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No. 65977-4-I

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

Skagit County No. 09-1-00818-2

STATE OF WASHINGTON,

Respondent,

v.

MARCIAL RAMOS TENORIO,

Appellant.

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APPELLANT'S BRIEF  
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APPELLANT'S OPENING BRIEF

ALLEN, HANSEN, & MAYBROWN, P.S.  
Attorneys for Appellant

Richard Hansen  
600 University St.  
Suite 3020  
Seattle, WA 98101  
(206) 447-9681

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**I. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Assignments of Error**

1. The trial court erred in granting the State's motion *in limine* to preclude the defense from eliciting testimony that, the Friday before the accusation was made against the Defendant, he reported his ex-wife to the police for abusing his son Steven and she became angry and vowed to make him "pay for this," and stated she would "hurt [him] in a way that . . . you won't be able to recover."

2. The trial court erred in excluding testimony from the Defendant's daughter, Ruby, that she was present the following Sunday when her mother was questioning Juliana about whether she had been molested, and that Juliana's mother used highly leading questions and told Juliana that her father was a child molester.

3. The trial court erred in refusing to dismiss Count III for the failure of the State to make a *prima facie* case of child molestation in the first degree.

**B. Issues Pertaining to Assignment of Error**

1. Whether the confrontation clause permits a defendant to elicit testimony showing that a child hearsay witness who testified against

him has a motive to fabricate out of anger or revenge. (Assignment of Error 1.)

2. Whether evidence of motive to fabricate in order to seek revenge is relevant where the vengeful witness is influencing the testimony of others. (Assignment of Error 1.)

3. Whether evidence of motive to seek revenge is relevant to a witness who testifies against the defendant, and also orchestrates the testimony of other witnesses by utilizing highly leading, coercive and suggestive interview techniques. (Assignment of Error 1.)

4. Whether evidence that a mother tried to convince her daughter that the daughter's father is a child molester in the course of questioning her daughter is relevant to the credibility of the accusation, especially where the daughter repeatedly denied that her father had ever molested her. (Assignment of Error 2.)

5. Whether the child who was told her father is a child molester needs to independently recall her mother making that statement in the course of coercive and suggestive questioning, where another child witnessed the questioning and clearly remembers the mother making that statement directly to both daughters in the course of questioning. (Assignment of Error 2.)

6. Whether vague and ambiguous testimony that, in the course of a normal visitation, a daughter received a hug from her father while both of them were clothed in pajamas and claims she felt something hard through her clothing against the back of her leg for a few seconds is sufficient to raise a jury question regarding the sexual gratification element of child molestation. (Assignment of Error 3.)

7. Whether, in assessing the sufficiency of the evidence, a court should consider the highly suggestive, coercive and repeated questioning of a young girl by adults even after the girl repeatedly denied she had ever been improperly touched. (Assignment of Error 3.)

8. Whether, in a case where the trial court dismissed one count for insufficient evidence and the jury acquitted the defendant of two of three remaining counts, the appellate court should dismiss the remaining count rather than remanding for a new trial where compelling evidence would be admitted to establish that the charge was unfounded.

## **II. PROCEDURAL BACKGROUND**

The State originally charged the Defendant with three counts of Child Molestation in the First and Second Degree (CP 1-2), but the Information was amended on October 16, 2009. CP 3-4. A Second Amended Information was filed July 23, 2010, which charged two counts of Child Molestation in the First Degree against Steven (Counts I-II), one

count of Child Molestation in the First Degree against Juliana (Count III), and one count of Child Molestation in the Second Degree against Ruby (Count IV). The Defendant was released on his personal recognizance. CP 5.

The trial began with a child hearsay hearing regarding one of the victims, the Defendant's daughter Juliana, who was 8 years old at the time of the hearing. RP (7/14/10) 3-107. Juliana had originally been questioned by her mother, Gabriella Cuevas, then by her Aunt Sylvia Cuevas, both of whom used extremely leading questions, repeatedly asking if her father had ever touched her inappropriately. She consistently denied this had ever happened but, on the second day of questioning when her aunt Sylvia demonstrated what an erect penis looked like by utilizing a wooden spoon that she put in her pants, allegedly whispered "yes" in her mother's ear. In subsequent statements, Juliana stated that her father had rubbed up against the back of her thigh one night a year earlier when they had been sleeping in bed. RP (7/14/10) at 4-64.

Juliana was then interviewed at school by a counselor, Ann Eilers, and stated that "in the middle of the night she felt her father touch her between the legs . . . and she felt like a wooden spoon handle was in her back." *Id.* at 60-61. At this point, the counselor terminated the interview and reported the incident to CPS.

A police interview resource specialist by the name of Nichole Flacco then interviewed Juliana on October 8, 2009. *Id.* at 66-68. Juliana told her that “she was in her bed, that her dad touched her private with something that was hard that described as being sticklike.” *Id.* at 71.

After reviewing the factors from *State v. Ryan*, the court ruled that Juliana’s statements were admissible under the child hearsay statute. *Id.* at 102. The case then proceeded to trial with the use of an interpreter for the Defendant. RP (7/22/10) at 3-4.

The State filed a motion *in limine* to prohibit the defense from bringing out “the incident regarding the police being called by Mr. Tenorio on September 25, 2009, wherein it is alleged that Ms. Cuevas, who’s the mother of one of the victims, made a threat toward the defendant.” RP (7/26/10) at 4-5. The defense made the following offer of proof about

an incident that occurred the Friday night before all of these accusations were first made. Mr. Tenorio picked up his children from Gabriella Cuevas’ home on this Friday night. When they returned on Sunday night, that’s when Ms. Cuevas was asking Juliana, the youngest child, whether anything had ever happened to her . . . . Then the next morning, the Monday morning is when Aunt Sylvia starts questioning them. Then it comes to light that Juliana and Steven had been touched.

