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Court of Appeals
Division I
State of Washington

No. 72941-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIO ONTIVEROS,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE..... 4

D. ARGUMENT..... 9

1. Mario Ontiveros’s constitutional right to present a defense was violated when the trial court excluded his expert witness who would have testified about tactics used in the detective’s interview that increase the chances of false confessions..... 9

 a. The federal and state constitutions guarantee the meaningful opportunity to present complete defense 10

 b. Mario’s expert witness would have informed the jury about interrogation techniques that called his admissions into question 12

 c. The trial court concluded that Dr. Connolly’s testimony was not relevant or helpful to the jury because the expert did not know if Mario was innocent 15

 d. The trial court misapplied ER 702 17

 i. *Dr. Connolly’s proposed testimony was relevant* 18

 ii. *Experts may offer opinions about factual issues the jury must decide* 19

 iii. *This Court’s opinion in Rafay is distinguishable* 19

 iv. *The trial court’s exclusion of Dr. Connolly was an abuse of its discretion* 23

 e. The trial court violated Mario’s constitutional right to present a defense..... 24

f. The constitutional error was not harmless, and Mario. Ontiveros’s convictions must be reversed	25
2. Mario Ontiveros’s constitutional right to be present was violated when the trial court discussed answers to jury questions without him.....	28
a. The federal and the state constitution guarantee a defendant the right to be present at his own trial	29
b. The trial court and attorneys discussed and formulated answers to jury questions without Mario Ontiveros	30
c. Mario’s state constitutional right to be present was violated when the court formulated answers to jury questions in his absence	33
d. Mario’s federal constitutional right to be present was violated when the court formulated answers to jury questions in his absence	34
e. Mario did not waive his right to be present.....	35
f. Mario Ontiveros’s convictions should be reversed and remanded for a new trial	38
3. The trial court erroneously admitted irrelevant and prejudicial evidence of KW’s self-harm and her opinion That it was caused by Mario Ontiveros	39
a. The trial court permitted KW to testify that her later mental health issues and problems in school were caused by Mario’s alleged molestation	39
b. KW’s testimony about her psychological and other problems was prejudicial and irrelevant	41
c. There is a reasonable possibility that the error in admitting the testimony of KW and Ms. Roth materially affected the outcome of Mario’s trial	43

4. The trial court violated Mario Ontiveros’s right to a jury trial by forbidding defense counsel from asking the prospective jurors questions about wrong convictions44

E. CONCLUSION47

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835,
cert. denied, 513 U.S. 849 (1994)..... 29, 35

State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) 11

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983) 30, 33, 38

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002)..... 18

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014)..... 11, 25

State v. Garza, 150 Wn.2d 360, 77 P.3d 347 (2003)..... 36, 37, 39

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)..... 11

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011)..... 29, 30, 33, 34, 38

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993)..... 17

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010)..... 11, 28

State v. Kirkman, 159 Wn.2d 918, 155 P.2d 125 (2007) 19

State v. Latham, 100 Wn.2d 59, 667 P.2d 56 (1983) 44

State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984) 45

State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995)..... 41

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 11, 25

State v. Parris, 98 Wn.2d 140, 654 P.2d 77 (1982). 21

State v. SaintCalle, 178 Wn.2d 34, 309 P.3d 326 (2013),
cert. denied, 134 S. Ct. 831 (2013)..... 44

<u>State v. Shutzler</u> , 82 Wash. 365, 144 Pac. 284 (1914)	30, 33, 34
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997), <u>cert. denied</u> , 523 U.S. 1008 (1998).....	43
<u>State v. Tharp</u> , 42 Wn.2d 484, 256 P.2d 482 (1953)	45
<u>Weyerhaeuser Co. v. Commercial Union Ins. Co.</u> , 142 Wn.2d 654, 15 P.3d 115 (2000).....	23

Washington Court of Appeals Decisions

<u>State v. Acosta</u> , 123 Wn. App. 424, 98 P.3d 503 (2004).....	43
<u>State v. Brady</u> , 116 Wn. App. 143, 64 P.3d 1258 (2003), <u>rev. denied</u> , 150 Wn.2d 1035 (2004)	46, 47
<u>State v. Burdette</u> , 178 Wn. App. 183, 313 P.3d 1235 (2013).....	35
<u>State v. Haq</u> , 166 Wn. App. 221, 268 P.3d 997, <u>rev. denied</u> , 174 Wn.2d (2012)	19
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>rev. denied</u> , 124 Wn.2d 1018 (1994)	42
<u>State v. Maule</u> , 35 Wn. App. 287, 667 P.2d 96 (1983)	42
<u>State v. Rafay</u> , 168 Wn. App. 734, 285 P.3d 83 (2012), <u>rev. denied</u> , 176 Wn.2d 1023, <u>cert. denied</u> , 134 S. Ct. 170 (2013)	17, 19, 21, 22
<u>State v. Ratliff</u> , 121 Wn. App. 642, 90 P.3d 79 (2004)	39
<u>State v. Russell</u> , 25 Wn. App. 933, 611 P.2d 1320 (1980).....	34
<u>State v. Vreen</u> , 99 Wn. App. 662, 994 P.2d 905 (2000), <u>affirmed</u> , 143 Wn.2d 923 (2001)	45

United States Supreme Court Decisions

<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	26
<u>Brooks v. Tennessee</u> , 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972).....	25
<u>Bruton v. United States</u> , 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1986).....	26
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	10, 24, 28
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	25, 38
<u>Crane v. Kentucky</u> , 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	9, 10, 24
<u>Holmes v. South Carolina</u> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).....	10, 11, 24
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938).....	36
<u>Kentucky v. Stincer</u> , 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).....	29
<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	13
<u>Rock v. Arkansas</u> , 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	24
<u>Rushen v. Spain</u> , 464 U.S. 114, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).....	38
<u>Snyder v. Massachusetts</u> , 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934).....	34

<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	29, 34
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).....	11, 25

United States Circuit Court of Appeals Decisions

<u>Frye v. United States</u> , 293 F. 1013 (D.C.Cir. 1923).....	17
<u>Larson v. Tansy</u> , 911 F.2d 392 (10 th Cir. 1990)	37
<u>United States v. Camacho</u> , 955 F.2d 950 (4 th Cir. 1992).....	36
<u>United States v. Fontanez</u> , 878 F.2d 33 (2 nd Cir. 1989).....	35, 36
<u>United States v. Gordon</u> , 829 F.2d 119 (D.C.Cir. 1987).....	35
<u>United States v. Rogers</u> , 853 F.2d 249 (4 th Cir.), <u>cert. denied</u> , 488 U.S. 946 (1988).....	36

Utah Decision

<u>State v. Perea</u> , 322 P.3d 624 (Utah 2013).....	22
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United States Constitution

U.S. Const. amend. VI.....	2, 4, 10, 44
U.S. Const. amend. XIV	2, 3, 4, 10, 29, 44

Washington Constitution

Const. art. I, § 21 4, 44
Const. art. I, § 22 2, 4, 10, 29, 44

Washington Statutes

RCW 4.44.140 45
RCW 4.44.190 45

Washington Court Rules

CrR 3.4..... 30, 33
CrR 6.4..... 45
ER 401 18, 41
ER 402 18, 41
ER 403 3, 41
ER 702 12, 15, 16, 17, 23, 24, 25
ER 704 19
ER 804 21

