remand to clarify an ambiguous sentence. State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997); see also State v. Iniguez, 143 Wn. App. 845, 860, 180 P.3d 855 (2008) (even where oral ruling clarifies court’s potentially ambiguous judgment and sentence, remand for correction required), overruled on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009).

Section 4.6 of the judgment and sentence states Richardson is prohibited for life from contact with minors unless such contact is supervised by an adult with knowledge of Richardson’s conviction. The

court excepted Richardson's four children from this prohibition, both in its oral and written rulings. CP 97; 1RP 187-88. Appendix H of the judgment and sentence, however, lists a lifetime community custody condition prohibiting contact with "the victim or minor-age children without prior approval" of Richardson's CCO. Unlike section 4.6, the condition contains no exception for Richardson's children. CP 100.

Remand for clarification of the judgment and sentence to reflect the court's oral ruling is required. Iniguez, 143 Wn. App. at 860.

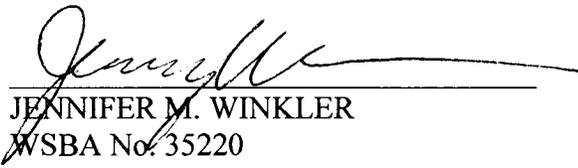
D. CONCLUSION

A new trial is required because of multiple instances of unconstitutional opinion testimony by two police officers, a polygrapher, a pediatrician, a social worker, and a longtime family friend. Because testimony from the first four resulted in manifest constitutional errors, Richardson may raise these claims for the first time on appeal. Alternatively, defense counsel was ineffective for repeatedly failing to object to testimony from each of the six witnesses. And even if each error taken alone does not constitute reversible error, the cumulative effect of the errors denied Richardson a fair trial. Finally, the judgment and sentence contains three illegal conditions that should be stricken as well as an ambiguity that must be resolved on remand.

DATED this 9th day of March, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63014-8-1
)	
RYAN RICHARDSON,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RYAN RICHARDSON
DOC NO. ~~RYAN RICHARDSON~~ 324788
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 1899
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF MARCH, 2010.

x Patrick Mayovsky