

66108-6

66108-6

NO. 66108-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

LEWIS SOUTHARD,

Appellant.

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

The Honorable George F.B. Appel, Judge

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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>Procedural Facts</u> .....	3
2. <u>Substantive Facts</u> .....	3
a. <u>M.C.’s Statements to Family Members</u> .....	4
b. <u>M.C.’s Statements to Professionals</u> .....	6
c. <u>M.C.’s New Allegations</u> .....	8
d. <u>M.C.’s Trial Testimony</u> .....	10
e. <u>Southard’s Testimony and Statements</u> .....	12
C. <u>ARGUMENT</u> .....	13
1. <u>SOUTHARD WAS IMPROPERLY DEPRIVED OF DISCOVERY RELEVANT TO THE COMPLAINING WITNESS’ BIAS</u> .....	13
a. <u>The Trial Court Denied Southard’s Motions for Discovery or In Camera Review of M.C.’s Counseling Records and Safety Plan.</u> .....	15
b. <u>The Records Are Material Because They Could Confirm or Refute Information Which, If True, Would Impeach the Reliability and Credibility of the Complaining Witness.</u> .....	18
c. <u>Southard Was Entitled To An In Camera Review Of The Records Because His Right To Prepare A Defense Far Outweighed The Minimal Intrusion Of In Camera Review.</u>	23

**TABLE OF CONTENTS (CONT'D)**

	Page
2. THIS COURT SHOULD INDEPENDENTLY REVIEW THE COMPLAINANT'S CPS RECORDS. ....	28
3. REPETITION OF M.C.'S HEARSAY STATEMENTS UNFAIRLY BOLSTERED THE STATE'S CASE. ....	29
a. <u>The Child Hearsay Statute Does Not Ameliorate the Prejudice Raised by Needlessly Cumulative Repetition of Damaging Testimony.</u> .....	29
b. <u>The Repetition of M.C.'s Statements Unfairly Bolstered the State's Case.</u> .....	31
c. <u>The Repetitive Statements Were Not Admissible to Rebut a Charge of Recent Fabrication.</u> .....	34
4. THE PROSECUTOR TRIVIALIZED THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT BY COMPARING IT TO A PARTIALLY COMPLETED PUZZLE.....	36
5. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING SEVERAL COMMUNITY CUSTODY CONDITIONS UNRELATED TO THE CRIME. ....	38
D. <u>CONCLUSION</u> .....	42

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Dependency of A.E.P.</u> 135 Wn.2d 208, 956 P.2d 297 (1998).....	19
<u>In re Pers. Restraint of Brett</u> 142 Wn.2d 868, 16 P.3d 601 (2001).....	14
<u>State Ex Rel. Carroll v. Junker</u> 79 Wn.2d 1, 482 P.2d 775 (1971).....	23
<u>State v. Anderson</u> 153 Wn. App. 417, 220 P.3d 1273 (2009).....	36, 38
<u>State v. Anderson</u> 58 Wn. App. 107, 791 P.2d 547 (1990).....	36, 39
<u>State v. Bedker</u> 74 Wn. App. 87, 871 P.2d 673 (1994).....	29
<u>State v. Bennett</u> 161 Wn.2d 303, 165 P.3d 1241 (2007).....	36
<u>State v. Boehme</u> 71 Wn.2d 621, 430 P.2d 527 (1967).....	27
<u>State v. Boyd</u> 160 Wn.2d 424, 158 P.3d 54 (2007).....	14
<u>State v. Casal</u> 103 Wn.2d 812, 699 P.2d 1234 (1985).....	28
<u>State v. Cleppe</u> 96 Wn.2d 373, 635 P.2d 435 (1981).....	14, 24, 25
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	18, 31

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Gonzalez</u> 110 Wn.2d 738, 757 P.2d 925 (1988).....	13
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	15, 20, 21, 22, 26, 28
<u>State v. Harper</u> 35 Wn. App. 855, 670 P.2d 296 (1983).....	31
<u>State v. Harris</u> 91 Wn.2d 145, 588 P.2d 720 (1978) .....	24
<u>State v. Johnson</u> 158 Wn. App. 677, 243 P.3d 936 (2010).....	36, 37, 38
<u>State v. Jones</u> 112 Wn.2d 488, 772 P.2d 496 (1989).....	29, 30
<u>State v. Lynch</u> 176 Wash. 349, 29 P.2d 393 (1934) .....	32, 33, 34
<u>State v. Mines</u> 35 Wn. App. 932, 671 P.2d 273 (1983).....	14, 24, 28
<u>State v. Nelson</u> 14 Wn. App. 658, 545 P.2d 36 (1975).....	27
<u>State v. Pendleton</u> 8 Wn. App. 573, 508 P.2d 179 (1973).....	32
<u>State v. Perez</u> 137 Wn. App. 97, 151 P.3d 249 (2007).....	34
<u>State v. Purdom</u> 106 Wn.2d 745, 725 P.2d 622 (1986).....	32
<u>State v. Riles</u> 86 Wn. App. 10, 936 P.2d 11 (1997).....	39

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	31
<u>State v. Uthoff</u> 45 Wn. App. 261, 724 P.2d 1103 (1986).....	15
<u>State v. Watkins</u> 61 Wn. App. 552, 811 P.2d 953 (1991).....	35
<u>State v. Wolken</u> 103 Wn.2d 823, 700 P.2d 319 (1985).....	24, 29
<u>Thomas v. French</u> 99 Wn.2d 95, 659 P.2d 1097 (1983).....	32
 <u>FEDERAL CASES</u>	
<u>Barker v. Wingo</u> 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) .....	13
<u>Brady v. Maryland</u> 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) .....	14
<u>Jencks v. United States</u> 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 1103 (1957) .....	25
<u>Kerr v. United States Dist. Ct.,</u> 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976) .....	25
<u>Pennsylvania v. Ritchie</u> 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) .....	14, 20, 28
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14
<u>United States v. Dupuy</u> 760 F.2d 1492 (9th Cir. 1985).....	25

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>United States v. Strifler</u> 851 F.2d 1197 (9th Cir. 1988).....	14
<u>Williams v. Florida</u> 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) .....	27

OTHER JURISDICTIONS

<u>Kopko v. State</u> 577 So.2d 956 (Fla. Dist. Ct. App. 1991) <u>disapproved of and opinion quashed on other grounds in</u> <u>State v. Kopko</u> 596 So.2d 669 (Fla. 1992).....	33
<u>Pardo v. State</u> 596 So.2d 665 (Fla. 1992) .....	33

RULES, STATUTES AND OTHER AUTHORITIES

CrR 4.7 .....	1, 14, 18, 23
ER 403 .....	30
John R. Christiansen <u>The Testimony Of Child Witnesses: Fact, Fantasy, And The Influence Of</u> <u>Pretrial Interviews</u> , 62 Wash. L. Rev. 705 (1987).....	19
Karl Tegland <u>5A Wash. Prac., Evidence</u> , § 292 (3d Ed. 1989) .....	32
VIII Wigmore, Evidence (3d ed. 1940).....	25
RCW 9.94A.030 .....	41
RCW 9.94A.507 .....	39
RCW 9.94A.703 .....	3, 39
RCW 9.94A.704 .....	39

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9A.36.120 .....	39
RCW 9A.44.120 .....	29, 30
RCW 18.19.180 .....	23
RCW 70.125.065 .....	14

A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's discovery motions for in camera review of the complaining witness's counseling records and the Department of Social and Health Services (DSHS) safety plan.

