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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
JEFFREY K. DAY

BRIEF OF PETITIONER

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Petitioner Pro Se
c/o Prairie Correction
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CERTIFICATE OF SERVICE

I certify that I mailed

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ORIGINAL

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None :

ASSIGNMENTS OF ERROR

1. Mr. Day was denied a fair trial when the court allowed the complaining witness to testify while holding a toy on the stand in front of the jury; when the court took no action to caution the jury following an outburst from the alleged victim's mother during testimony; and when the court prohibited Mr. Day from testifying regarding the specifics of the legal representation of the alleged victim.

2. The prosecutor committed prejudicial and reversible error denying Mr. Day a fair trial when (1) he gave his personal opinion on the credibility of the alleged victim; (2) he improperly appealed to the passion and prejudice of the jury by repeatedly referring to Mr. Day as a judge in closing argument; and (3) when he made other improper comments unsupported by testimony designed to appeal to the passion and sympathy of the jury.

3. Defense counsel provided ineffective assistance by (1) failing to interview or call witnesses which could have provided a strong character defense and (2) by failing to object to the alleged victim holding a toy while testifying or to request judicial action

following the outburst during testimony or to object to the prosecutor's improper statements in closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Day denied a fair trial when the alleged victim testified before the jury holding a toy and the court made no preliminary inquiry into the necessity for such a toy? (Assignment of Error No. 1)

2. During Mr. Day's testimony, alleged victim's mother, who had previously testified, created a disturbance in front of the jury. Was Mr. Day denied a fair trial when the court took no action to caution the jury or determine the effect of the outburst?

(Assignment of Error No. 1)

3. Did the trial court err and deny Mr. Day a fair trial when it granted the State's motion prohibiting Mr. Day from discussing any details of his prior legal representation of the alleged victim?

(Assignment of Error No. 1)

4. Did the prosecutor commit misconduct denying Mr. Day a fair trial when, in closing argument, he gave his personal opinion on the credibility of the alleged victim? (Assignment of Error No. 2)

5. Did the prosecutor improperly appeal to the passion and sympathy of the jury by repeatedly referring to Mr. Day's infrequent status as a judge in closing argument?
(Assignment of Error No. 2)

6. Did the prosecutor improperly appeal to the passion and prejudice of the jury in closing argument when he made comments about the alleged victim's financial status and clothing and compared it to an attorney when such statements were not supported by the testimony?
(Assignment of Error No. 2)

7. In a case where there is no evidence other than an accusation by the alleged victim and Mr. Day provided counsel with the names of persons who could have provided a strong character defense on the issue of sexual morality, was defense counsel ineffective when he did not interview or call such witnesses to testify?
(Assignment of Error No. 3).

8. Did defense counsel fail to provide effective assistance when he did not object to the alleged victim testifying in front of the jury holding a toy or to the prosecutor's comments on the credibility of the alleged victim or when he did not request judicial action following the outburst before the jury during Mr. Day's testimony?
(Assignment of Error No. 3)

STATEMENT OF THE CASE

Procedural History

Jeffrey Day was charged with one count of Child Molestation in the first degree on April 14, 2004. CP 2. A plea of not guilty was entered. CP 29. Jury trial was held September 29, 2004–October 7, 2004. RP 1–595. A verdict of guilty was returned. CP 36. Judgment and sentence were entered November 5, 2004. Mr. Day was sentenced to 60 months in DOC. CP 49. An appeal was previously filed challenging the sufficiency of the evidence and this court affirmed. Mr. Day now files this petition.

Factual Background

Mr. Day has been an attorney since 1993. CP 357: 8–11. He began representing D.J. in February, 2002. RP 360: 3–9. D.J. was charged with arson in Juvenile court. See Affidavit of Jeffrey Day. Legal representation ended in September 2002 when Mr. Day obtained dismissal of the charges. RP 360–61.

After representation ended, Mr. Day had periodic social contact with D.J. and his family unrelated to the representation. RP 362: 23–5. Mr. Day befriended D.J. because of events in Mr. Day's life where he had

grown up in a similar situation. RP 405:8-406:3.

Between September 2002 and February 2004, Mr. Day took D.J. out 3-4 times. RP 149:17-24. In November 2002, Mr. Day allowed D.J. to stay overnight at his house. RP 363-74.

Mr. Day did not have contact with D.J. or his mother from March 2003-Christmas 2003. RP 389:9-12. He stopped by their house briefly on Christmas Eve, RP 393.