*Id.* at 7. The defense argued “this is relevant because this is something, this is a chain of events that led up to these disclosures.” *Id.* The defense

also made an offer of proof that the mother threatened the Defendant after he reported her to the police, stating “you will pay for this. I will hurt you in a way that . . . you won’t be able to recover.” *Id.* at 8.

However, the judge granted the motion *in limine*, reasoning that the defense had failed to “connect the dots” between the mom’s anger and any fabrication. *Id.* at 12-13. CP 36-38.

The next day, the Defendant was arraigned on the Second Amended Information and the trial began. RP (7/27/10) at 24-25; CP 25-27. The State rested on Wednesday, July 28, 2010 and the defense moved to dismiss all charges for lack of sufficient evidence. RP (7/28/10) at 208-210. The judge granted the motion as to Count IV for lack of “any facts whatsoever, in dicta [sic: indicia] or facts whatsoever to allow it to go to the jury on sexual gratification” for alleged victim Ruby. *Id.* at 216. Specifically, the judge ruled there “has to be something more than just, I felt his penis on the back of my leg for whatever period of time it was, however brief it was. . . . So I would grant the motion to dismiss IV.” *Id.* at 219.

The defense then presented its case, including testimony by the Defendant. *Id.* at 225-240. There was no rebuttal from the State after the defense rested. *Id.* at 248-49. There were no exceptions or objections from either party to the proposed jury instructions. *Id.* at 241, 250-51.

The jury was instructed and closing arguments presented on Thursday, July 29, 2010. RP (7/29/10) at 258-309.

The jury found the Defendant not guilty on Counts I and II, but convicted him on Count III. CP 90-92. As already noted, the trial judge had dismissed Count IV for insufficient evidence. RP (7/28/20) at 219.

The standard range for the single count of child molestation in the first degree was 51-68 months to life. RP (9/1/10) at 5. The State argued for a sentence of 68 months to life, the high end of the range. *Id.* at 5-6. There were also pending deportation proceedings against the Defendant. *Id.* at 6.

The Defendant had collected “68 letters from people who are in support of him.” *Id.* at 4. Ruby, one of the Defendant’s daughters, spoke to the court at sentencing and told her father “I love you a lot” and that she was heartbroken he would not “be there to watch me graduate” from high school. *Id.* at 8. Molly Polido addressed the court, insisting “this man is innocent.” *Id.* at 18-19. The Defendant also asserted that he was “innocent . . . I never think to do something bad to my kids . . . I love very much my kids, like any dad.” *Id.* at 22.

The court imposed a sentence of 51 months, the low end of the sentencing range. *Id.* at 29. A Notice of Appeal and Order Authorizing Appeal *In Forma Pauperis* were then filed. *Id.* at 31, 33; CP 111, 109-

110. The State has cross appealed the trial court's dismissal of Count IV. CP 112-127.

### III. FACTUAL BACKGROUND

The Defendant, Marcial Ramos Tenorio, was charged with two counts of Child Molestation in the First Degree and two counts of Child Molestation in the Second Degree. The alleged victims were all three of the Defendant's children, his son Steven (Counts I and II), his daughter Juliana (Count III) and his daughter Ruby (Count IV).

The State's first witness was the Defendant's ex-wife, Gabriella Cuevas, who had been married to him for ten years though, at the time of her testimony, they had been divorced for over five years. RP (7/27/10) at 27-28. The family was under a lot of stress because their house had just burned down and they were living in "temporary housing." She explained that it "just had been such a stressful year for us. . . . I'm really stressed out. Steven is just angry all the time. He's just acting out." *Id.* at 34-35. She testified that the Defendant would have visitation with their three children every other weekend "or whenever he just wanted to see them when he had the time to see them." *Id.* at 28.

She claimed that, when Juliana came back from her last visit she "looked a little different. She was a little more quieter." *Id.* at 30. Ms. Cuevas testified that she had "just an intuition, just a feeling, just the way

she was quiet and really didn't say much, the way she kind of looked down." *Id.* at 30.

Because of her supposed "intuition," Ms. Cuevas called Juliana to her room

and I reached over in the bed and I told her to get on the side. And I rubbed her arm. And I looked at her. And I said, Juliana, are you okay? Is there anything bothering you? Is there anything I should know about? I just had – I don't know – a feeling. *She kept saying no* but her eyes were like really big and just watery. I could tell she wasn't telling me everything. So then I hollered for Ruby.

*Id.* at 31 (emphasis added). That night, Ms. Cuevas kept

asking her if she was okay, and I was holding her, and if anything had happened or if her dad had been doing anything to her or been inappropriate or anything. She kept saying, no, no, no, and her eyes were tearing and she was looking down.

*Id.* at 40. She again asked "if her father had been inappropriate with her" because, as Gabriella explained, "I just know that she wasn't right." *Id.* at 41. She did not "remember the exact words" that she used. *Id.* at 43. However, she did specifically ask her daughter "that night if her dad had ever touched her in her private area." *Id.* at 44. With Juliana's sister Ruby sitting on the bed with their mother, she continued questioning Juliana further and then finally sent them both off to bed. *Id.* at 33.

The next day, Monday, Gabriella Cuevas' sister Sylvia came over to help with some cooking, "when the kids came home from school, and it

all just broke loose.” *Id.* at 35. According to Sylvia, Gabriella asked her to talk to her children because she had assumed “something is wrong with the kids.” *Id.* at 68.