Other Authorities

Danielle E. Chojnacki et. al., An Empirical Basis for the Admission of Expert Testimony on False Confessions, 40 Ariz. St. L.J. 1 (2008)..... 21

Jon B. Gould & Richard A. Leo, <u>One Hundred Years Later: Wrongful Convictions after a Century of Research</u> , 100 J. Crim. L. & Criminology 825 (2010)	13
Mark Costanzo et. al., <u>Juror Beliefs About Police Interrogation, False Confessions, and Expert Testimony</u> , 7 J. Empirical Legal Studies 231 (June 2010).....	20
Melissa B. Russano et. al., <u>Investigating True and False Confessions Within a Novel Experimental Paradigm</u> , 16 Psychological Science 481 (2005).....	14
Richard A. Leo & Brittany Liu, <u>What do Potential Jurors Know About Police Interrogation Techniques and False Confessions?</u> , 27 Behav. Sci. & Law 381 (2009)	20
Saul M. Kassin et. al., <u>“I’d Know a False Confession if I Saw One”:</u> <u>A Comparative Study of College Students and Police Investigators</u> , 29 Law & Hum. Behav. 211 (2005)	21
Saul M. Kassin et. al., <u>Police-Induced Confessions: Risk Factors and Recommendations</u> , 34 Law & Hum. Behav. 3 (2010).....	12, 13, 20, 21, 22
Sydney Gibbs Ballesteros, <u>Don’t Mess With Texas Voir Dire</u> , 39 Hous. L. Rev. 201 (2002)	46

A. ASSIGNMENTS OF ERROR

1. The trial court violated Mario Ontiveros's constitutional right to present a defense when it excluded his expert on police interrogation techniques and false confessions.

2. The trial court violated Mario Ontiveros's state constitutional right to be present when it discussed jury questions and formulated answers in open court when Mario was not present.

3. The trial court violated Mario Ontiveros's federal constitutional right to be present when it discussed jury questions and formulated answers in open court when Mario was not present.

4. The trial court erred by admitting evidence that KW engaged in self-harming behavior because she was sexually abused by Mario Ontiveros.

5. The trial court erred by permitting unlicensed therapist Logan Roth to testify as an expert.

6. The trial court erred by instructing the jury on expert testimony. Instruction 4 (CP 283).

7. The trial court violated Mario Ontiveros's state constitutional right to an impartial jury when it prohibited defense counsel from

asking prospective jurors about wrongful conviction cases during voir dire.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to call witnesses and present a complete defense. U.S. Const. amends. VI, XIV; Const. art. I § 22. Reasoning that his expert's opinion was not relevant because she did not know if Mario Ontiveros was innocent, the trial court prohibited the defense from calling a psychologist who would have testified that Mario's admissions to the police detective should be viewed with caution because the interrogator used interview techniques that contribute to false confessions. Should Mario's convictions be reversed because this Court cannot be convinced beyond a reasonable doubt that the violation of Mario's constitutional right to present his defense was harmless? (Assignment of Error 1)

2. The accused's constitutional right to "appear and defend in person, or by counsel" entitles him to be present at every stage of the trial where his substantial rights may be affected. Cont. art. I, § 22. Mario Ontiveros was not present when the court and lawyers discussed questions from the deliberating jury and formulated the court's responses. Should Mario's convictions be reversed because this Court

cannot be convinced beyond a reasonable doubt that the violation of Mario's right to present where his substantial rights were at stake was harmless? (Assignment of Error 2)

3. The accused has a federal constitutional right to be present at his trial applies to all hearings where his presence would contribute to the fairness of the proceedings. U.S. Const. amend. XIV. Mario Ontiveros was not present when the court and lawyers discussed questions from the deliberating jury and formulated the court's responses. Because Mario could have consulted with his counsel about the jury questions, which were largely factual, should his convictions be reversed because this Court cannot be convinced beyond a reasonable doubt that the violation of his Fourteen Amendment right to present be present was harmless? (Assignment of Error 3)

4. Evidence is inadmissible if its prejudicial value is outweighed by the danger it will mislead the jury or prejudice the defendant. ER 403. KW was permitted to testify that her psychological problems, self-harming behavior, and problems in school were caused by Mario Ontiveros's actions, and the State argued the causal connection to the jury in closing. No expert offered the opinion that Mario was responsible for KW's behavior, and there is no

scientific proof that self-harm, depression and problems in school are characteristics of sexually abused children. Should Mario's convictions be reversed because the evidence was more prejudicial than probative and there is a reasonable possibility its admission impacted the jury verdict? (Assignments of Error 4-6)

5. The accused has the constitutional right to trial by an impartial jury. U.S. Const. amends. VI, XIV; Cont. art. I §§ 21, 22. The defense has the right to question prospective jurors in an effort to ensure an impartial jury, but the trial court prohibited defense counsel from questioning the prospective jurors about cases of wrongful convictions. Should Mario Ontiveros's convictions be reversed because the court's prohibition impeded his ability to exercise challenges for cause and peremptory challenges in order to obtain an impartial jury? (Assignment of Error 7)

C. STATEMENT OF THE CASE

When Mario Ontiveros's mother was ill and he was having problems in high school, he moved from Texas to Washington to live with his sister Autumnne and her husband Brad West. 10/27/14 RP 177; 10/28/14 RP 33, 42-43; Ex. 24 at 4. Mario lived with the couple from approximately 2004 to August 2006. 10/24/14 RP 7-8; 10/27/14 RP

178; 10/28/14 RP 17, 32-33. He obtained a job, paid rent, and helped with household chores. 10/24/14 RP 111-12; 10/28/14 RP 17-18.

Mr. Ward's daughter from a prior marriage, KW, lived with her mother Autumn Pulver in Seattle. 10/24/14 RP 4, 5. KW normally spent every other weekend during the school year, some holidays, and various weeks during the summer with her father and stepmother. 10/27/14 RP 19, 179. KW had a good relationship with Mario, and they watched television and played video games together. 10/24/14 RP 7; 10/28/14 RP 4-5, 35.

In August 2006, when she was 11 years old, KW called and asked her mother to pick her up early from her father's house in Everett. 10/24/14 RP 29, 45; 10/27/14 RP 31, 32, 69. Mrs. Pulver picked her daughter up, and on the drive home, KW told her mother that Mario was doing something she could not see, told he was masturbating, asked her if she had ever masturbated, and suggested she should try it. 10/24/14 RP 31; 10/27/14 RP 33-34. KW assured her mother that Mario had not touched her. Id. at 59.

When they arrived home, Mrs. Pulver called KW's father and related what KW told her. 10/27/14 RP 34, 57, 69. Mr. West confronted Mario and inquired if he had the reported conversation with

K.W. 10/28/14 RP 9. Mario responded that he did. Id. Mr. West was very angry and had a kitchen knife in his hand. Id. at 10. Mario left the West's home that day and soon returned to his mother's home in Texas. Id. at 10, 37.