2. The trial court erred in failing to disclose records from Child Protective Services (CPS) concerning the complainant and reviewed by the court in camera.

3. The court erred in admitting unfairly cumulative and prejudicial child hearsay statements.

4. The prosecutor committed flagrant misconduct in closing argument by analogizing reasonable doubt to intuiting the result of a partially completed puzzle.

5. The court exceeded its authority in imposing conditions of community custody unauthorized by statute and unrelated to the crime.

Issues Pertaining to Assignments of Error

1. The complainant's initial disclosures of sexual abuse were vague and lacking in detail. After engaging in counseling for several months, she told her mother about several new incidents and many more details. Appellant's constitutional rights to due process and effective assistance of counsel include the right to present a defense and to engage in reasonable investigation. CrR 4.7 authorizes reasonable discovery of

material information. Did the trial court err in denying appellant's motions for discovery of the complainant's mental health records or alternatively, for in camera review?

2. The trial court granted in camera review of the complainant's CPS records, but determined that all relevant material had already been disclosed. Did the trial court err in denying appellant access to the complainant's CPS records?

3. Defense counsel objected to needlessly cumulative and prejudicial repetition of the complainant's out-of-court statements. Did the court err in admitting all the complainant's similar out-of-court statements to both her cousins, an uncle, both her grandparents, a nurse practitioner, a social worker, and the child interview specialist?

4. During closing argument, the prosecutor compared the trial to putting together a puzzle of a city, saying "you look at it and you see the Space Needle. And without seeing any other piece there, you're convinced beyond a reasonable doubt that that's Seattle." Did this argument constitute prosecutorial misconduct because it unfairly trivialized the burden of proof beyond a reasonable doubt?

5. The judgment and sentence imposed numerous conditions of community custody, including that appellant not possess any item used or designed to attract, lure, or entertain children, that he not possess

computers, computer parts, or peripherals, and that he engage in substance abuse treatment and urinalysis testing. RCW 9.94A.703 provides for certain mandatory conditions and for other crime-related prohibitions. When there was no evidence of items used to lure children, computers, or substance abuse, should this Court strike these conditions because they are neither specifically authorized by statute nor related to the crime?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Lewis Southard with two counts of first-degree child molestation and two counts of first-degree rape of a child. CP 356-57. The jury found him guilty and the court imposed indeterminate sentences of 198 months to a maximum term of life on the child molestation counts and 318 months to life on the rape of a child counts, all to run concurrently. CP 23-24. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

Southard always believed he had a good relationship with M.C., his girlfriend's nine-year-old daughter. 10RP<sup>1</sup> 66; 17RP 27. Although his

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<sup>1</sup> There are 19 volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Dec. 18, 2009; 2RP – Apr. 8, 2010; 3RP – May 7, 2010; 4RP – June 16, 2010; 5RP – July 7, 2010; 6RP – July 9, 2010; 7RP – July 12, 2010; 8RP – July 13, 2010; 9RP – July 1, 2010; 10RP – July 15, 2010; 11RP – July 16, 2010; 12RP – July 19, 2010; 13RP – July

eight-and-a-half-year relationship with M.C.'s mother was rocky, the couple had a child together, M.C.'s younger half-sister, and always seemed to reconcile eventually. 10RP 69; 12RP 124, 127, 129.

In March 2009, M.C.'s mother kicked Southard out, and he moved into a rented trailer on property owned by his mother, known to the children as "Grandma Rita." 12RP 127. M.C. and her sister visited Southard every Wednesday, and by June, Southard and M.C.'s mother had begun to reconcile again. 12RP 127-29. M.C.'s last visit to Southard was the night before she left for a family reunion with her grandparents. 12RP 134.

a. M.C.'s Statements to Family Members

At the reunion, a group of children sat on a trampoline telling stories about their lives. 9RP 47-48. One mentioned being abused, and another said her father was in jail for raping two or three women. 10RP 15. M.C. told the group, which included her 14-year-old cousin Presley, that her mother's boyfriend had been raping her. 9RP 47. Presley testified M.C. told her it started a few years ago, that he raped her every time she went to his house, that it started with just him sitting on a couch touching her but later he had her watch pornography. 9RP 50-52. Presley testified M.C. did not say what part of his body touched her and claimed Southard told her for now it was just touching but later he would start sexual intercourse. 10RP 8. Presley

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20, 2010; 14RP – July 21, 2010; 15RP – July 22, 2010; 16RP – July 23, 2010; 17RP – July 26, 2010; 18RP – July 27, 2010; 19RP – Sept. 24, 2010.

testified M.C. said her stepdad held a knife to her neck and said if she told anyone, he would kill her. 10RP11. Presley told her father what M.C. said. 10RP 12.

Presley's father asked M.C. if what Presley said was true. 10RP 24-25. He testified that at first, M.C. was hesitant, but then agreed it was true. 10RP 24-25. M.C.'s grandmother testified Presley's father came to her and told her M.C. was being raped by her mother's boyfriend. 11RP 36-37. M.C.'s grandfather also testified that Presley's father told M.C.'s grandmother that Southard molested her. 11RP 64. Her grandmother testified she asked M.C., "Why didn't you tell anyone?" and M.C. responded, "I did. I told Kourtney." 10RP 37. She did not mention any threat. 10RP 37, 39-40.

Kourtney, another of M.C.'s cousins, testified M.C. had already told her about the abuse, but she told no one because M.C. made her promise not to tell. 10RP 54-55. She could not say for certain when she was told, but it was definitely before the family reunion. 10RP 55-56. She said the two were at a birthday party, and M.C. took her into the computer room and said her mother's boyfriend raped her. 10RP 54. When Kourtney did not know the word rape, she testified, M.C. explained it was forced sex. 10RP 54.

When M.C. and her grandparents returned from the family reunion, her grandfather told M.C.'s mother what happened. 12RP 135. M.C.'s

mother confronted Southard. 12RP 147-48. She testified he turned white, stared at her, and did not say a word. 12RP 147-48. M.C.'s mother and grandfather went to the Snohomish County Sheriff's Office. 12RP 62-63.

b. M.C.'s Statements to Professionals

After the authorities got involved, M.C. was examined by a pediatrician and a nurse practitioner and was interviewed by a social worker and twice by a child interview specialist. 12RP 90-93; 13RP 122-23; 14RP 28, 120. The pediatrician's examination revealed nothing but redness of undetermined origin and the faint outline of an old rash. 12RP 90-93. The nurse practitioner testified she asked M.C. if anyone had broken the rule that no one touches her underpants area, and M.C. said "sort of," that her stepdad Lewis touched her under her underpants, more than once, with his hands and with his private part, but it did not hurt or bleed. 13RP 125. Her physical findings were consistent with sexual abuse or many other causes. 13RP 133.