The next day when her sister arrived, Sylvia told “the kids about a child molester case involving a pastor or priest” while she was questioning Juliana. *Id.* at 45-46. Sylvia then called her own daughter over to join the conversation and asked her to “show the kids what’s a good touch and a bad touch,” and Sylvia’s daughter demonstrated good and bad touches. *Id.* at 47. According to Gabriella, Sylvia “was trying to tell about . . . this pastor who carried a brush in his back pocket . . . and she said this pastor bounced the kids on his lap.” *Id.* at 47-48. Sylvia explained to Juliana and the other children that the pastor would get an erection and, when his victims noticed it, he would claim “it’s just a brush. Then he’d pull out this brush and show them.” *Id.* According to Gabriella, Sylvia went into great detail about the brush and then told Juliana and the others that “if you guys ever feel anything like that, that brush or anything like that, that’s not okay. It’s called a male organ.” *Id.* at 48.

Sylvia Cuevas described her conversation with all three children similarly. She testified that she came over that Monday because Sylvia and her children had “just got through a house fire, and they were trying to find a place to live, in and out of a hotel, trying to situate living out of

boxes and stuff. So I would come over. I would help her cook, cleaning, pick up.” *Id.* at 58. She recalled Gabriella’s son Steven making a comment “that he couldn’t sleep” because sometimes when he was at his father’s house “the bed shakes.” *Id.* at 60. When Sylvia heard this she immediately assumed that “something inappropriate was happening.” *Id.* at 61. She described these statements as “red flags.” *Id.* at 62. In response to this, she

took a wooden spoon . . . and I made, in the conversation and stuff I said, a man’s organ, if he ever touches your body, you’re going to feel uncomfortable. You’re going to kick. You’re going to respond that way. You need to tell somebody.

*Id.* at 63-64. She asked Juliana “why do you kick and shake and freak out?” and Juliana answered “I don’t know,” but Sylvia continued questioning her and learned that she slept in the middle of the bed between Steven and her father. *Id.* at 64. At this point:

And I said, well, if you ever feel something like this, and I took the spoon, and I was wearing loose sweats. I said, if you ever feel something like this on your body, it’s a man’s organ that’s acting inappropriately. You need to let someone know if it makes you feel uncomfortable and I left it at that.

RP 64-65. According to Sylvia, when Juliana heard her say this “she freaked out,” and Sylvia informed her sister, Gabriella, who said “yes,

something inappropriate is going on.” *Id.* at 65. Both of them then questioned Juliana further about inappropriate touching. *Id.* at 66.

Sylvia then went into great detail about the priest who used “a hair brush in his private area, and then put it up against – he would do the little horsey thing, and it wasn’t a hair brush. It was a man’s organ, and these girls were confused. They didn’t know until they actually saw the hair brush.” *Id.* at 66.

Sylvia admitted that she initiated the conversation with the kids “about a man’s organ” without anyone bringing up allegations of sexual misconduct. It was her idea to utilize a wooden spoon to demonstrate what “a man’s organ” looks like, and she actually pressed the spoon up against Juliana, “around her hip area.” *Id.* at 73.

After all of this questioning and demonstrating Juliana whispered in her mother Sylvia’s ear the word “yes” in response to leading questions about whether she had been touched. *Id.* at 75. Sylvia explained “I can’t recall the exact wording, but she did say yes.” *Id.*

At this point, Juliana began crying and Sylvia “had to sit her down. . . . I can’t believe it. And I fed them broth. We – I prayed with her. I said, well, you know what, they’re safe now.” *Id.* at 67. Then both Gabriella and Sylvia got on the phone and called the school counselor to report that Juliana had been sexually abused by their father. *Id.* at 67-68.

After Juliana allegedly made the disclosure she was in tears and Gabriella “was shocked, out of breath. I had to have her sit down -- cried.” *Id.* at 69.

Ann Eilers testified that she is a counselor at Juliana’s school and she “got a call from her aunt and mom and they alerted me that something inappropriate had happened during the weekend when they had visited their father.” *Id.* at 150. Sylvia and Gabriella told Ms. Eilers during this conversation that “Juliana had reported to their aunt, Aunt Sylvia, that some inappropriate behavior happened in the bed that they shared during the weekend.” *Id.* at 151.

When Ms. Eilers questioned Juliana about this she explained that her dad had brushed up against her and “it felt like a wooden spoon handle against her. . . . She said her dad was moving a lot, and it felt like a wooden spoon handle against her.” *Id.* at 153. As soon as she heard this, Ms. Eilers “stopped” because she “felt I had information to then report inappropriate behavior.” *Id.* at 152-53.

Detective Ben Hagglund arranged to have Juliana interviewed after he received a CPS referral on October 2, 2009. *Id.* at 77. The interviewer, Nichole, brought a service dog with her to the interview. *Id.* at 80. The detective then arrested and interviewed the Defendant, and executed a search warrant at his trailer to take photographs. *Id.* at 82-83. The

photographs showed that the trailer had two bedrooms but only one was used for sleeping because the other one was “full of miscellaneous items.” *Id.* at 90.

The trial judge also granted a prosecution motion *in limine* to prohibit questioning another daughter, Ruby, about the fact “that her mom had told Juliana that her dad is a child molester . . . the night before Juliana told her aunt that she felt this wooden spoon.” *Id.* at 98-99. The defense strenuously argued that the fact

these statements were actually made . . . is all completely relevant. This goes to an eight year old girl – statements that she made the next morning to her aunt when she was told that she couldn’t be protected from her father and was shown a wooden penis or whatever. How is this not relevant?

*Id.* at 101-102. The judge reasoned that “as far as asking Ruby whether she heard mom’s statements to Juliana, that’s hearsay.” *Id.* at 102. The defense took exception to this ruling. *Id.*

The jury was brought out and Ruby, who was 17 years old and in the twelfth grade, was then called by the State. *Id.* at 103. She testified that, when visiting her father,

sometimes we’d all sleep together, my dad, my sister, and my brother, and me. Sometimes my dad would sleep on the floor with my brother. Sometimes he’d sleep on the floor with my sister, but the other two would sleep on the bed.