When she was in high school, KW became withdrawn and depressed; she frequently missed school and began cutting herself. 10/24/14 RP 33-34. KW told her mother about her unhappiness and the self-harm, related that she had not told her mother everything that happened with Mario, and asked for counseling. Id. at 46; 10/27/14 RP 73. Mrs. Pulver arranged for KW to see a therapist, Logan Roth, who met with KW for about six months. 10/27/14 RP 37-38.

KW told Ms. Roth that someone who lived in her father's house had touched her breasts, and she reported to a high school counselor that she had been molested. 10/24/14 RP 48, 170; 10/27/14 RP 111-12. The school counselor called the police. 10/24/14 RP 171.

KW provided a written statement via email to Snohomish County Sheriff's Deputy Steven Martin and then sent him an amended statement in response to his questions and suggested additions. 10/28/14 RP 111-15. The Snohomish County Prosecutor charged Mario with a single count of child molestation in the first degree, later

amended to four counts of child molestation in the first degree and one count of communicating with a minor for immoral purposes. CP 971-72, 1003.

At trial in 2014, 19-year-old KW testified that Mario grabbed her, tickled her, and briefly touched her breasts when he tucked her into bed on the evenings she stayed at her father's home in Everett.

10/24/14 RP 3, 16-22. KW could not describe any particular incidents, explaining they all blended together. Id. at 20, 27. Mr. and Mrs. West moved into the Everett home in February or March 2006, and KW thought Mario began tucking her in about a month after the move.

10/24/14 RP 21; 10/27/14 RP 181; 10/28/14 RP 26.

KW also related times when Mario talked to her about masturbation. The first occurred at her father's Mill Creek home during Christmas vacation when she saw Mario moving in a way that did not seem normal. 10/24/14 RP 11-14. Later at the Everett house, Mario reportedly asked if she remembered what he said at Christmas and appeared to be stroking his penis outside of his pants. Id. at 22, 25-26. The third incident was the one KW told her mother about in August 2006 when Mario again asked KW about masturbation. Id. at 28-29. KW called her mother when Mario left to tend to a barking dog.

Id. Mario apologized for his remarks when he reentered the house. Id. at 30.

The jury heard a tape-recorded statement Detective Martin took from Mario in August 2012. 10/28/14 RP 119-20; Ex. 23.¹ Mario denied masturbating in KW's presence, but he later admitted that KW may have seen him masturbating and he might have talked to her about it. Ex. 24 at 13-16, 17-18, 23, 36, 37-38, 40. Mario denied touching KW's breasts, then agreed he could have accidentally touched her breasts one time when tickling her, and later admitted it was possible it happened two times or maybe a few times. Id. at 19-22, 26-31, 33-34, 45.

Prior to trial, the court excluded testimony from Deborah A. Connolly, a psychologist who would have testified about police interrogation tactics that lead to false confessions. CP 815-31. Dr. Connolly reviewed the transcript of the interview, located suggestive tactics, and would have opined that Mario's admissions should be viewed with extreme caution. CP 796-814.

¹ A disc of the taped interview was admitted as Exhibit 23, and a written transcript was admitted as Exhibit 24. Both exhibits included Mario's Social Security number. In order to comply with GR 31(e)(1)(A), the parties are replacing Exhibit 24 with a redacted copy and will then designate the exhibit to this Court. The parties will attempt to redact and designate the disc, Exhibit 23, if this Court informs counsel that it wants to hear the exhibit.

The jury found Mario guilty of two counts of first degree child molestation, two counts of the lesser-included crime of fourth degree assault, and one count of communicating with a minor for immoral purposes. CP 261-63, 268-69. Mario was sentenced to 78 months to life for the child molestation charges. CP 36-37.

D. ARGUMENT

1. **Mario Ontiveros's constitutional right to present a defense was violated when the trial court excluded his expert witness who would have testified about tactics used in the detective's interview that increase the chances of false confessions.**

Confessions are extremely powerful evidence, and the accused must be permitted to present reliable evidence bearing on the credibility of a confession. Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). The State introduced Mario Ontiveros's tape-recorded interview with a police detective, but the court prevented the defense from calling an expert witness who would have testified that, due to interview techniques utilized by the detective, the resulting admissions should be viewed with caution. Without the expert, the jury had no reason to doubt the detective's approach or Mario's admissions. Mario's conviction should be reversed because

the trial court's exclusion of his expert witness violated his constitutional right to present a complete defense.

- a. The federal and state constitutions guarantee the meaningful opportunity to present complete defense.

The federal and state constitutions provide the accused the rights to counsel, to compel the production of witnesses, and to confront his accusers. U.S. Const. amends. VI, XIV; Const. art. I, § 22.² Together, these rights guarantee “a meaningful opportunity to present a complete defense.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting, Crane, 476 U.S. at 690); accord Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The right to present witnesses is essential to the defendant's right to defend himself:

The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right

² The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence.” The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The compulsory process clauses of the Sixth Amendment is an essential components of due process that applies to the States through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 18-19 (1967).

Article I, Section 22 provides specific rights in criminal cases, including “the right to appear and defend in person, or by counsel . . . [and] to have compulsory process to compel the attendance of witnesses in his own behalf . . .”

to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); accord State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). Courts therefore "safeguard" this fundamental right "with meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

The constitutional right to present a complete defense limits the "broad latitude" of the government to establish rules excluding evidence from criminal trials. Holmes, 547 U.S. at 324. Thus, court rules may not be used to prevent a defendant from presenting relevant, probative evidence. State v. Jones, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010) ("If the evidence is of high probative value . . . 'no state interest can be compelling enough to preclude its introduction constituent with the Sixth Amendment and Const. art. 1, § 22.'") (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Mario Ontiveros's defense was critically prejudiced when the trial court prohibited him from presenting an expert on interrogation techniques that contribute to false confessions, thus depriving the jury of evidence necessary to objectively evaluate Mario's statement to a police detective. The trial court misapplied ER 702, and the decision to exclude Dr. Connolly's testimony made it impossible for Mario to challenge the reliability of his statement to the police.

- b. Mario's expert witness would have informed the jury about interrogation techniques that called his admissions into question.

While false confessions have been identified throughout our legal history, the recent exoneration of a number of innocent prisoners based upon DNA technology has intensified interest in the phenomenon of false confessions. Saul M. Kassin et. al., Police-Induced Confessions: Risk Factors and Recommendations, 34 Law & Hum. Behav. 3, 4 (2010) (hereafter White Paper);³ Jon B. Gould & Richard A. Leo, One Hundred Years Later: Wrongful Convictions after a Century of Research, 100 J. Crim. L. & Criminology 825, 827-32

³ This article is a Scientific Review Paper (White Paper) issued by the American Psychology-Law Society, a division of the American Psychological Association, summarizing the research regarding false confessions. William C. Thompson, An American Psychology-Law Society Scientific Review Paper on Police Interrogation and Confession, 34 Law & Hum. Behav. 1 (2010) (introduction to White Paper). The article and introduction are found at CP 757-94.

(2010). Current scientific research has found that police interrogators “seek to manipulate a suspect into thinking that it is in his or her best interest to confess” using a variety of techniques, referred to as “maximization” and “minimization.” White Paper at 12.