The social worker testified M.C. told her someone touched her under her swimsuit area. 14RP 31-32. She testified M.C. said that, when she was seven, Southard put his hands down her pants and touched her privates while they sat on the couch and her mother was at the store. 14RP 33. M.C. said this happened many times. The social worker testified M.C. told her the worst time was the most recent, which happened when she was nine. 14RP

34. She testified M.C. said she was home alone with Southard and he touched his private to her private in the bedroom. 14RP 34.

Ashley Wilske, the child interview specialist, interviewed M.C. for the first time shortly after her allegations came to light in July 2009. 14RP 120. By stipulation, the DVD recording of the interview was played for the jury. 14RP 123-24; Exs. 6, 11.<sup>2</sup> M.C. told Wilske when she was seven and lived in the house in Gleneagle, Southard pulled down her pants and underwear and touched under her swimsuit area, her front private, with his hand while her mother was at the store. Ex. 11 at 15-17. She said Southard asked her to go upstairs and get his inhaler from his bedroom, and then followed her there. Ex. 11 at 19. She said his hand stayed still, and the touching lasted a couple of seconds. Ex. 11 at 17. She said he told her not to tell anyone or he would kill her. Ex. 11 at 18.

M.C. told Wilske the same thing happened in the Granite Falls house when she was nine, except that this time, it was his private, rather than his hand, that touched her. Ex. 11 at 20-21. She said this happened in his bedroom, but she did not know how she got there. Ex. 11 at 21. She said similar things happened whenever she saw him. Ex. 11 at 30. She did not know how many times, but the first three times were in the Gleneagle house

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<sup>2</sup> Exhibit 6 is the dvd, exhibit 11 is the transcript which was admitted for illustrative purposes only. 15RP 25-26. For ease of reference, citation is made to the transcript page numbers.

and it also happened in the trailer at Grandma Rita's . Ex. 11 at 29-30, 46-47. She said the last time was before the family reunion. Ex. 11 at 32. M.C. said she did not think any pictures or videos were involved and she did not know if she was sitting or lying down when he touched her. Ex. 11 at 37-38.

c. M.C.'s New Allegations

Nine months later, in April 2010, M.C. told her mother there were some things she had not previously told her, and a second interview with Wilske was arranged. 12RP 142; 14RP 120. The DVD of this interview was also played for the jury by stipulation. 14RP 123; 15RP 41; Exs. 7, 12.<sup>3</sup> This time M.C. also began by discussing the first incident when Southard sent her to get his inhaler. Ex. 12 at 11. She said this time was the worst because it was the scariest. Ex. 12 at 9. She said he went in the closet, then picked her up, sat her on the bed and took off her pants. Ex. 12 at 11. She said he was not wearing anything and started touching her front private with his hands. Ex. 12 at 11. She was "kind of laying down" and he pushed her legs apart. Ex. 12 at 12, 14. She said he said he would kill her if she told anybody and emphasized the word "anybody," "like I couldn't even tell a tree." Ex. 12 at 13, 15.

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<sup>3</sup> Exhibit 7 is the dvd recording of the interview. Exhibit 12 is the transcript admitted for illustrative purposes only. 15RP 25-26. For ease of reference, citation is made to the transcript page numbers.

She also described an incident when she was eight and the whole family was staying at Grandma Rita's and she went to wake Southard. Ex. 12 at 17. She said he sleeps naked, and he pulled her into bed and wrapped his legs around her. Ex. 12 at 17.

She said the next time it happened was in the Granite Falls house, where his private touched her private. Ex. 12 at 22. She said it usually happened in his bed. Ex. 12 at 23. On one occasion, her mother had placed the children's clean laundry in the bedroom she shared with Southard. Ex. 12 at 23. When M.C. went in looking for her clothes, he grabbed her hand, took her in the bed and started touching her private part with his private part. Ex. 12 at 23-24. She said the contact was both inside and outside of her private part. Ex. 12 at 25-26.

Next, M.C. talked about when Southard lived in the trailer at Grandma Rita's. Ex. 12 at 27. She said there he touched her, made her watch a "really gross" movie with naked people in it, and made her do the things that the people in the movie were doing. Ex. 12 at 28. She said both his fingers and his private touched her private, inside and out. Ex. 12 at 28-29. She said he made her suck on his private, like the people in the movie were doing. Ex. 12 at 30-31. She said he also made her squeeze his private and he licked her private, mostly on the inside. Ex. 12 at 33-35. She said the sucking happened more than ten times, and the private-to-private contact

also happened more than ten times. Ex. 12 at 38. She said the most recent incident, which involved only sucking, was the night before she left for the family reunion. Ex. 12 at 39. She also said Southard showed her a “gross” text message from her mother and told her he would get her better at this than her mom. Ex. 12 at 40.

d. M.C.’s Trial Testimony

At trial, M.C. also testified about these incidents. 10RP 64. She testified that when she was seven and lived in the Gleneagle house, Southard touched her where he shouldn’t. 10RP 75-76. She described him sending her upstairs for his inhaler and then following her. 10RP 76-77. She testified he went in the closet, took off his clothes, came out, took off her clothes, and touched the outside of her privates with his hand while she was lying on the bed. 10RP 77-82. When they heard her mother come home, he told her to get dressed and said if she told anyone, he would kill her. 10RP 84. She said this happened more than once in the Gleneagle house, but she could not recall details of any other incidents. 10RP 86-87. M.C. testified it was shortly after this first incident that she told her cousin Kourtney what was going on but insisted she not tell anyone. 10RP 86.

M.C. also testified it happened more than once in the Granite Falls house and described the incident in which she went into her mother’s and Southard’s bedroom looking for her clothes. 10RP 87-88. She testified he

was naked and touched the outside of her private with his hand. 10RP 89-90. She could not say how many times it happened, but it was more than twice in the Granite Falls house and also at least once in Grandma Rita's house. 10RP 92, 94-95.

M.C. testified it happened a lot in the trailer at Grandma Rita's when she visited on Wednesdays with her sister. 10RP 95-100. She said in the trailer he began touching her with his private instead of just his hands. RP 101. She said he would shake his private against hers and these incidents in the trailer were also different because he showed her movies of naked adults doing "gross" things like touching each other's privates with their hands and privates and sucking on each other's privates. 10RP 104-07. She said after the movie, he would tell her to touch him and do the things people did in the movie. 10RP 109. She said he made her squeeze and suck on his private until it got hard and white sticky stuff came out. 10RP 110-14. She said this happened most recently the night before the family reunion. 10RP 116. On this most recent occasion, there was touching and sucking after dinner at a burger restaurant while her sister played outside. 10RP 117-18. She testified this was a separate incident from the movie incidents already described. 10RP 118.

e. Southard's Testimony and Statements

When Detective Ferreira contacted him, Southard voluntarily came in to the Snohomish County Sheriff's Office for an interview. 14RP 51. He denied any sexual contact with M.C. 14RP 57. He told the detective that on one occasion, he came out of the shower in the nude and M.C. poked him in the penis, whereupon he told her that was inappropriate. 14RP 57. He also told the detective about an incident when M.C. was suffering from a vaginal rash. 14RP 58. She came to him because her mother was not home, so he checked her vaginal area and saw that it was red. 14RP 58.