*Id.* at 106. When asked what she was there “to talk about,” she answered “what happened in middle school.” *Id.* at 107. She testified:

I was in the room with my brother, and he was playing video games. I was lying on the bed, and he was sitting on the floor. My dad came out of the – he was in the shower, and then he came out with his pajamas. I was lying on the bed on my side, and he came and laid down and gave me a hug. And then I felt his area right there on my leg, so I felt uncomfortable. So I went and sat on the floor with my brother.

*Id.* at 107-108. After repeated questioning about what she felt, she answered “his area, like his man area . . . like his penis.” *Id.* at 108. She felt it against “the back of my leg,” and stated that it felt “like hardish.”

*Id.* at 109. She could not remember whether it was light or dark out because it happened so long ago. *Id.*

She mentioned this to both her brother and her mom, and her mother became “upset, and then I had to talk to counselors at school.” *Id.* at 109. After that “it was fine. I talked about it with my dad, and it was fine.” *Id.* at 110.

On cross-examination, she clarified that her dad had hugged her from behind and that she thought she felt his penis on “the back of my leg.” *Id.* at 111-112. She denied that it was on her rear “or anything like that,” and she denied that he “moved it around or anything like that.” *Id.* at 112. He did not say anything or do anything with his hands, and

nothing else happened. *Id.* She clarified that “this was a long time ago.” *Id.* at 113. However, she was not allowed to testify that she had witnessed Juliana’s mother, Gabriella, telling Juliana that her father was a child molester due to the judge’s granting of the State’s Motion in Limine discussed above.

Steven was called by the State and testified in support of Counts I and II. He was in the seventh grade and 13 years old at the time of his testimony. *Id.* at 120-21. He explained that, when he and Juliana were visiting their father, she would always sleep in the middle. *Id.* at 124. He claimed that his dad had touched him “in the wrong spot . . . like two, three years ago.” *Id.* at 126. When asked how many times this happened, he answered “just once.” *Id.* at 127. He and his sister were watching television with the defendant and Steven had his legs “crisscrossed” in front of him when his father “kind of like reached out and just touched me right there but on top. Then I told him not to, and then he didn’t.” *Id.* at 129. Steven was fully clothed and was touched on the outside of his pants, and he explained that it lasted approximately “ten seconds.” *Id.* at 130. His dad did not say anything and nothing happened after he moved away. He explained: “I just kept watching T.V.” and nothing else happened that day. *Id.* at 131.

He also testified that sometimes “the bed moved” when they were visiting their father. *Id.* at 135. “When he asked his dad . . . he would, well, that’s Ruby.” *Id.* at 136. In her testimony, Juliana described herself as “a crazy sleeper, and I kick the covers off. Everybody got upset.” *Id.* at 187.

When Juliana testified she was nine years old and in the fourth grade. RP (7/28/10) at 168. She had difficulty remembering basics such as how long her parents had been divorced, how often she would visit her father, or whether she had a regular visiting schedule. *Id.* at 170-71. She could not remember where her dad lived. *Id.* at 171. Even when shown numerous pictures of her dad’s trailer and bedroom she could not identify the bed or recognize anything from any of the pictures of the trailer other than a “Dalmatian blanket” that was hanging over a window. *Id.* at 172.

She testified that she was in court because her dad “touches the spots he’s not supposed to.” *Id.* at 175. She claimed this happened while she was “sleeping.” *Id.* at 176. When asked what it felt like, she answered “a wooden spoon.” *Id.*

In her direct examination she explained that she was touched “on the side of me, my leg.” When pressed with further questions about “where on your leg?” she answered “I don’t know, like upper leg.” *Id.* at 177. She claimed she “was lying flat on my back . . . I always lay flat on

my back.” *Id.* She explained that her dad was “hugging me.” *Id.* She claimed that the wooden spoon would “move up and down” but did not know how long “because I ended up falling asleep.” *Id.* at 178.

She could not remember talking to her mother about this the night she came home after her last visit. She did remember “I was sitting on her bed, and she was asking me questions” about “my dad.” *Id.* at 181. Her mother persistently asked her “if my dad had ever touched me,” but she could not remember if she answered that question. *Id.* at 182. She confirmed that her mother asked her very leading questions the night she came home from her dad’s. Her mother was asking “if your dad touched you in your private parts,” but she never agreed that he did. She verified that the movement was “on the side of your leg,” and that her father always wore pajamas or boxers to bed. *Id.* at 188-89.

However, she did remember Sylvia pulling out “a wooden spoon . . . She told me to feel it, and then she asked me if it felt like that,” and Juliana then answered “yes.” *Id.* at 183. She had no idea “what a man’s body part felt like” before the demonstration with the spoon. *Id.* at 184. She also remembered her Aunt Sylvia questioning whether “he had ever touched me.” *Id.* She explained: “I answered her, but it took me awhile to tell her.” *Id.* at 183. Her Aunt Sylvia kept asking her questions but Juliana could not recall “what she said.” Her aunt and mother and her

sister Ruby were present throughout the conversation, and it took her awhile to answer her Aunt Sylvia when she kept asking about the wooden spoon. *Id.* at 186. She had no idea what a man's organ was like until her Aunt Sylvia demonstrated with the "wooden spoon." *Id.* at 190-91.

As already noted, Juliana described herself as "a crazy sleeper, and I kick the covers off. Everybody got upset." *Id.* at 187. She had no recollection of talking to the school counselor, Ann Eilers. *Id.* at 184.

Nichole Flacco, a specialist trained to interview children for the police and prosecution, testified that it was important not to use suggestive or leading questions. *Id.* at 195. On cross-examination, she verified that she would never start out an interview by explaining to a child about a man's private parts." *Id.* at 205.