Maximization refers to a guilt-based interview, where the interrogator assumes the suspect is guilty and communicates his certainty to the suspect. White Paper at 12; see Miranda v. Arizona, 384 U.S. 436, 450, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Minimization occurs when the interrogator normalizes the crime by providing moral justification or face-saving excuses for committing the crime, such as suggesting it was an accident. White Paper at 12; Miranda, 384 U.S. at 450; CP 801. Minimization may include offering the suspect alternative explanations for the crime, which vary in terms of moral culpability, but none of which permit the suspect to assert his innocence. Id; CP 801. Some suspects infer leniency from this technique, and others seek positive reinforcement by providing answers that please the interviewer. White Paper at 15-16; CP 802.

Minimization and explicit offers of leniency significantly increase the rate of both true and false confessions. CP 802 (citing Melissa B. Russano et. al., Investigating True and False Confessions

Within a Novel Experimental Paradigm, 16 Psychological Science 481 (2005)).⁴

Psychology professor Deborah Connolly reviewed Detective Martin's interview with Mario Ontiveros and concluded that it was a guilt-presumptive interview that should be "treated with great caution." CP 806-07. In her written report, Dr. Connolly explained that when an interviewer like Detective Martin assumes a person is guilty, he is likely to ignore or reject evidence to the contrary. CP 806. She pointed out where Detective Martin rejected Mario whenever he denied guilt and continued to question him about allegations he had denied. CP 804, 806.

After refusing to accept Mario's denials, Detective Martin used interview techniques designed to elicit a confession. For example, he asked Mario why KW would say that he had molested her, but rejected Mario's explanation as nonsensical. CP 804. The detective also used sequential requests for admissions combined with statements minimizing the seriousness of the actions or providing excuses for them. CP 805-06. The detective praised Mario for any incriminating statements. Id. The detective later encouraged Mario to "take

⁴ Found at CP 252-57.

responsibility” and “get it off his chest,” and he presented options for Mario to explain his actions, but all of the options were consistent with guilt. CP 806.

Dr. Connolly noted that Mario was susceptible to the detective’s interview techniques, as many of his admissions occurred immediately or shortly after a statement by the detective minimizing the actions or posing options. CP 807. Mario was also willing to agree to at least one of Detective Martin’s statements even if he did not understand all of the words. CP 806. She concluded that his statement should be viewed with “great caution.” CP 807.

Mario did not present any witnesses and did not testify. See 10/21/14 RP 38-39. Dr. Connolly was his only defense to the charges and his only hope of convincing the jury that he falsely confessed to the charged crimes.

c. The trial court concluded that Dr. Connolly’s testimony was not relevant or helpful to the jury because the expert did not know if Mario was innocent.

The court ruled that Dr. Connolly’s testimony was inadmissible under ER 702 because it would not be helpful to the trier of fact. The court initially reasoned that the expert’s testimony was not helpful because she would not “connect Mr. Ontiveros with the kinds of people

who confess falsely given these techniques” and the evidence was therefore speculative. 10/20/14 RP 43-44. The court, however, had not read the articles presented by defense counsel and therefore permitted Mario to move for reconsideration. 10/20/14 RP 43, 44; 10/22/14 RP 2; see CP 249-57, 307-425, 735-37.

The court later denied the motion for reconsideration, holding that Dr. Connolly’s testimony was irrelevant because she did not know if Mario was innocent or not. 10/23/14 RP 8-9. The court agreed that behavioral science has established that interview techniques “can cause an innocent person to confess.” Id. at 8. The court acknowledged that an expert could explain why an innocent person would confess falsely, but felt the subject was irrelevant because no expert could know if the interrogated suspect was innocent. Id. The court therefore concluded that Dr. Connolly’s testimony was inadmissible:

So the testimony is only relevant if the person, in fact, was innocent. And that is, of course, the ultimate question for the jury anyway, and so it is not useful to the trier of fact.

This is not a question about Frye. It is, has been, and remains a question about ER 702 which is right back where I started. So I think Rafay was correctly decided. . . . And therefore, the motion to reconsider is denied, and Dr. Connolly will not testify.

Id. at 9 (referring to State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023, cert. denied, 134 S. Ct. 170 (2013)).

d. The trial court misapplied ER 702.

Novel scientific evidence must pass a two-part test for admissibility. State v. Janes, 121 Wn.2d 220, 232, 850 P.2d 495 (1993). First, it must satisfy the Frye standard, and second it must fit within the requirements of ER 702. Id. (citing Frye v. United States, 293 F. 1013 (D.C.Cir. 1923)). Under ER 702, the court determines (1) if the witness qualifies as an expert and (2) would the expert's testimony be helpful to the trier of fact. Id. 235-36. ER 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In the present case, trial court found that the expert's proposed testimony was based upon principles generally accepted in the relevant science community, but that the testimony would not be helpful to the jury because it was irrelevant. The trial court's ruling was incorrect.

i. Dr. Connolly's proposed testimony was relevant.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Even minimally relevant evidence is generally admissible. ER 402; State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

According to the trial court, Dr. Connolly's testimony would only have been helpful to the jury if she knew that Mario's admissions were false. Of course, only Mario and KW know if his statement was true, false, or somewhere in between. As the trier of fact, the jury was responsible for determining if Mario was guilty or not guilty, and thus the reliability of his statements to Detective Martin were of great concern to the jury.

The trial court's reasoning creates an impossible barrier to the introduction of expert testimony on police interrogation techniques and false confessions. No psychologist is likely to know that a defendant is innocent. A psychologist similarly does not know for certainty that an individual is likely to reoffend, but may still offer an expert opinion about that likelihood.

ii. Experts may offer opinions about factual issues the jury must decide.

The trial court also concluded that Dr. Connolly's testimony was not useful because whether Mario was guilty was the ultimate question for the jury. Expert witnesses, however, are permitted to testify about the ultimate issues. State v. Kirkman, 159 Wn.2d 918, 929, 155 P.2d 125 (2007) (“[I]t has long been recognized that a qualified expert is competent to express an opinion on a proper subject, even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact”); State v. Haq, 166 Wn. App. 221, 267, 268 P.3d 997 (accord), rev. denied, 174 Wn.2d (2012).

ER 704 specifically provides, “Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” The trial court misinterpreted this rule in excluding Dr. Connolly's testimony.

iii. This Court's opinion in Rafay is distinguishable.

The trial court's ruling excluding Mario's expert also references this Court's opinion in Rafay, supra. The trial court in that case prohibited the defense from calling Dr. Leo, an expert on police interrogation and false confessions. Rafay, 168 Wn. App. at 783. The

trial court reasoned that (1) Dr. Leo's testimony would not be helpful to the jury because most people know that people tell lies and (2) his opinion was inadmissible because it addressed ultimate issues for the jury. Id.

Unlike in Rafay, Dr. Connolly's testimony went beyond informing the jury that people sometimes lie. The information Dr. Connolly would have provided was not a matter of common knowledge.