M.C.'s dermatologist corroborated the existence of M.C.'s rash. 12RP 28-30. She saw M.C. for a rash in the groin area including the outer labia of the vagina beginning in April 2009. 12RP 30-31. She said M.C. described severe itching and burning. 12RP 32-34. Between April and June 2009, she saw M.C. repeatedly as the rash continued to spread whenever she stopped using the prescribed cream. 12RP 36-44. M.C.'s vaginal culture came back positive for strep B, which could be contracted in myriad ways including childbirth, a cough, or a sneeze. 12RP 38-39.

At trial, Southard testified he was "shocked" at the allegations. 17RP 27. He explained that once, while M.C.'s mother was at the store, she was jumping up and down because her rash was burning. 17RP 30. He had her lay on the couch so he could look, and used his finger to open her labia to

check on the rash, which looked pretty bad. 17RP 30-31. He explained this incident occurred at the Granite Falls house, during a period when he had moved out but decided to come over to make dinner as a favor to M.C.'s mother. 17RP 31. After seeing how serious the rash looked, he told M.C. she should either take a cool bath or put a cool, damp cloth on it. 17RP 32. She chose the cloth so that she could watch television. 17RP 32.

M.C.'s mother testified Southard never told her about this incident, either at the time or when she confronted him with M.C.'s allegations. 13RP 51. She testified Southard frequently walked around the house in the nude and when she attempted to close the door while they were having sex, Southard stopped her, saying they should let the kids see how they were made. 13RP 78-79. Additional facts pertaining to discovery motions and closing argument are discussed in the relevant argument sections below.

### C. ARGUMENT

#### 1. SOUTHARD WAS IMPROPERLY DEPRIVED OF DISCOVERY RELEVANT TO THE COMPLAINING WITNESS' BIAS.

“[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system.” Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); State v. Gonzalez, 110 Wn.2d 738, 748, 757 P.2d 925 (1988). Thus, courts have long recognized that effective assistance of counsel and access to evidence are crucial elements of due

process and the right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007). The right to effective assistance includes a “reasonable investigation” by defense counsel. See Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Constitutional due process is violated where the state fails to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). A defendant is similarly entitled to material that bears on the credibility of a significant witness in a case. United States v. Strifler, 851 F.2d 1197, 1201-02 (9th Cir. 1988).

When the prosecution claims records are privileged or confidential, a defendant is entitled to an in camera review, to determine whether the records contain exculpatory or impeaching information. See Ritchie, 480 U.S. at 57-58; State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983). See also CrR 4.7(h)(6); RCW 70.125.065. An in camera review is necessary when the defense establishes a non-speculative basis to believe the records may have evidence relevant to the defendant’s innocence. State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981); State v. Uthoff, 45 Wn.

App. 261, 268, 724 P.2d 1103 (1986). This Court reviews a trial court's refusal to conduct an in camera review for an abuse of discretion. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006).

Southard's due process rights were violated when the Court denied his motion either to compel discovery or conduct in camera review of M.C.'s counseling records and DSHS safety plan. The court erred in denying in camera review because the records potentially contained exculpatory information and Southard's interest in preparing his defense far outweighed the minimal intrusion of in camera review.

a. The Trial Court Denied Southard's Motions for Discovery or In Camera Review of M.C.'s Counseling Records and Safety Plan.

In December 2009, Southard requested discovery of M.C.'s counseling records. Supp. CP<sup>4</sup> \_\_\_\_ (Sub no. 16, Defense Discovery Motions, 12/9/2009); 1RP6; 2RP 58; 4RP 66; 5RP 5-9, 12; 8RP 111-13; 9RP 7. M.C.'s mother had provided some counseling records, but Southard wanted to ensure they were complete by obtaining the records directly from the counselor, rather than as edited by a State witness. 1RP 6. After first considering an in camera review, the court denied Southard's initial motion. 1RP 30.

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<sup>4</sup> A supplemental designation of clerk's papers was filed on March 11, 2011.

On April 8, 2010, Southard moved again to compel discovery of M.C.'s counseling records. Supp. CP \_\_\_ (Sub no. 31, Defense Discovery Motions, 4/8/2010). He also presented an affidavit from Dr. John Yuille explaining why the records were relevant to assessing the reliability of M.C.'s statements. Supp. CP \_\_\_ (Sub no. 38, Affidavit of Dr. John Yuille, 4/8/2010). The court again denied Southard's discovery motions. Supp. CP \_\_\_ (Sub no. 41, Order on Criminal Motions, 4/8/2010).

M.C. made new allegations in late April 2010, and the State amended the information, adding new charges. CP 356-57. Southard renewed his motion for discovery of M.C.'s counseling records. 4RP 66. M.C.'s mother adamantly objected to disclosure of the counseling records, and the parties agreed to treat her statement as a motion for a protective order. 4RP 70-75.

In light of M.C.'s new and more detailed disclosures, made after she had attended counseling, counsel argued the counseling records were potentially exculpatory and impeaching. 5RP 6-7. If the counselor encouraged M.C. to make a full disclosure in counseling but she did not give the additional details, that would be important impeachment of her testimony. 5RP 6-7; Supp. CP \_\_\_ (Sub no. 77, Response to Protective Order Motion, 6/25/2010). On the other hand, if she did disclose the additional details to her counselor, defense counsel needed to learn

whether that was in response to suggestive questioning. 5RP 6-7; Supp. CP \_\_\_\_ (Sub no. 77, Response to Protective Order Motion, 6/25/2010). Out of deference to M.C.'s privacy, counsel noted that only a very limited inquiry would be necessary and in camera review would suffice as an alternative to turning over the records. 5RP 9, 15; Supp. CP \_\_\_\_ (Sub no. 77, Response to Protective Order Motion, 6/25/2010).

The court ruled there was no more than a mere possibility of impeaching evidence because M.C. did not, in her more recent disclosures, indicate that she was asked to fully disclose or was subjected to suggestive questioning by her counselor. 5RP 10-14. The court denied discovery and also denied the alternative motion for in camera review. 5RP 12-14, 19; Supp. CP \_\_\_\_ (Sub no. 79, Order on Criminal Motion, 7/7/2010).