When she interviewed Juliana on October 8, 2009, with her service dog Arria, she asked Juliana if she knew why she was there and she answered "it's because my dad, he touched me." *Id.* at 199. According to Ms. Flacco: "She also mentioned something about getting hot or crazy and wanted the blankets off, and her dad got mad and wanted the blankets back on top of her, and also her dad getting mad at the brother, Steven because he wanted to sleep in between them, and he had pulled out a belt and made her brother move." *Id.* at 200. Juliana described the feeling as being "like a hard stick." *Id.* at 200-201. Importantly, when she was

specifically asked “whether she knew what was touching her?” she answered “no, she did not.” *Id.* at 202. She verified that it happened in the middle of the night. *Id.* at 202.

The State then rested and the defense moved to dismiss the charges “for their being no evidence that this was the intent of my client’s sexual gratification.” *Id.* at 208-210. In response, the court characterized the evidence as “skimpy,” and dismissed Count IV involving Ruby because of the absence of “any facts whatsoever, in dicta [sic: indicia] or facts whatsoever to allow it to go to the jury on sexual gratification.” *Id.* at 215-216. The judge explained:

Well, . . . there aren’t facts sufficient there to get by the *prima facie* case to support the sexual gratification element. It may have been inappropriate. It may have been accidental. . . . It could have been one or the other. It could have been a lot of different things. I don’t see anything that would allow the jury to deliberate upon the sexual gratification. It has to be something more than just, I felt his penis on the back of my leg for whatever period of time it was, however brief it was. . . . So I would grant the motion to dismiss Count IV.

*Id.* at 219.

The defense called the Defendant as its first witness and Marcial Tenorio testified he was 40 years old and explained that he had been living in the trailer in Sedro Wooley for “about five years.” *Id.* at 225. He had been working on the farm for seven years as a herdsman “in charge of the

health of the cows,” and helping with delivery of calves, feeding and artificial insemination. His three children were Ruby, Steven and Juliana. *Id.* at 226. The last time he saw them was during the visit on September 25, 2009 when he was accused of inappropriate touching. *Id.* at 227.

That weekend, he had picked the children up “a little bit late that Friday because I was late getting off work,” and took them back to their mother’s on Sunday after nine at night. That weekend only Steven and Juliana were visiting. *Id.* at 228.

He shared his trailer with his brother Abraham and the only bed is in his room, and it is a full size bed. *Id.* at 236. His brother would sleep in the living room on either the floor or the couch. *Id.* at 237. Marcial’s brother Abraham used the second bedroom for storage so it was not available for sleeping. *Id.* at 229.

When just two children were visiting they would all three sleep on the bed together. *Id.* at 229. During this last visit the kids “were fighting over the pillows” and “talking a lot,” so he “told them that if they kept arguing and kept talking I was going to get the belt and I was going to spank them, but I never did spank them or even get the belt.” *Id.* at 232. They fought awhile longer but eventually “just fell asleep and I fell asleep, and nothing else.” *Id.* at 233. There were only two pillows and he let each of his children have one and he slept without a pillow. *Id.*

He readily admitted that he would sometimes “hug” his children, explaining “I just kind of stretch out my arm, and they lay their head right here, either Juliana or Steven. They fell that I’m hugging them, and they go to sleep.” *Id.* at 233. But he adamantly denied that he had ever touched his children “in their private areas” beyond the years when they were infants and he was changing their diapers and would wipe them. *Id.* at 233-34. He never touched them sexually and never touched them with his own “private areas.” *Id.* at 234. He denied that he had ever gotten into bed “with an erection.” *Id.* at 240. He explained “I love them with all my heart. Before anybody, it’s my children.” *Id.* at 234.

The defense called an investigator, Brandi Bowers, who testified that, during the defense interview, Juliana consistently described the touching “as feeling like a wooden spoon” and equated this with “her dad’s organ. She called it a man’s organ.” *Id.* at 245. The defense rested and there was no rebuttal from the State. *Id.* at 248-49.

#### **IV. CLOSING ARGUMENT: THE WOODEN SPOON THEME**

During closing argument, the prosecutor argued that the Defendant was “*spooning* her in bed he has an erection, and he’s rubbing up and down against her.” *Id.* at 260-61 (emphasis added). The prosecutor conceded in closing argument that Juliana denied her father had done anything sexually inappropriate with her when questioned by her mother

Gabriella Sunday night, but “the next day Aunt Sylvia comes over . . . Gabriella says something is going on with the kids. Could you talk to them for me.” *Id.* at 261-62. According to the prosecutor:

Aunt Sylvia takes the spoon that she’s cooking with and sticks it under her shirt and says, this is what a man’s organ feels like. It gets hard like this. If you feel that, it is not okay, and you need to tell somebody. And . . . it’s like things are clicking in Juliana’s mind. This eight year old child.

*Id.* at 263. Steven then told Aunt Sylvia in front of his sister Juliana that he had “been touched” but he “kept inside for two years before he said anything.” *Id.* at 264. It is only then that Juliana claimed she was “spooned.”

## V. DISCUSSION

### A. The Trial Judge Erred in Precluding Testimony that, After the Defendant Reported His Ex-Wife to the Police When He Picked Up His Children on Friday, She Stated “You Will Pay for This,” and Threatened to “Hurt” Him in a “Big Way.”

In its ninth motion *in limine*, the State specifically argued against any “reference by any witness to an incident occurring on September 25, 2009, between Gabriella Cuevas, E.A.T. [Steven] and the Defendant, wherein Officer Paul Budrow of SPD responded, or any alleged ‘threat’ by Gabriella Cuevas to the Defendant surrounding this event.” CP 38. In that same motion, the State moved to preclude the testimony of the

Defendant's brother, Abraham Tenorio, that the Defendant had told him about the threat and his concerns. *Id.* The judge granted the motion reasoning that the defense failed to "connect the dots" by providing direct evidence that the mother convinced Juliana to make a false accusation against her father. RP (7/26/10) at 12-13.