Not only are confessions very powerful evidence, most people do not believe that an innocent person would confess to a serious crime in response to psychological methods of interrogation. White Paper at 23-24. Mark Costanzo et. al., Juror Beliefs About Police Interrogation, False Confessions, and Expert Testimony, 7 J. Empirical Legal Studies 231 (June 2010); Richard A. Leo & Brittany Liu, What do Potential Jurors Know About Police Interrogation Techniques and False Confessions?, 27 Behav. Sci. & Law 381 (2009); Iris Blandón-Gitlin et. al., Jurors Believe Interrogation Tactics Are Not likely to Elicit False Confessions: Will Expert Witness Testimony Inform them Otherwise?, 17 Psych., Crime & Law 239 (2011); Danielle E. Chojnacki et. al., An Empirical Basis for the Admission of Expert Testimony on False

Confessions, 40 Ariz. St. L.J. 1, 3-4, 40 (2008) (survey results showed that “the body of knowledge on false confessions is . . . well outside of the common knowledge of jury-eligible citizens” and 73% of respondents believed that an innocent person would “never confess” or would confess only after “strenuous interrogation pressure”). In fact, the common belief that people do not falsely admit criminal behavior is the foundation of our evidence rule permitting the introduction of hearsay statements against the declarant’s penal interest. ER 804(b)(3); State v. Parris, 98 Wn.2d 140, 151-52, 654 P.2d 77 (1982).

In addition, jurors are themselves unlikely to be able to detect a false confession. Research shows that lay people and professionals are unlikely to tell when someone is lying with any degree of accuracy. White Paper at 24-15; Saul M. Kassin et. al., “I’d Know a False Confession if I Saw One”: A Comparative Study of College Students and Police Investigators, 29 Law & Hum. Behav. 211, 216 (2005) (overall accuracy rate of participants who viewed taped statements was insignificant).

The Rafay Court also reasoned that the defendant’s proposed expert lacked expertise that would assist the jury “in evaluating the unusual facts of this case.” Rafay, 168 Wn. App. at 784. Indeed, the

Rafay case was unusual. It involved admissions obtained by Canadian undercover operatives in an elaborate and lengthy “sting” operation in which the defendants voluntarily met with the operatives, believing them to be leaders of organized crime. Id. at 749-54, 785. This Court therefore affirmed the exclusion of the defense expert because his offer of proof did not mention undercover operations or show how they were related to the area of his expertise - custodial police interrogation in the United States. Id. at 782, 785.

The Rafay Court also faulted Dr. Leo for the absence of a correlation between coercive interrogation techniques and false confessions. Rafay, 168 Wn. App. at 786. The trial court here did not rely upon that portion of the Rafay opinion for good reason. Behavioral science has advanced since the 2004 Rafay trial, as evidenced the American Psychological Society’s White Paper on the topic, authored by leading social scientists in the field. White Paper, supra; State v. Perea, 322 P.3d 624, 641-44 (Utah 2013) (contemporary, laboratory-based studies “demonstrate that the science surrounding false confessions now meets the reliability standards of [Utah Evidence] Rule 702”) (citing inter alia two studies addressing

minimization techniques, including the study provided to the trial court, CP 252-57); CP 799-804, 814.

iv. *The trial court's exclusion of Dr. Connolly was an abuse of its discretion.*

The admissibility of expert testimony under ER 702 is reviewed for an abuse of discretion. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000). A trial court abuses its discretion if the decision is based upon untenable grounds or is unreasonable or arbitrary. *Id.* Testimony that will assist the trier of fact in understanding the evidence or determine a fact is admissible under EER 702. *Id.* The trial court's refusal to admit Dr. Connolly's testimony was an unreasonable interpretation of the rule.

Dr. Connolly's proposed testimony would have educated the jury about interview techniques that encourage false confessions and thus assisted the jurors in evaluating the evidence. Her testimony was based upon scientific principles accepted in the behavioral science community. The trial court, however, prevented Dr. Connolly from testifying on the grounds that she did not know if Mario was innocent. This illogical reason was untenable and an abuse of discretion.

e. The trial court violated Mario's constitutional right to present a defense.

The trial court's extreme interpretation of ER 702 created a barrier for Mario Ontiveros similar to that created by evidence rules found unconstitutional by the United States Supreme Court. In Kentucky, for example a court rule prohibited the defendant from presenting evidence at trial concerning the circumstance surrounding his confession if the trial court had ruled the statement was voluntary and admissible. Crane, 476 U.S. at 687. Noting that the manner in which a statement is taken is highly relevant to its reliability and credibility, the United States Supreme Court found that the Kentucky courts had violated Crane's constitutional right to be heard. Id. at 690-91.

Other state court evidentiary rules limiting the defendant from presenting witnesses have also violated the right to present a complete defense. Holmes, 547 U.S. at 324-25 (defendant's right to present defense violated when state case law prohibited him from presenting testimony that a third party may have committed the crime); Rock v. Arkansas, 483 U.S. 44, 57-62, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (defendant's right to testify violated by state's per se rule excluding all hypnotically refreshed testimony); Chambers, 410 U.S. at 294

(defendant charged with murder prohibited from examining man who had admitted the murder as adverse witness or call witnesses who heard him admit the crime); Brooks v. Tennessee, 406 U.S. 605, 611-12, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (state rule requiring defendant to testify before other defense witnesses violated right against self-incrimination and due process); Washington v. Texas, 388 U.S. at 22-23 (right to present witnesses violated by state law that prohibited defendant from calling a witness who participated in the charged crime). Similarly, ER 702 cannot be used to deny a defendant the opportunity to present his defense.

f. The constitutional error was not harmless, and Mario Ontiveros's convictions must be reversed.

When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Franklin, 180 Wn.2d at 382; Maupin, 128 Wn.2d at 928-29. The harmless error test is designed to block the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22.

A confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . Certainly, confessions have profound impact on the jury . . .’

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1986) (White, J., dissenting)). The trial court’s decision to exclude Dr. Connolly’s testimony directly affected Mario Ontiveros’s constitutional right to present a defense. This Court cannot be convinced beyond a reasonable doubt that Mario would have been convicted of the five offenses if the jury had heard Dr. Connolly’s testimony.

The State’s only proof of the charges offenses was KW’s testimony and Mario’s admissions to Detective Martin. There was no physical evidence, KW’s hearsay statements lacked detail, and her testimony concerning the four child molestation charges was especially vague. KW was also impeached in several areas, such as differences between her pre-trial statements and trial testimony, changes in her statement requested by the detective, and her failure to tell her parents about the molestation. 10/24/14 RP 80-91, 93-96, 98-100, 104-06, 109-10, 112-13. In addition, KW’s father, stepmother, or both were

normally present in the home on the evenings that KW was staying with them, yet neither heard anything unusual nor suspected anything improper was occurring in their home. 10/27/14 RP 180, 182; 10/28/14 RP 18, 29-30, 38, 41-42, 49-50, 79.

Further, KW was unable to describe any specific incidents or provide dates for the child molestation charges. 10/14/14 RP 20-21, 27, 114, 116. The court instructed the jury on the need for unanimity on separate and distinct acts, CP 287-91, and the jury convicted Mario of only two counts of child molestation, returning verdicts on the lesser-included offense of fourth degree assault on the other two counts. The reasonable explanation for the jury's decision is found in Mario's agreement with Detective's Martin's assertions that it probably happened more than once. Ex. 24 at 33-34; see CP 275, 180-81.