Mr. Day's next contact with D.J. was February 6, 2004, the first lengthy contact in 11 months. RP 395:13-17. Mr. Day went to their home to get a haircut which D.J.'s mother had offered after the legal representation. During this visit, D.J. was on the phone with a new girlfriend. He wanted to go to her home, and when his mother would not let him be there unsupervised, he became upset. RP 407.

D.J. showed his mother and Mr. Day a letter that the girl, Katelyn, had written to D.J. Katelyn wrote that her parents may be sending her to live with her grandparents. RP 407-8. She also said that if she did not behave, she would be sent to a juvenile facility and that her best friend's male cousin had been sent to such a place where he was beaten and raped. RP 77, 157:9-18.

Because D.J. was upset that he could not go to Katelyn's, Mr. Day offered to take him out to eat. RP 409:1-5. During their visit, D.J. asked if he could stay overnight with Mr. Day and Mr. Day said he could not. RP 414-15. He said he would call D.J. the following week. RP 416:1-4.

Mr. Day called D.J. on February 14. D.J.'s mother, Amber, said D.J. had been bothered by something he was refusing to discuss. She asked Mr. Day to try to find out what was bothering D.J.. RP 417:16-15, RP 90.

Amber had been having increasing difficulty with D.J.'s behavior especially since her daughter, Amelia, was born in November, 2002. RP 70. D.J. had been demanding more attention. RP 74. He had recently been wearing gothic clothing and exhibiting gothic behavior which upset Amber. RP 120:5-11, 146:6-8. The father of Amber's daughter was Byron Smith, a live-in boyfriend. He and D.J. had little in common and did not get along. RP 349-50.

When D.J. would not tell Amber what was bothering him, she took away his CD player and wristbands which he liked to wear. RP 80, 164:11-25. When Mr. Day later picked up D.J. he had these items with him. RP 418:22-25.

RP 418: 22-25.

Mr. Day took D.J. to eat at McDonalds. RP 419. During dinner, D.J. said his mother had threatened to send him to a boot camp if he continued to misbehave. Amber had seen a story on TV about boot camps and had threatened D.J. with it. RP 419:17-22, 157:9-158:7, RP 56-8. In fact, she had told him about the camp earlier that day. RP 80.

D.J. could not be consoled despite Mr. Day's efforts. He said his mom had already saved the money to send him away. RP 235-6, 167:7-11.

After eating they went to Mr. Day's home and watched DVDs. RP 420-22.

During the evening, Mr. Day asked D.J. if anything else was bothering him. D.J. said there was and that his mother had wanted him to talk about it but he refused to do so. He also would not talk to Mr. Day about it. RP 427:10-17, 180:1-4.

Mr. Day told D.J. to sleep on the couch in the media room if he fell asleep watching movies. RP 423. D.J. fell asleep about 11:30 p.m. Mr. Day covered D.J. with a blanket, left him on the couch and went to sleep in his own room down the hall. RP 424:1-6, 20.

Just after 4 a.m. Mr. Day was awoken when D.J. unexpectedly crawled into his bed. D.J. had never been invited into the room or to sleep in the bed. RP 424-5, 175:16-17. After D.J. got into the bed, Mr. Day waited a few minutes for D.J. to get to sleep and then left the room to go sleep in the media room. RP 426-7.

About 6 a.m. Mr. Day awoke and went to check on D.J. as he passed the bedroom. He heard D.J.'s breathing was loud and quick. He noted the breathing was uneven, and when he looked in, he could see D.J. moving his head side to side and he was making chewing motions. RP 428-29. Mr. Day continued to watch D.J. due to his restlessness and knowing D.J. had obviously been bothered by the possibility of boot camp and other issues he would not talk about. RP 429-30.

Mr. Day sat on the edge of the bed. At one point he touched D.J.'s chest and could feel that D.J. was warm and his heart was beating fast. He felt that D.J. was agitated. RP 430-32.

D.J. woke up a few minutes later, went down the hall to use the bathroom and then got back into the bed as Mr. Day sat there. RP 432-33. A minute later, D.J. asked to watch a movie and Mr. Day set up the

DVD in the media room where they had left off the night before. He left D.J. in the media room and went back to bed. RP 433-34.

About 7:30, D.J. awoke Mr. Day and asked to use his computer. Mr. Day went into the media room, got the computer running, left D.J. and went back to bed. RP 434-35.

About 9:00 a.m. D.J. awoke Mr. Day and told him he had to be home by 10 a.m. RP 435:3-8. Mr. Day got up, showered, and took D.J. home, leaving his house about 9:30. RP 438-39. D.J. arrived home just before 10 a.m. RP 61.

When he got home, D.J. told his mother that when he awoke about 6 a.m. Mr. Day was touching him near his testicles. RP 132:15-133:2.