In this case, there was abundant evidence that Juliana's mother, Gabriella and her sister Sylvia repeatedly questioned Juliana and suggested to her that she had been molested by her father Marcial, despite her repeated denials. Juliana finally relented only after a full day of suggestive questioning when she was surrounded by Sylvia, Gabriella, her brother and sister and Sylvia's daughter and subjected to a demonstration with a wooden spoon where Sylvia placed it in her pants and rubbed it up against Juliana, finally prompting her to whisper the single word "yes" in her mother's ear. This is the most coercive form of questioning imaginable and, even according to the State's expert child interviewer, it was extremely inappropriate and suggestive.

Moreover, the trial court failed to consider the fact that Gabriella herself was a critical child hearsay witness regarding statements allegedly made by Juliana to her. Accordingly, Gabriella's credibility was directly at issue in addition to the effect of her repeatedly coaching Juliana to accuse her father of improper touching. The trial judge's reasoning, that

the defense had failed to “connect the dots,” certainly does not apply to Gabriella’s testimony since her testimony about Juliana’s hearsay statements were the strongest evidence against the Defendant. RP (7/26/10) at 12-13.

In fact, her testimony was especially damning because she was allowed to describe her “feeling” and her “intuition” that something bad had happened to Juliana that weekend when she was visiting her father. RP (7/27/10) at 30-31. She was allowed to testify that Juliana “kept saying no but her eyes were like really big and just watery. I could tell she wasn’t telling me everything.” *Id.* at 31. She kept asking Juliana “if anything had happened or if her dad had been doing anything to her or been inappropriate or anything. She kept saying, no, no, no, no, and her eyes were tearing and she was looking down.” *Id.* at 40. She was allowed to state “I just know that she wasn’t right.” *Id.* at 41. Obviously, her credibility was directly at issue and her threat to get even with her ex-husband just two days earlier was critical evidence that the jury was entitled to hear.

Accordingly, it was reversible error for the court to exclude Gabriella’s threat to Marcial two days before the questioning began. Just the Friday before, after Marcial had reported Gabriella to the police for abusing their son Steven, she told him “you will pay for this. I will hurt

you in a way that . . . you won't be able to recover." RP (7/26/10) at 8. As the defense argued, "this is relevant because this is something, this is a chain of events that led up to these disclosures." *Id.* at 7.

Long ago, in *Davis v. Alaska*, 415 U.S. 308, 315 (1974), the Supreme Court emphasized that "cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." In *Davis* the Supreme Court held it was reversible error to prevent defense counsel from bringing out the fact that a prosecution witness was on probation to juvenile court, even though juvenile records were confidential under Alaska law. 415 U.S. at 316. The Court reasoned that the "cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit the witness." *Id.*

Given the way the children in this case were interrogated as a group with suggestive questioning over the course of two days, it is particularly notable that, in *Coy v. Iowa*, 487 U.S. 1012 (1988), Justice Scalia observed that

face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, *or reveal the child coached by a malevolent adult*. It is a truism that constitutional protections have costs.

487 U.S. at 1020 (emphasis added). *Accord: Olden v. Kentucky*, 488 U.S. 227 (1988) (prosecution for rape reversed).

Washington cases are in agreement. In *State v. Roberts*, 25 Wn.App. 830, 834 (1980), the court reasoned “that witnesses’ credibility or motive must be subject to close scrutiny,” especially “where a case stands or falls on the jury’s belief or disbelief of essentially one witness.” In *Roberts*, the defendant’s convictions for rape and kidnapping were reversed because the trial court precluded defense counsel from cross-examining the complainant about the fact that her parents disciplined her for missing an interview at the prosecutor’s office. The court emphasized that “the denial of a criminal defendant’s right to adequately cross-examine an essential state witness as to relevant matters tending to establish bias or motive will violate the Sixth Amendment’s right of confrontation . . . .” *Id.* at 835 (emphasis in original), citing *Davis v. Alaska, supra*. *Accord: State v. Smith*, 130 Wn.2d 215, 922 P.2d 811 (1996).<sup>1</sup>

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<sup>1</sup> Similarly, federal courts have “repeatedly held that when the Government’s case turns on the credibility of a witness, then `defense counsel . . . must be given a maximum opportunity to test the credibility of the witness.”” *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980) (upholding grant of habeas corpus on the grounds that defendant’s right of confrontation had been denied by limitations on cross-examination). *See also, United States v. Willis*, 647 F.2d 54 (9th Cir. 1981) (reversing conviction for failure to allow cross-examination of government investigator who had “sexual relations with [the defendant’s former girlfriend] and had supplied her with a small number of Seconal pills”); *United States v. Stanfield*, 521 F.2d 1122, 1128 (9th Cir. 1975) (noting that “[w]ide latitude should ordinarily be afforded where there exists a serious issue of the credibility of the witness”); *United States v.*

As the Supreme Court made abundantly clear in *Coy v. Iowa*, *supra*, such restrictions on cross-examination and the right to confrontation are reversible error because they can “reveal the child coached by malevolent adult.” 487 U.S. at 1020. That holding could not be more on point, given the facts of this case. And our Court’s holding in *State v. Roberts*, *supra*, is equally applicable where our Court reversed convictions for both rape and kidnapping where the trial court precluded the far more questionable cross-examination about the fact that the victim’s parents disciplined her for missing an interview at the prosecutor’s office.