Mario did not present any witnesses and exercised his right not to testify, so without Dr. Connolly he was unable to provide the jury with any reason not to take his admissions at face value. While defense counsel cross-examined Detective Martin about interrogation techniques used in the interview, the jury heard that the techniques were learned through legitimate training and on-the job experience. 10/28/14 RP 104-06, 145-47; 10/29/14 RP 49-53. The jury was never

provided with any reason to doubt the methods or results of the interrogation. Had they heard Dr. Connolly's testimony, however, the jury would have been provided a framework from which to review Mario's admissions. As a result, the jury may have required evidence to corroborate KW's testimony other than the admissions.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers, 410 U.S. at 302. Mario's statements were critical to the jury verdicts in light of the weak evidence presented by the State. Mario's constitutional right to present a defense was violated when he was not permitted to call an expert witness to explain why his statement should be viewed with caution. This Court cannot be convinced beyond a reasonable doubt that the error was not harmless, and his conviction must be reversed. Chambers, 410 U.S. at 303; Jones, 168 Wn.2d at 725.

2. Mario Ontiveros's constitutional right to be present was violated when the trial court discussed answers to jury questions without him.

The deliberating jury sent seven written questions to the court, addressing the evidence, lack of evidence, and charging decisions. CP 270-76. The court discussed proposed answers to the questions with counsel in open court, but Mario Ontiveros was not present.

10/31/14RP 2-5, 7. Answering jury questions in Mario's absence violated his constitutional right to be present at trial.

- a. The federal and the state constitution guarantee a defendant the right to be present at his own trial.

A person accused of a crime has the fundamental constitutional right to be present for all important stages of the proceedings. U.S. Const. amend. XIV; Const. art. I, § 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). Under the Fourteenth Amendment, the defendant's right to be present applies to hearings where the defendant's presence would contribute to the fairness of the proceedings. Stincer, 482 U.S. at 745; United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994). Thus, the defendant does not have the right to be present at in-chambers conference between the court and the attorneys on legal issues "at least where those issues do not involve the resolution of disputed facts." Lord, 123 Wn.2d at 306.

The Washington Constitution specifically provides the right to "appear and defend in person." Const. art. I, § 22. Under the Washington Constitution, the defendant's right to appear in person

extends to “every stage of the trial when his substantial rights may be affected.” Irby, 170 Wn.2d at 885 (emphasis deleted) (quoting State v. Shutzler, 82 Wash. 365, 367, 144 Pac. 284 (1914), overruled on other grounds, State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983)). The right to be present is also protected by Washington court rule. CrR 3.4(a).

This Court reviews violations of constitutional rights such as the right to be present de novo. Irby, 170 Wn.2d at 880.

b. The trial court and attorneys discussed and formulated answers to jury questions without Mario Ontiveros.

Shortly after the jury began deliberating, it sent seven written inquiries to the judge. CP 270-76; 10/30/14 RP 118. The court notified the attorneys, who appeared in open court to discuss the questions. 10/31/14 RP 2, 15-16. Two of the jurors’ questions were about the prosecutor’s charging decisions. CP 270, 275. The other questions addressed the evidence: why no one contacted the internet service provider to retrieve deleted emails between KW and the detective; why KW’s therapist did not submit a report; what were the contents of KW’s 5th grade sex education class; what videos games did

KW and Mario play; and why KW's physical development was significant.⁵ CP 271-74, 276.

After receiving input from counsel, the court answered the two questions about the prosecutor's charging decision by stating "The Court cannot comment on charging decisions." CP 270, 275.

Concerning the other questions, the court told the jury that no further evidence would be introduced:

Questions about the facts of the case concern evidence. The parties having rested, no further evidence will be introduced.

CP 271-74, 276.

Mario's attorney initially agreed with the court's answers.

10/31/14 RP 2-5. He later asked the court to give different instructions.

Id. at 6. Defense counsel proposed the jury be informed that the charges are not evidence and referred to the relevant instruction.⁶ Id.

He also argued the court should answer the questions about the internet service provider by informing the jury that they could consider the evidence or lack of evidence and referring them to the instruction

⁵ KW's email to Detective Martin with her original statement was admitted at trial, but the jury learned the detective had deleted the email and it was not provided to the defense until after opening statement. 10/24/14 RP 80-81, 85-86; 10/28/14 RP 29-30. Several photographs of KW taken near the time of the crimes were also introduced. 10/24/14 RP 140-42.

⁶ Instruction 1 states, "The filing of a charge is not evidence that the charge is true." CP 278.

addressing the State's burden of proof.⁷ Id. The court did not address defense counsel's requests because the jury had just indicated it had a verdict. Id. at 7.

Before the verdict was announced, defense counsel also informed the court that Mario had not been present for the initial discussion of jury questions because counsel had forgotten to inform his client of the hearing. Id. at 7. The prosecutor related that he had not noticed Mario's absence. Id.

Defense counsel later moved for a new trial based in part upon the denial of his right to be present for the discussion of the jury questions, adding that the court's answers commented on the evidence and did not clarify the burden of proof was on the State. CP 81; 12/23/14 RP 18-24. The court denied the motion, holding that Mario did not have a right to be present at the hearing and that the court and the State did not prevent him from attending. CP 26; 12/12/14 RP 37-38. The court also found that its answers to the jury questions were proper and the defendant's request to change the answers came too late. Id. at 38.

⁷ Instruction 2 addresses the burden of proof and reasonable doubt. CP 281.

- c. Mario's state constitutional right to be present was violated when the court formulated answers to jury questions in his absence.

Article I, section 22 provides an explicit guarantee of the right to be present: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Washington interprets its constitutional right to be present independently from the federal due process right. Irby, 170 Wn.2d at 885. The Washington Constitution explicitly affords the accused the constitutional right to appear and defend "at every stage of the trial when his substantial rights may be affected." Id. (quoting Shutzler, 82 Wash. at 367) (emphasis omitted). Unlike the federal constitution, this right is not limited to a particular stage of the trial or whether the defendant's presence would have aided his defense. Id. at 885 n.6. The constitutional right to be present is reflected in CrR 3.4(a), which provides, "The defendant shall be present at . . . every stage of the trial."

"It is settled in this state that there should be no communication between the court and the jury in the absence of the defendant." Caliguri, 99 Wn.2d at 508 (error for trial court to replay tapes of defendant's conversations with undercover federal agent without

notifying parties); accord Shutzler, 82 Wash. at 367 (giving special instructions to the jury during deliberations violated art. 1, § 22 right to defend in person and by counsel); State v. Russell, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980) (constitution violated when judge answered jury questions during deliberation through bailiff in the absence of defense counsel or defendant).

The trial court communicated with the jury after a hearing where Mario was not present. This was a stage of the proceeding where Mario's substantial rights were be affected, and the communication in his absence is specifically prohibited by Caliguri. The trial court violated Mario's state constitutional right to be present.

d. Mario's federal constitutional right to be present was violated when the court formulated answers to jury questions in his absence.

The federal right to be present is rooted in the right to due process as well as the right to confront witnesses. Gagnon, 470 U.S. at 526; Irby, 170 Wn.2d at 880-81. The accused has the due process right "to be present in his own person whenever his presence has a relationship, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). Thus, the defendant has

federal constitutional to be present during the jury selection process, but not for in-chambers discussions between the court and counsel on purely legal matters. Id. at 106; Irby, 170 Wn.2d at 883; Lord, 123 Wn.2d at 306; United States v. Gordon, 829 F.2d 119 (D.C.Cir. 1987).