Regarding DSHS records, the court initially granted in camera review, and concluded defense counsel already had all material information. 3RP 25. However, it later became clear Southard never received a copy of the safety plan the social workers gave M.C.'s mother. 8RP 21-22, 111-13. When counsel asked about it at the child hearsay hearing, M.C.'s mother stated she had the safety plan, but it was in her storage locker and she could not get it. 8RP 160-61.

Counsel explained it was relevant because it may have instructed M.C.'s mother to cooperate with law enforcement or threatened her with

consequences if she did not do so, thereby providing her with a motive to influence M.C.'s statements. 9RP 7. The court acknowledged the safety plan was potentially relevant, but found there was no clear showing of materiality and its potential use to the defense was outweighed by the annoyance of retrieving it from the storage locker. 9RP 10-12.

- b. The Records Are Material Because They Could Confirm or Refute Information Which, If True, Would Impeach the Reliability and Credibility of the Complaining Witness.

Washington court rules governing discovery protect an accused's constitutional right to discover exculpatory information.

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

CrR 4.7(a)(3). This rule imposes a mandatory obligation on prosecuting attorneys. See State v. Coe, 101 Wn.2d 772, 784, 684 P.2d 668 (1984) (prosecutor's failure to inform defendant witnesses made statements under hypnosis violated discovery rules). Court rules also permit disclosure of information "[u]pon a showing of materiality to the preparation of the defense." CrR 4.7(e)(1). The counseling records and safety plan were relevant, material, and potentially exculpatory because they pertained to the background and context of the complaining witness's statements.

Coe illustrates the relevance, materiality, and potentially exculpatory nature of facts relating to the context and background of witness statements. In that case, the court held it was a discovery violation for the State not to inform Coe that several witnesses had been hypnotized. 101 Wn.2d at 784. Since hypnosis is unreliable as a method of restoring memory, the court also held all testimony relating to any facts recalled after hypnosis must be excluded. Id. at 786.

While not as problematic as hypnotic suggestions, the potential that suggestive questioning by a counselor may result in false accusations is also significant, particularly when the witness is a child. John R. Christiansen, The Testimony Of Child Witnesses: Fact, Fantasy, And The Influence Of Pretrial Interviews, 62 Wash. L. Rev. 705, 707 (1987). If M.C.'s counselor asked leading, suggestive questions capable of influencing her statements or tainting her memory, it could show her testimony and out-of-court statements to be extremely unreliable and potentially inadmissible on competency or child hearsay grounds. See In re Dependency of A.E.P., 135 Wn.2d 208, 230-31, 956 P.2d 297 (1998) (suggestive questioning may so corrupt a child's memory as to render the child incompetent to testify or her hearsay statements unreliable). If M.C.'s mother was ordered to cooperate with authorities or was threatened with penalties for not doing so, that fact would also affect the credibility of M.C.'s statements. At a minimum, it

would have been useful to impeach the complaining witness' credibility before the jury, in a case where that credibility was the State's entire case.

Without access to the counseling records, defense counsel could not say for certain whether the counselor engaged in suggestive questioning or improper influence, whether M.C.'s statements were consistent with her testimony, or whether M.C.'s mother was ordered in the safety plan to cooperate with the prosecution of Southard. This is why a criminal defendant is entitled to in camera review of a privileged or confidential records upon a "plausible showing" that the information would be both material and favorable to the defense." Gregory, 158 Wn.2d at 791 (citing Ritchie, 480 U.S. at 58 n.15). Although mere speculation is insufficient, a defendant need only establish a basis to claim that the record in question contains material evidence. Gregory, 158 Wn.2d at 792.

Gregory is instructive. In that case, the defendant was convicted of three counts of first-degree rape. Id. at 778. His theory at trial was that he had consensual, paid intercourse with the complainant. Id. at 779-80. Before trial, he sought in camera review of the dependency files of the victim's child, which the court denied. Id. The Gregory court held the defendant was entitled to in camera review because, although privileged, the files would probably have shown whether or not the victim had been

engaged in prostitution at the time of the crime, corroborating the defense theory of the case. Id. at 795.

It was impossible to say whether the files actually contained information supporting the defense theory, and the files might instead have contained damaging evidence that the victim was not involved in prostitution at the time. Id. Nevertheless, the court held it was enough to show that if the victim was involved in prostitution, that information would likely be in the files and that the files would either confirm or refute his theory of the case. Id.

As in Gregory, defense counsel established a basis for the claim that the counseling records contained material exculpatory information. First, M.C.'s initial disclosures were extremely limited and lacking in detail. See, e.g., Ex. 11. After her initial disclosures, she began attending counseling. 1RP 6. Also during this period, DSHS became involved and the safety plan was produced. 8RP 21-22; 14RP 26. Roughly nine months after her initial disclosures, M.C. suddenly gave many more details about significantly different types of incidents than she had ever mentioned before. See, e.g., Ex. 12. This alone is a plausible showing that something in counseling or in the safety plan may have influenced her statements. Southard did not need to show that the counseling records or safety plan would confirm this theory

– only that the information either to confirm or refute it would likely be in the records. See Gregory, 158 Wn.2d at 794-95.

Second, defense counsel explained that if M.C. were encouraged to make full disclosures in counseling, and mentioned none of the newer allegations, that would be important impeachment information. 5RP 7. M.C. stated she initially did not tell child interview specialist Ashley Wilske because Wilske told her there were things she did not want to talk about, she did not have to. 10RP 124. If M.C. also did not mention the new allegations in a different context in which she was urged to reveal everything, that would reflect poorly on the credibility of these newer allegations. This useful impeachment strategy would either be confirmed or refuted by the counseling records.

Either of these two rationales is sufficient to require in camera review under Gregory. Yet the court appears to have mistaken the standard. It reasoned that because defense counsel had no evidence yet that the counselor asked suggestive questions or encouraged M.C. to fully disclose, no in camera review was warranted. 5RP 10. But this is incorrect under Gregory. The defense need only make a plausible showing that this information, if true, would be material, and that it is likely to be found in the records. See Gregory, 158 Wn.2d at 794-95. In Gregory, the court did not require a showing that the complaining witness was actually engaged in

prostitution during the relevant time period. It was sufficient that if that fact were true, it would be material to the defense, and if it were true, the information would likely be in the identified records. Id.

A trial court abuses its discretion where its action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State Ex Rel. Carroll v. Junker, 79 Wn.2d 1, 26, 482 P.2d 775 (1971). Here, the trial court's refusal to conduct the requested in camera hearing was unreasonable because it was grounded in this misunderstanding of the law. The court abused its discretion and violated Southard's constitutional right to prepare his defense when it denied even a minimally intrusive in camera review of M.C.'s counseling records.

- c. Southard Was Entitled To An In Camera Review Of The Records Because His Right To Prepare A Defense Far Outweighed The Minimal Intrusion Of In Camera Review.