**B. The Trial Judge Erred in Excluding Testimony from Ruby that Her Mother Told Juliana Her Father Was a Child Molester Even Though Juliana Denied He Had Molested Her.**

Similarly, it was error for the trial judge to preclude the defense from questioning Ruby about the fact “that her mom had told Juliana that her dad is a child molester . . . the night before Juliana told her aunt that she felt this wooden spoon.” RP (7/27/10) at 98-99. The prosecutor seemed to concede that this testimony would be relevant for the purpose of

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*Bleckner*, 601 F.2d 382 (9th Cir. 1979) (reversing conviction for unduly limiting cross-examination regarding witness’ bias); *United States v. Dees*, 34 F.3d 838, 844 (9th Cir. 1994) (holding it was error to prevent cross-examination of witness regarding financial incentive to obtain conviction, where witness had sold movie rights whose value may have been tied to success or failure of the criminal prosecution).

showing “the effect on Juliana,” but only if Juliana admitted that she heard the statement Ruby claims she made in Juliana’s presence. *Id.* at 100.

The defense argued that this testimony was highly relevant because it “goes to an eight year old – statements that she made the next morning to her aunt when she was told that she couldn’t be protected from her father and was shown a wooden penis or whatever. How is this not relevant? This is exactly part of the child hearsay.” *Id.* at 101-102.

The court granted the motion *in limine*, ruling that “because mom made the statements doesn’t mean that Juliana heard the statements . . . There has got to be connective tissue there, and the connective tissue is Juliana heard the statements . . . but as far as asking Ruby whether she heard mom’s statements to Juliana, that’s hearsay.” *Id.* at 102.

With all due respect, the judge’s ruling is clearly erroneous and a basis for reversal of Count III, involving Juliana. The transcript of Juliana’s testimony makes clear that she repeatedly denied to her mother on Sunday night that her father had ever touched her inappropriately despite highly leading, coercive and suggestive questioning from Gabriella. The mother apparently told Juliana that her father was a child molester on Sunday night, when Juliana and her sister Ruby were in her bedroom sitting on the bed, but Juliana’s testimony makes clear that she remembers very little of what was said during that conversation, or even

the conversation with her Aunt Sylvia the next day, other than the wooden spoon which she distinctly recalled. *See* Summary of Juliana's testimony at pp. 15-17, *supra*.

The next night, all of the children were gathered together with Sylvia's daughter and told stories about a pastor who was a child molester, then used a wooden spoon to mimic a man's organ.

The defense was clearly offering the testimony of Ruby, not for the truth of the matter asserted but to establish the effect that it had on Juliana by influencing her to finally believe, a day later, that her father was a child molester. As such, it is clearly not hearsay and should have been admitted. *See, e.g., State v. Williams*, 85 Wn.App. 271, 932 P.2d 665 (1997); *State v. Alvarez*, 45 Wn.App. 407, 726 P.2d 43 (1986).

Such testimony is particularly important in a case such as this where a young and impressionable witness has been influenced by highly suggestive and coercive questioning. Juliana initially denied her father had done anything wrong and, whether she remembers her mother's statement about her dad being a child molester or not, the fact that Ruby witnessed her mother making this statement to Juliana is highly relevant to show the improper influence that her mother was exerting on Juliana to make her believe she had been molested.

C. **Harmless Error.**

This case was exceedingly weak from the outset, as evidenced by the fact that the judge dismissed Count IV for insufficient evidence and the jury acquitted the Defendant of Counts I and II, convicting him on only one of the four counts.

In *State v. Johnson*, 90 Wn.App. 54, 950 P.2d 981 (1998), our court again recognized the constitutional dimensions of the right to cross-examination:

A defendant's right to impeach a prosecution witness with evidence of bias or prior inconsistent statement is guaranteed by the constitutional right to confront witnesses. *Davis v. Alaska*, 415 U.S. 308, 316-18 (1974); *State v. Dickenson*, 48 Wn.App. 457, 469, 740 P.2d 312 (1987). Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *Davis*, 415 U.S. at 318; *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980); *Dickenson*, 48 Wn.App. at 470.

*Id.*, at 69. *Accord: State v. Smits*, 58 Wn.App. 333, 338, 792 P.2d 565 (1990) ("preclusion of any inquiry into possible suit or financial interest was error," conviction reversed); *State v. Whyde*, 30 Wn.App. 162, 167, 632 P.2d 913 (1981) (extending *Smits* to even potential litigation, rape case conviction reversed). In *Whyde*, the Court reasoned:

Bias and interest are relevant to the credibility of a witness. This is of special significance here because the entire State's case depended on the credibility of one witness . . .

\* \* \*

The question of a possible lawsuit related directly to the bias, prejudice and interest of S [the complainant]; the trial court's ruling prevented the defense from making a factual record on which to base its contention that S. fabricated the rape story for her own financial benefit, and was erroneous. It was also error to exclude this issue from S's cross-examination. To call these errors harmless would inevitably presume the truth of S's testimony and thereby beg the question.

*Id.*, at 166-67 (citations omitted).

As our Court stated in *State v. Whyde, supra*, where it reversed a rape conviction based on the exclusion of cross-examination about "potential" litigation: "To call these errors harmless would inevitably presume the truth of S's testimony and thereby beg the question." 30 Wn.App. at 167.

**D. Count III Should Have Been Dismissed for Insufficient Evidence**

At the conclusion of the State's case, the defense moved to dismiss all charges for lack of sufficient evidence that any touching was done for the purpose of the Defendant's "sexual gratification." RP (7/28/10) at 208-210. The court granted this motion as to Count IV only, involving Ruby, because of the absence of "any facts whatsoever, in dicta or facts

whatsoever to allow it to go to the jury on sexual gratification.” *Id.* at 215-216. The judge reasoned that the touching she described could easily have been “accidental” and found no evidence “that would allow the jury to deliberate upon the sexual gratification. It has to be something more than just, I felt his penis on the back of my leg for whatever period of time it was, however brief it was. . . . So I would grant the motion to dismiss Count IV.” *Id.* at 219.