A defendant has the right to be present when the court responds to a deliberating jury's announcement that it is deadlocked. State v. Burdette, 178 Wn. App. 183, 201, 313 P.3d 1235 (2013); United States v. Fontanez, 878 F.2d 33, 34-35 (2nd Cir. 1989)). This case is similar. Mario Ontiveros was excluded when the court and counsel discussed responses to the jurors' questions. The questions were factual, and fashioning a proper answer required a knowledge of the facts of the case as well the law. Discussing the questions and answers with Mario could have helped his attorney formulate answers that directed the jurors to instructions that would have assisted them in analyzing the facts and absence of facts relevant to their decisions. This Court should conclude that Mario's federal due process right to be present was violated.

e. Mario did not waive his right to be present.

The constitutional right to be present "cannot cursorily, and without inquiry, be deemed by the trial court to have been waived

simply because the accused is not present when he should have been.” United States v. Camacho, 955 F.2d 950, 954 (4th Cir. 1992) (quoting United States v. Rogers, 853 F.2d 249, 252 (4th Cir.), cert. denied, 488 U.S. 946 (1988)). Mario was not present when the court discussed the jury questions with counsel because his lawyer did not inform him of the hearing. Mario Ontiveros did not waive his constitutional right to be present, and his attorney could not waive that right for him.

A defendant’s waiver of his right to be present at trial must be knowing, intelligent, and voluntary. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); Fontanez, 878 F.2d at 36; see Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 2d 1461 (1938). Mario did not knowingly waive his right to be present because he was not informed of the hearing.

Mario’s attorney could not waive his client’s right to be present. In Gordon, defense counsel informed the court that he preferred that his in-custody client not be brought to court until after the jury was selected. Gordon, 829 F. 2d at 121. The trial court acquiesced and presided over jury selection and gave preliminary instructions without Gordon. Id. The defendant later moved for a new trial with the help of new counsel, informing the court that he wanted to be participate in the

impaneling of the jury and was never informed that his attorney was proceeding without him. Id. at 21-22. The circuit court reversed, holding that, given that Gordon was in custody, the trial court should have required a personal waiver of his right. Id. at 126. Accord Larson v. Tansy, 911 F.2d 392 (10th Cir. 1990) (invalid waiver where counsel's statement that the defendant, who was being held in a mental hospital and had been present for the beginning of the trial, voluntarily waived his presence for instructions, closing argument, and jury verdict).

Mario's absence also did not establish a knowing waiver of his right to be present. When a defendant is absent from his trial without explanation, the court must inquire into the reasons for his absence and make a preliminary finding of voluntariness before proceeding in his absence. Garza, 150 Wn.2d at 350. Once the defendant reappears, the court must provide him with the opportunity to explain his absence. Id. In performing the analysis, the court must indulge every reasonable presumption against waiver. Id. The trial court in this case, however, proceeded without inquiring as to why Mario was not present. Had the court done so, his counsel would have easily located his client, who was only about ten minutes away from the courtroom. 12/23/14 RP 20, 21. Mario did not waive his right to be present

f. Mario Ontiveros's convictions should be reversed and remanded for a new trial.

A violation of the defendant's right to be present is analyzed under the constitutional harmless error standard. Rushen v. Spain, 464 U.S. 114, 118-20, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); Irby, 170 Wn.2d at 885-86 (same standard under federal and state constitutions); Caliguri, 99 Wn.2d at 508. The State must demonstrate beyond a reasonable doubt the error did not contribute to the jury verdict. Chapman, 386 U.S. at 24; Irby, 170 Wn.2d at 886.

The State cannot meet its burden here. Defense counsel was unable to consult with Mario before agreeing to the answers proposed by the court. Had defense counsel had that opportunity, he may have thought of the suggestions he made later to the court. Given the jury's questions about factual matters that were not in evidence, referring the jurors to the reasonable doubt instruction may have impacted their reasoning process and the ultimate outcome of the case.

As discussed in Argument 1(f) above, this case rested on the jury's evaluation of KW's uncorroborated testimony. This Court cannot be convinced beyond a reasonable doubt that Mario would have been convicted of the five offenses if his right to be present at this important discussion had been honored. This Court should reverse

Mario's convictions and remand for a new trial. See Garza, 150 Wn.2d at 371; State v. Ratliff, 121 Wn. App. 642, 648, 90 P.3d 79 (2004).

3. The trial court erroneously admitted irrelevant and prejudicial evidence of KW's self-harm and her opinion that it was caused by Mario Ontiveros.

The trial court admitted evidence that KW engaged in self-harm and her opinion that her cutting was caused by Mario Ontiveros. This evidence was irrelevant, created undue sympathy for KW, and prejudiced Mario.

a. The trial court permitted KW to testify that her later mental health issues and problems in school were caused by Mario's alleged molestation.

The State sought to introduce not only KW's statement to therapist Logan Roth about her alleged sexual abuse but also the therapist's expert opinion that KW engaged in self-harm because of the abuse. 10/20/14 RP 99-100, 102-03. Ms. Roth was not a licensed therapist when she worked with KW in 2011, and she was probably suffering from serious mental health problems. Id. at 95-96, 105-06; see 10/27/14 RP 157. The trial court ruled in limine that Ms. Roth could offer testimony as an expert. Id. at 103-04, 106-07.

Defense counsel then moved to exclude evidence that KW had engaged in self-harm, including a suicide attempt, and KW's opinion

that her behavior was caused by the sexual abuse. CP 733-34; 10/21/14 RP 201-05. Defense counsel argued that the impact of the abuse on KW was irrelevant and unduly prejudicial, and pointed out that KW's conclusion about the reasons that she harmed herself was not supported by an expert opinion. 10/21/14 RP 206-07. The trial court ruled that KW's testimony that she was engaging in self-harm and the reasons why were relevant to corroborate her allegations of sexual abuse and to explain why she was in therapy. 10/21/14 RP 107-08, 210.

At trial KW testified that she started cutting herself when she was about 15 years old in order to cope with depression and "trauma." 10/24/14 RP 33-34, 44. Over Mario's renewed objection, KW defined "trauma" as "what Mr. Ontiveros had done to me and the lingering feelings I had about it." Id. at 34-42, 44. KW also linked her problems in school and work to the purported abuse. 10/24/14 RP 116-17

Ms. Roth disclosed what KW told her about her cutting behavior and her inability to sleep; KW linked her inability to sleep to the abuse. Id. at 10/27/14 RP 114-15, 119-22, 124. Ms. Roth declined to give an opinion about why KW was harming herself; she believed "it's better to come directly from the person themselves." Id. at 172-73. According to Ms. Roth, KW believed her behavior occurred because she felt

disappointed by people, felt intense internal pain, and found emotional release in cutting. Id. at 174. In closing argument, the State argued that KW's self-harm and problems in school were directly related to the alleged offenses. 10/30/14 RP 90-91, 93-94, 116-17.

b. KW's testimony about her psychological and other problems was prejudicial and irrelevant.