CrR 4.7 provides that trial courts may deny a discretionary discovery request if

there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

CrR 4.7(e)(2). Additionally, any statutory privilege in the records<sup>5</sup> must be weighed against Southard's constitutional rights to prepare and present a defense and to confront state witnesses through impeachment with any doubt resolved in favor of conducting an in camera hearing. See Cleppe, 96 Wn.2d at 381 (court should balance public interest with defense's right to prepare a defense and State's privilege not to disclose informant's identity "must yield" when disclosure is relevant and helpful to the accused). In this case, the privilege and minimal intrusion into privacy is far outweighed by Southard's need to present at defense.

First, in camera reviews have been found to be effective methods of balancing a defendant's right to disclosure and the public interest in maintaining confidentiality. See, State v. Wolken, 103 Wn.2d 823, 829, 700 P.2d 319 (1985) (trial court's in camera examination of police officer regarding information provided in search warrant application "adequately achieved a balance between the competing interests of the defendants and the State"); State v. Harris, 91 Wn.2d 145, 150, 588 P.2d 720 (1978) (in camera hearing "preferred method for making this determination [whether

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<sup>5</sup> RCW 18.19.180 provides in relevant part that counselors "shall not disclose. . . any information acquired from persons consulting the individual in a professional capacity when that information was necessary to enable the individual to render professional services to those persons except. . . (3) If the person is a minor, and the information acquired by the person registered under this chapter indicates that the minor was the victim or subject of a crime, the person registered may testify fully upon any examination, trial, or other proceeding in which the commission of the crime is the subject of the inquiry; . . . (5) In response to a subpoena from a court of law."

disclosure of informant's identity was relevant to defense] without prejudicing the rights of either the State or the defendant"); Mines, 35 Wn. App. at 939 (in camera review of witness medical records to determine whether they were exempt from discovery due to physician-patient privilege "protected privacy between physician and patient and adhered to the legislative policy establishing the privilege"); United States v. Dupuy, 760 F.2d 1492, 1501 (9th Cir. 1985) (consultation with trial judge is "particularly appropriate" because trial judge can weigh the state's need for confidentiality against the defendant's right to a fair trial).

Because documents are inspected by the court without being submitted to the opponent's view, an in camera review does not deprive the witness of any right of privacy. Jencks v. United States, 353 U.S. 657, 77 S. Ct. 1007, 1 L. Ed. 1103 (1957) (Burton, J. concurring) (quoting VIII Wigmore, Evidence (3d ed. 1940), 117-118.). The Supreme Court has stated:

in camera review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiff's asserted need for the documents is correctly struck. Indeed, this Court has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege.

Kerr v. United States Dist. Ct., 426 U.S. 394, 405-406, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). Moreover, doubt should be resolved in favor of an in

camera hearing. Cleppe, 96 Wn.2d at 382. The court in this case should have resolved any doubt in favor of this “eminently worthwhile method” to insure that Southard received all exculpatory impeachment evidence.

Second, the balance should have been struck in favor of review to determine whether the records contained crucial impeachment evidence because as in Gregory, this case hinged on credibility. The Gregory court noted the case was a “credibility contest.” 158 Wn.2d at 794. Information that would have tended to support Gregory’s version of events and cast doubt on the complainant’s “would have been reasonably likely to impact the outcome of the trial.” Id. This being the case, the Gregory court held the defendant’s right to a fair trial outweighed the children’s privacy interests in their dependency files. Id. at 795. The court concluded the trial court abused its discretion in denying in camera review of the files. Id.

The same is true in this case. This case was also a credibility contest. There was no physical evidence whatsoever and no witnesses to the alleged incident except M.C. Thus, her credibility and the circumstances surrounding her disclosures were key. In camera review would have ensured Southard received any evidence necessary to his defense while at the same time protecting M.C.’s privacy interest. M.C.’s negligible privacy interest in avoiding in camera review of the counseling

records was outweighed by Southard's constitutional right to present a defense and the court abused its discretion in denying in camera review.

The balance should also weigh in favor of an in camera hearing to promote the interest of the judicial system in discovering the truth through the adversarial process. The system is designed to enhance the search for truth in a criminal trial by ensuring both the defendant and the state ample opportunity to investigate facts crucial to the determination of guilt or innocence. Williams v. Florida, 399 U.S. 78, 81-82, 90 S. Ct. 1893, 26 L. Ed. 2d 446, (1970); State v. Nelson, 14 Wn. App. 658, 663, 545 P.2d 36 (1975).

To allow the privilege to thus become a device by which the victim of an attempted crime could, without a civilly paramount reason, thwart the course of a criminal proceeding against the perpetrator might well promote greater evils than the privilege was designed to avoid. The maintenance of an orderly society, and the circumvention of criminal activities, are functions of government which should not be subjected to casual suppression by the operation of a procedural rule primarily designed for the purpose of aiding in the healing of physical ailments.

State v. Boehme, 71 Wn.2d 621, 637, 430 P.2d 527 (1967) (citations omitted).

The trial court abused its discretion by refusing to conduct an in camera review of the counseling records and safety plan. Under the circumstances of this case, any privilege must yield to Southard's greater due

process right to prepare and present a defense to the charges against him and to the judicial system's greater interest in uncovering the truth through operation of the adversarial system. This Court should require the trial court to conduct the requested in camera review to determine if the records contain impeachment evidence material to his defense. If so, Southard's conviction should be reversed and remanded for a new trial. Gregory, 158 Wn.2d at 795.

2. THIS COURT SHOULD INDEPENDENTLY REVIEW THE COMPLAINANT'S CPS RECORDS.

Similar concerns to those discussed above prompted Southard's request for M.C.'s CPS/DSHS records. There were indications of potential prior false accusations by M.C., and the court grudgingly but correctly granted in camera review of the records to determine whether any materially exculpatory information had not yet been disclosed. 3RP 24-25. This Court should review the files to determine whether they contain any possibly exculpatory material for the defense. See Ritchie, 480 U.S. at 58-59; Mines, 35 Wn. App. at 938-39. See also State v. Casal, 103 Wn.2d 812, 822-23, 699 P.2d 1234 (1985) (defendant entitled to have appellate review of sealed transcript of an in camera hearing to determine whether trial judge abused his discretion in determining that probable cause for a search warrant was present or absent).

In Ritchie, the United States Supreme Court stated:

[T]he duty to disclose [materials reviewed in camera] is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.

Ritchie, 480 U.S. at 60.

Our supreme court has stated that “[t]he appellate courts will not act as a rubber stamp for the trial court’s in camera hearing process. The record of the hearing must be made available to the appellate court.” Wolken, 103 Wn.2d at 829. A review by this Court of the documents will determine whether it was proper to withhold any undisclosed information and whether any of the information became significant as the trial progressed.

3. REPETITION OF M.C.’S HEARSAY STATEMENTS  
UNFAIRLY BOLSTERED THE STATE’S CASE.

Southard registered a standing objection to the unfair repetition of M.C.’s statements by numerous witnesses. 8RP 84-85. The prejudice of this needless repetition of cumulative testimony by her cousins Kourtney and Presley, Presley’s father, both of M.C.’s grandparents, nurse practitioner Young, social worker Ahrens, and child interview specialist Wilske requires reversal.

a. The Child Hearsay Statute Does Not Ameliorate the Prejudice Raised by Needlessly Cumulative Repetition of Damaging Testimony.