However, the same can be said with regard to Count III, the only count that resulted in conviction. Juliana testified that she was asleep during the single time this occurred. *Id.* at 176. During her direct examination she explained that she was touched “on the side of me, my leg,” and when pressed further with questions about where the touching occurred she answered “I don’t know, like upper leg.” *Id.* at 177. She described the feeling as a “wooden spoon” and explained that her dad was “hugging me” as she was lying “flat on my back.” *Id.* She repeatedly confirmed that the touching was on “the side” of her “leg” and that her dad was wearing pajamas. *Id.* at 188-89. She had no idea what “a man’s body part felt like” until her Aunt Sylvia demonstrated this with a spoon the next Monday. *Id.* at 184, 190-191.

Even the child hearsay witness, Ms. Flacco, testified that when Juliana was specifically asked “whether she knew what was touching her?” she answered “no, she did not.” *Id.* at 202.

In *State v. Powell*, 62 Wn.App. 914, 816 P.2d 86 (1992), the Court of Appeals reversed a conviction for first degree child molestation and dismissed the charge for insufficient evidence on facts very similar to those presented here. In that case, the complainant reported that, while seated on the lap of her “Uncle Harry,” he

hugged her around the chest. As he assisted her off his lap he placed his hand on her “front” and bottom on her underpants under her skirt. On another occasion, while Windy was alone with Uncle Harry in his truck waiting for her cousin, he touched both her thighs.

*Id.* at 916. In considering the definition of “sexual contact,” and specifically whether this contact was “done for the purpose of gratifying sexual desire of either party,” the Court set forth several principles, as follows:

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was done for the purpose of sexual gratification. *State v. Wilson*, 56 Wn.App. 63, 68, 782 P.2d 224 (1989), *rev. denied*, 114 Wn.2d 1010 (1990); *State v. Ramirez*, 46 Wn.App. 223, 730 P.2d 98 (1986). However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification. *E.g.*, *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850

(1990) (“The defendant then rubbed the zipper area of the boy’s pants for five to ten minutes.”); *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence and unrelated male with no caretaking function wiped a 5-year-old girl’s genitals with a washcloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him); *State v. Wilson*, *supra* (both incidents occurred where they would not be easily observed, and defendant was only partially clothed; victim of second incident was disrobed); *State v. Brown*, 55 Wn.App. 738, 780 P.2d 880 (1989) (multiple incidents including one in which defendant had victim operate a “penis enlarge”), *rev. denied*, 114 Wn.2d 1014, 791 P.2d 897 (1990); *State v. Brooks*, 45 Wn.App. 824, 727 P.2d 988 (1986) (whitish liquid found on infant’s face, chest, and stomach; stain on infant’s rubber booties identified as semen); *In re Adams*, 24 Wn.App. 517, 601 P.2d 995 (1979) (defendant removed victim’s pants and was on top of her when discovered).

*Id.* at 916-917.

In the case before it, the Court held that “the evidence is insufficient to support an inference Mr. Powell touched Windy for the purposes of sexual gratification. No rational trier of fact could find this essential element beyond a reasonable doubt. Thus we reverse and dismiss.” *Id.* at 918.

In this case, Juliana initially denied that anything inappropriate had happened with her father despite her mother’s highly suggestive questioning. It was only after she was told her father was a child molester, and told the story about a pastor who molested children, and only after her aunt engaged in a bizarre demonstration with a wooden spoon that Juliana

whispered the word “yes” in her mother’s ear. In court, Juliana testified she was asleep, and both she and her father were clothed when she allegedly felt something hard against her thigh or the back of her leg. It was a fleeting contact and nothing else was said or done.

Based on this sparse evidence, and particularly the highly suggestive and coercive way that Juliana was questioned, this Court should follow the lead of *State v. Powell, supra*, reverse and dismiss the remaining charge, Count III.

## **VI. CONCLUSION**

As Justice Scalia noted in *Coy v. Iowa, supra*, the confrontation clause requires that a jury hear all evidence that tends to undercut the credibility of an accusation, especially where there has been evidence that “the child [was] coached by a malevolent adult,” as clearly occurred in this case. 487 U.S. at 1020.

On their face, the accusations in this case were so weak that the trial judge dismissed one at the conclusion of the State’s evidence, and the jury acquitted on two others. If this jury had heard the improperly excluded evidence of the “malevolent adult” who had vowed to get even with the Defendant just two days before the accusation was coerced out of their daughter, there is no doubt that this Defendant would have been acquitted on all charges.

Accordingly, this Court should summarily reverse and dismiss Count III rather than putting this entire family through the trauma of another trial that would undoubtedly result in acquittal.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of April, 2011.

A handwritten signature in black ink, appearing to read 'Richard Hansen', is written over a horizontal line.

RICHARD HANSEN, WSBA #5650  
Attorney for Appellant

**PROOF OF SERVICE**

Richard Hansen swears the following is true under penalty of perjury under the laws of the State of Washington:

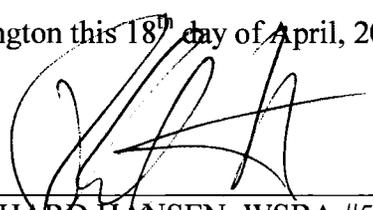
On the 18<sup>th</sup> day of April, 2011, I sent by U.S. Mail, postage prepaid, one true copy of Appellant's Opening Brief directed to attorney for Respondent:

Skagit County Prosecuting Attorney  
Attention: Appeals  
Courthouse Annex  
605 S. Third  
Mount Vernon, WA 98273

And mailed to Appellant:

Marcial Ramos Tenorio, #342375  
Airway Heights Corrections Center  
P.O. Box 1899  
Airway Heights, WA 99001-1899

DATED at Seattle, Washington this 18<sup>th</sup> day of April, 2011.

  
\_\_\_\_\_  
RICHARD HANSEN, WSBA #5650  
Attorney for Appellant