Only relevant evidence is admissible in Washington. ER 402; State v. Luvene, 127 Wn.2d 690, 706, 903 P.2d 960 (1995). Evidence is relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger the evidence will mislead the jury or prejudice the defendant. ER 403; Luvene, 127 Wn.2d at 706-07. This Court reviews the admission of irrelevant evidence for abuse of discretion. Luvene, 127 Wn.2d at 707.

KW's problems in school and self-harming behavior after the events at issue were not relevant to the jury's determination of whether Mario Ontiveros molested or communicated with her for immoral purposes in 2006. The evidence was also prejudicial, as it was likely to cause an emotional response and produce added sympathy for KW.

The State also used the testimony to bolster KW's credibility by showing her "nose dive" was caused by the alleged offenses. In essence, the prosecutor was eliciting KW's psychological problems and problems in school so that the jury would conclude they were characteristics of abused children and proof that KW was abused.

The State, however, had no scientific basis to support this reasoning. Ms. Roth was not an expert witness and did not claim to have expertise and experience with sexually abused children.⁸

10/27/14 RP 108. Moreover, Washington cases have not recognized a scientific basis for expert testimony concerning characteristic of abused children. State v. Jones, 71 Wn. App. 798, 817, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994); State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983). "[T]he use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under Frye." Jones, 71 Wn. App. at 820.

⁸ Ms. Roth worked under a licensed therapist to provide "body, mind, and spirit counseling" to families, couples, and individuals. 10/27/14 RP 108.

- c. There is a reasonable possibility that the error in admitting the testimony of KW and Ms. Roth materially affected the outcome of Mario's trial.

When an evidentiary error is not of constitutional magnitude, this Court will reverse if, within a reasonable possibility, the error materially affected the outcome of the case. State v. Acosta, 123 Wn. App. 424, 438, 98 P.3d 503 (2004) (quoting State v. Stenson, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998)). Evidence that KW engaged in self-harm and lost interest in school as a result of purported abuse by Mario was highly prejudicial. It was not relevant. Any relevance the evidence had in corroborating KW's claims of abuse was speculative and unsupported by science or an expert opinion. In addition, the evidence served to prejudice Mario by engendering greater jury sympathy for KW.

The error was compounded when the court permitted Ms. Roth to testify as an expert that the reasons cited by KW for her self-harming behavior were determinative, not Ms. Roth's opinion. Ms. Roth was not qualified as an expert, but was simply what she believed was important. The court, however, gave the jury an expert witness instruction based solely on this testimony. CP 283; 10/29/14 RP 162-63. The jury was thus left with the impression that Ms. Roth had

offered an expert opinion that KW's self-harm was caused by the defendant.

Given the lack of physical evidence in this case and the other issues discussed in Argument 1(f), there is a reasonable possibility that testimony from KW and Ms. Roth that KW's problems were the result of sexual abuse prejudiced the jury and thus affected the jury verdict. Mario Ontiveros's convictions should be reversed.

4. The trial court violated Mario Ontiveros's right to a jury trial by forbidding defense counsel from asking the prospective jurors questions about wrong convictions.

The right to a jury trial is protected by the federal and state constitutions. U.S. Const. amends. VI, XIV; art. I, §§ 21, 22. Article I, section 21 provides, "The right of trial by jury shall remain inviolate." Washington defendants also enjoy the right to trial before an "impartial jury." Const. art. 1, § 22. To ensure the right to an impartial jury, the defendant has the right to move to exclude a potential juror for cause or exercise a limited number of peremptory challenges without giving reason. State v. SaintCalle, 178 Wn.2d 34, 62, 309 P.3d 326 (2013) (Madsen, C.J., concurring), cert. denied, 134 S. Ct. 831 (2013); State v. Latham, 100 Wn.2d 59, 70, 667 P.2d 56 (1983); State v. Vreen, 99 Wn.

App. 662, 666, 994 P.2d 905 (2000), affirmed, 143 Wn.2d 923 (2001); RCW 4.44.140-190; CrR 6.4(e).

Voir dire is conducted “for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges.” CrR 6.4(b). Thus, the defendant “should be permitted to examine prospective jurors carefully, ‘and to an extent which will afford him every reasonable protection.’” State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (quoting State v. Tharp, 42 Wn.2d 484, 499, 256 P.2d 482 (1953)). The court, however, has the discretion to set the “limits and extent” of the examination. Id. at 757.

The trial court prohibited Mario’s attorneys from asking questions about wrongful conviction cases unless the cases were first brought up by a prospective juror. 10/20/14 RP 86-87. Defense counsel, however, asserted that the topic was relevant and counsel often referred to well-known cases during voir dire. Id. at 85-86.

Defense counsel was correct. Mario’s defense depended upon convincing the jury that his admissions to Detective Martin were not reliable due to the interview techniques the detective utilized. Learning the prospective jurors’ feelings and beliefs about a famous case where

an innocent person was exonerated would have assisted the defense in exercising their peremptory challenges and may even have revealed a bias that was deserving of a challenge for cause. It is through intense and expansive voir dire that bias and prejudice are revealed and the changes of seating an impartial jury improved. Sydney Gibbs Ballesteros, Don't Mess With Texas Voir Dire, 39 Hous. L. Rev. 201, 215 (2002).

The trial court's discretion to limit the scope of voir dire is limited "by the need to assure a fair trial by an impartial jury." State v. Brady, 116 Wn. App. 143, 147, 64 P.3d 1258 (2003), rev. denied, 150 Wn.2d 1035 (2004). The trial court here acknowledged the parties were entitled to find out what the jurors were thinking, but did not think a discussion of other cases could begin with a lawyer. 10/20/14 RP 86. The court therefore illogically ruled that wrongful conviction cases could be discussed, but only if first mentioned by a prospective juror. Id. at 86-87. There is thus no logical reason that the court's limitation assisted the process of selecting an impartial jury.

Many attorneys, judges, and commentators consider voir dire the most important part of a jury trial. Ballesteros, 39 Hous. L. Rev. at 202. The trial court abused its discretion by prohibiting Mario from

raising the subject of wrongful convictions in the jury selection process. As a result, this Court cannot be convinced that Mario Ontiveros received a trial by the “impartial” jury guaranteed by the Washington constitution. Mario’s conviction should be reversed and remanded for a new trial. See Brady, 116 Wn. App. at 149.

E. CONCLUSION

Mario Ontiveros’s constitutional right to present a defense was violated when the trial court excluded the testimony of his expert witness concerning police interrogation and false confessions, and his constitutional right to be present was violated when the court and counsel discussed answers to the deliberating jury’s questions when he was not present.

In addition, the trial court improperly admitted testimony linking KW’s mental health issues and poor performance in school with the offense. Finally, the court prevented defense counsel from questioning the jurors about abuse wrongful conviction cases, thus limiting counsel’s ability to ensure Mario was tried by an impartial jury.

Mario asks this Court to reverse his convictions and remand for a new trial.

DATED this 18th day of August 2015.

Respectfully submitted,

s/Elaine L. Winters

Elaine L. Winters – WSBA # 7780

Washington Appellate Project

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72941-1-I
)	
MARIO ONTIVEROS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF AUGUST, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 18TH DAY OF AUGUST, 2015.



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