The child hearsay statute allows admission of otherwise inadmissible hearsay to alleviate proof problems frequently encountered in cases where children are often the only witnesses. State v. Bedker, 74 Wn. App. 87, 92-93, 871 P.2d 673 (1994) (citing State v. Jones, 112 Wn.2d 488, 493-94, 772 P.2d 496 (1989)). The Bedker court found that RCW 9A.44.120 “is principally directed at alleviating the difficult problems of proof that often frustrate prosecutions for child sexual abuse.” 74 Wn. App. at 92.

A child’s ability to provide live testimony can be thwarted by feelings of intimidation or confusion engendered by the courtroom setting, embarrassment at the sexual nature of the testimony, discomfort with the role of accuser against someone who may be a close relative or family friend, unwillingness to recount or recall abuses, or failed memories. Id. at 92-93. Thus, the Legislature has made it possible to provide the proof necessary by way of reliable hearsay statements. Id. at 93 (citing Jones, 112 Wn.2d at 493-94).

Although sensible in the abstract, these goals must be balanced “against the concern that the use of such hearsay should not create too great a risk of an erroneous conviction.” Jones, 112 Wn.2d at 495. The special conditions set forth in RCW 9A.44.120 do not alleviate the inherent

objection to hearsay and concerns about needlessly repetitive evidence. ER 403<sup>6</sup> specifically provides for exclusion of prejudicially cumulative evidence, and courts should consider with heightened scrutiny the argument that cumulative hearsay is unfairly prejudicial. In doubtful cases, the question of the admissibility of prejudicial evidence should be resolved in favor of the defense and the exclusion of the evidence. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). “Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest.” Coe, 101 Wn.2d at 780-81.

b. The Repetition of M.C.’s Statements Unfairly Bolstered the State’s Case.

Even assuming M.C.’s out-of-court statements were admissible under the child hearsay statute, the repetition of her statements by seven different witnesses caused a prejudicial bolstering effect that far outweighed any minimal probative value. This repetition should not have been allowed.

First, there was no need for hearsay testimony in this case. M.C. was able to overcome her youth and embarrassment and testify as to all necessary details of the alleged sexual acts. The hearsay statements served no purpose other than to provide repetition of her story. There is no legitimate purpose

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<sup>6</sup> ER 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

in allowing adults to repeat a child witness's prior consistent statements alleging sexual misconduct. The improper bolstering resulting from such testimony can easily mislead jurors.

“Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity.” State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983). Harper was convicted of indecent liberties with his 11-year-old stepdaughter. Id. at 855. At trial, a caseworker was allowed to testify over objection that the victim told her Harper had her “suck his penis,” and that the victim had during several interviews been consistent in her representations. Id. at 856. This Court held that the caseworker's testimony was “highly prejudicial, perhaps devastating, to the defense of this heinous crime,” and reversed the conviction. Id. at 858.

Washington courts have consistently found repetition of prior consistent statements to be immaterial in the search for truth. Id. See also State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986); Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983); State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934). However, a jury may be persuaded by such repetition, especially when it comes from expert witnesses like the child

interview specialist.<sup>7</sup> The frequent repetition of M.C.'s statements by no fewer than seven witnesses presented a great danger of swaying the jury by the mere repetition of hearsay. See, e.g., State v. Pendleton, 8 Wn. App. 573, 575-76, 508 P.2d 179 (1973) (admission of detective's testimony as to what another detective told him, which allowed the state to double the impact of evidence critical to its case, was prejudicial and reversible error).

In this case, by allowing numerous witnesses to repeat M.C.'s prior statements alleging sexual contact, the trial court allowed her testimony to unfairly take on greater importance. See Lynch, 176 Wash. at 351.<sup>8</sup> "A witness may not fortify his testimony or magnify its weight by showing that he has previously told the same story on another occasion out of court." Id. The Lynch court explained, "If a witness were permitted to do that, then garrulity would supply veracity." Id. at 351-52. This analysis applies with particular vigor in a case such as this, where the child was over ten years old at the time of trial and had no difficulty relating her story to the jury. M.C.

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<sup>7</sup> With regard to expert opinion testimony, one commentator notes that "courts have often referred to an expert's 'aura of reliability' that may be prejudicial when the jurors are capable of evaluating the facts for themselves." Karl Tegland, 5A Wash. Prac., Evidence, § 292, at 398 (3d Ed. 1989).

<sup>8</sup> See also Kopko v. State, 577 So.2d 956, 960 (Fla. Dist. Ct. App. 1991), disapproved of and opinion quashed on other grounds in State v. Kopko, 596 So.2d 669 (Fla. 1992 and Pardo v. State, 596 So.2d 665 (Fla. 1992) ("By having the child testify and then by routing the child's words through respected adult witnesses, such as doctors . . . with the attendant sophistication of vocabulary and description, there would seem to be a real risk that the testimony will take on an importance or appear to have an imprimatur of truth far beyond the content of the testimony.").

was not intimidated or confused by the courtroom, and her memory did not become a problem.

The problem identified in Lynch, of garrulity substituting for veracity, is present here, where M.C.'s statements were repeated numerous times. The justifications for the hearsay exception are absent. The child hearsay exception should not be used as an open-ended exception to the hearsay rule that allows admission of prior consistent statements where a child victim is able to testify fully and accurately at trial. Unless a specific need is identified, the multiple repetitions have no significant probative value beyond the unfair prejudice of bolstering M.C.'s testimony.

c. The Repetitive Statements Were Not Admissible to Rebut a Charge of Recent Fabrication.

Prior consistent statements have negligible probative value and are generally inadmissible because repetition does not make something true. State v. Perez, 137 Wn. App. 97, 107, 151 P.3d 249 (2007). Nevertheless, they may be admissible if they predate a bribe or other motive to lie. Id. See also Lynch, 176 Wash. at 352; ER 801 (d)(1). Statements made before the pressure arose may rebut the claim of fabrication under pressure. Id.

The defense theory of the case was that M.C. either mistakenly connected the unfamiliar word "rape" with the incident when Southard inspected her rash, and later was afraid to back down from the story or she

was motivated to cut off her sister from Southard because she was jealous of his attention. 18RP 55-56, 66. She added details because she was encouraged to do so by repeated and likely suggestive questioning. 18RP 68-69. There was no argument that M.C.'s fabrication was recent; the same argument applied to all of her statements. None of the statements could be said to precede the motivation to lie and thus they were not admissible to rebut it.

Southard did not waive his objection by stipulating to admissibility of M.C.'s interviews with Ashley Wilske because attempts to mitigate the damage from an unfavorable ruling do not waive objection to that ruling. See State v. Watkins, 61 Wn. App. 552, 557-58, 811 P.2d 953 (1991) (when court ruled defendant's prior convictions admissible, defense did not invite error by introducing the convictions first to mitigate prejudice). After the court admitted all M.C.'s out-of-court statements, pointing out the inconsistencies between as many statements as possible became the only reasonable strategy.

The parade of witnesses all testifying that M.C. accused Southard of sexually abusing her had the obvious effect of bolstering M.C.'s testimony. Even though the jury heard the inconsistent statements M.C. made both in and out of court, it is easy to imagine a jury inferring "where there is smoke there is fire" and convicting Southard just based on the sheer number of

times M.C. told people Southard abused her. By allowing seven repetitions of M.C.'s allegations of sexual abuse, the trial court allowed her testimony to take on a greater importance. Therefore, the repetition of prejudicial hearsay testimony constituted reversible error.

4. THE PROSECUTOR TRIVIALIZED THE BURDEN OF PROOF BEYOND A REASONABLE DOUBT BY COMPARING IT TO A PARTIALLY COMPLETED PUZZLE.

“[A] misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands,’ constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due process rights.” State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936, 940 (2010) (quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007); State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). Southard’s conviction should be reversed because in rebuttal closing argument, the prosecutor trivialized the burden of proof beyond a reasonable doubt by analogizing it to a partially completed puzzle. Johnson, 158 Wn. App. at 684-85.

In rebuttal closing argument, the prosecutor attempted to explain the burden of proof beyond a reasonable doubt and the significance of circumstantial evidence:

You can be given a puzzle and someone can tell you that this puzzle is of any city in the world. You start to put the pieces

together, and you can't figure it out, so you get some pieces, you see a mountain range. But it could be any city in the world. You start putting some pieces together, and you see a high rise downtown with apartment buildings and tall buildings but can't still figure it out. It could be any city in the worlds. But someone throws in there, you turn this piece, and you look at it and you see the Space Needle. And without seeing any other piece there, you're convinced beyond a reasonable doubt that that's Seattle. Maddie has given you a Space Needle in this case.

18RP 81-82. This is nearly identical to the argument made in Johnson:

I like to look at abiding belief and use a puzzle to analogize that. You start putting together a puzzle and putting together a few pieces, and you get one part solved. So with this one piece, you probably recognize there's a freeway sign. You can see I-5. You can see the word "Portland" from looking in the background. You may or may not be able to see which city that is, but it is probably near one that is on the I-5 corridor.

You add another piece of the puzzle, and suddenly you have a narrower view. It has to be a city that has Mount Rainier in the background. You can see it. It can still be Seattle or Tacoma, or if you weren't familiar, you might think that mountain might be Mt. Hood, and it could be Portland.

You add a third piece of the puzzle, and at this point even being able to see only half, you can be assured beyond a reasonable doubt that this is going to be a picture of Tacoma.

158 Wn. App. at 682. The court held that analogizing reasonable doubt to a partially completed puzzle, "trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." Id. at 685. The puzzle argument in Johnson, along with the prosecutor's argument that to have

reasonable doubt jurors needed to “fill in the blank,” was improper. Id. The court found these arguments, which misstated the burden of proof, were flagrant, ill intentioned, and incurable by instruction. Id. at 685-86.

Although Johnson was published several months after the prosecutor’s rebuttal in this case, reversal is nonetheless required. While a published opinion is good evidence that prosecutorial misconduct is ill intentioned, the absence of a published opinion does not remove the possibility of ill-intentioned misconduct. Id. Indeed, Johnson appears to have been the first published decision to consider this puzzle argument. Yet the court found ill-intentioned misconduct because the analogy trivialized the burden of proof in a similar way to the arguments held to be improper in Anderson, which discussed the reasonable doubt standard in the context of every day decisions such as having elective surgery and changing lanes on the freeway. Id. (discussing Anderson, 153 Wn. App. at 425). Given the well-established law regarding the importance of the burden of proof beyond a reasonable doubt and the impropriety of attempting to trivialize or minimize the state’s burden, this argument was flagrant, ill intentioned, and incurable.

5. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING SEVERAL COMMUNITY CUSTODY CONDITIONS UNRELATED TO THE CRIME.

The trial court erred in prohibiting Southard from possessing any item designated or used to entertain, attract or lure children, prohibiting him from accessing the internet or possessing computers or any computer parts or peripherals, and requiring him to engage in substance abuse treatment and urinalysis testing. CP 33-34. None of these conditions are statutorily authorized because they are not crime-related.

Whether the trial court acted outside its statutory authority in imposing community custody conditions is an issue that may be raised for the first time on appeal. State v. Riles, 86 Wn. App. 10, 15, 936 P.2d 11 (1997) (citing State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990)). Moreover, Southard has standing to challenge these conditions even though he has not been charged with violating them. Riles, 86 Wn. App. at 17.

The following conditions of community custody are authorized under RCW 9.94A.703:

- (1) Mandatory conditions. As part of any term of community custody, the court shall:
  - (a) Require the offender to inform the department of court-ordered treatment upon request by the department;
  - (b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

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

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

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

- (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;
- (e) Refrain from consuming alcohol; or
- (f) Comply with any crime-related prohibitions.

Emphasis added. Accordingly, any conditions not specified by statute must be crime-related. A crime-related prohibition is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

There is no connection here between the crimes Southard was convicted of and the conditions mentioned above. There was no evidence Southard possessed “any item designated or used to entertain, attract or lure children” or that such an item in any way contributed to his crime of conviction. There was never any allegation that he used items designed to lure children in committing the charged offenses.

Similarly, there was no evidence he used the Internet or a computer to commit his offenses or that use of the Internet or a computer in any way contributed to the crime of conviction. Given the essential nature of computers and access to the Internet in every day life, it is unreasonable, in addition to unauthorized by statute, to prohibit use of the Internet and computers.

Finally, the record is devoid of even a hint of substance abuse. Thus the requirement that Southard obtain treatment is unreasonable and unauthorized. These unauthorized conditions should be stricken from his judgment and sentence.

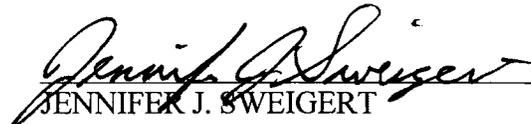
D. CONCLUSION

For the foregoing reasons, this Court should reverse Southard's conviction and remand for in camera review and a new trial. Alternatively, this Court should strike the unauthorized conditions of Southard's community custody.

DATED this 18<sup>th</sup> day of March, 2011.

Respectfully submitted,

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Office ID No. 91051

Attorney for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66108-6-1
	)	
LEWIS SOUTHARD,	)	
	)	
Appellant.	)	

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**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 18<sup>TH</sup> DAY OF MARCH 2011, 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] SETH FINE  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] LEWIS SOUTHARD  
DOC NO. 342426  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 18<sup>TH</sup> DAY OF MARCH 2011.

x Patrick Mayovsky

2011 MAR 18 PM 4:18  
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STATE OF WASHINGTON