D.J. also had in his possession the items he had taken from his mother's room the night before. He was aware he was not to have these items and that he would be in trouble when he got home and his mother found out.. RP 81, 165:13-16.

Mr. Day has consistently denied touching D.J. improperly at any time. RP 437:15-16, 447:16-18.

At trial, D.J. testified before the jury holding a toy, an orange-yellow Koosh ball. This was clearly

visible to the judge and jury. There was no preliminary inquiry into the necessity for having the toy. See Affidavits of Lisa Jensen and Jo Rhodes.

Prior to trial, the court granted the State's motion to prohibit Mr. Day from discussing any details about his legal representation of D.J. RP 13-16.

During Mr. Day's testimony, D.J.'s mother, who had previously testified, suddenly rose from her seat in the audience, cried out, and stormed out of the courtroom. Her hysterics could be heard in the hallway. Though the jury observed this disruption, the court took no action to caution the jurors or inquire into the possible effect of the disruption. See Affidavits of Dan Platter, Lisa Jensen and Jo Rhodes.

In closing argument, the prosecutor directly commented on D.J.'s credibility. RP 546:20-22. The prosecutor also made repeated references to Mr. Day's occupation as a lawyer and his occasional service as a pro tem judge. RP 590-91. The prosecutor also appealed to the jury by drawing specific attention to D.J.'s clothing and comparing it to the "wardrobe of fine suits" that lawyers have to wear. RP 589-90.

Additional facts will be presented in Section IV when discussing the prejudicial impact of these errors.

ARGUMENT

I. Personal Restraint Petition Standards

A court is to grant relief if the petitioner is under unlawful restraint. RAP 16.4(a). Confinement in prison is a restraint. RAP 16.4(b). A conviction obtained in a criminal proceeding in violation of the U.S. or State Constitutions or in violation of state laws makes the restraint based on the conviction unlawful. RAP 16.4(c).

To obtain relief based on a constitutional error, the petitioner must demonstrate by a preponderance of the evidence that the petitioner was actually and substantially prejudiced by the error. In Re Personal Restraint of Davis, 152 Wash. 2d 647, 100 P.3d 1 (2004).

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Constitutional errors are treated specially because they often result in serious injustice to the accused and may adversely affect the public perceptions of the fairness and integrity of the judicial proceedings. State v. McFarland, 127 Wash. 2d 322, 899 P.2d 1251 (1995).

An error of constitutional magnitude is presumed prejudicial and the State bears the burden of proving

the error was harmless beyond a reasonable doubt. Constitutional error is harmless only when the untainted evidence provides an overwhelming conclusion of guilt. State v. Olmedo, 112 Wash. App. 525, 49 P.3d 960 (Div. 3 2002).

If a petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. This evidence may be presented by affidavit. State v. Roche, 114 Wash. App. 424, 59 P.3d 686 (Div. 1 2002).

This PRP is properly before the court. Mr. Day was convicted of a felony charge and is currently incarcerated. Mr. Day alleges the restraint is unlawful as the conviction was obtained in violation of his constitutional rights to have a fair trial and effective assistance of counsel.

Several issues require evidence outside the record. Affidavits, as required, have been attached to the PRP and will be referenced in this brief.

This court should grant the PRP and reverse the conviction as the errors demonstrate that Mr. Day was actually and substantially prejudiced.

II. The Right to a Fair Trial

The right to a fair trial is a fundamental liberty secured by the 14th Amendment to the U.S. Constitution. State v. Sanchez, 122 Wash. App. 579, 94 P.3d 384 (Div. 3 2004). The right to a fair trial includes the presumption of innocence. State v. Gonzalez, 129 Wash. App. 895, 120 P.3d 645 (Div. 3 2005).

The responsibility to provide a fair trial applies to both the court and the prosecutor.

It is the duty of the court to give effect to the presumption of innocence by being alert to any factor that could undermine the fairness of the fact finding process. Id., citing Estelle v. Williams, 425 U.S. 501 at 503, 96 S.Ct. 1691, 49 L.Ed. 2d 126 (1976). Whether a particular practice had a negative effect on the judgment of the jurors receives close judicial scrutiny. Id.

Due process requires the trial judge to be ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Id., citing Smith v. Phillips, 455 U.S. 209 at 217, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982).

A prosecutor has a duty to see that an accused person receives a fair trial. A prosecutor must act impartially

seeking a verdict free of prejudice and based upon reason. State v. Suarez-Bravo, 72 Wash. App. 359, 864 P.2d 426 (Div. 2 1994).

Central to the right of a fair trial is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial and not on other circumstances not adduced as proof at trial. State v. Lord, 128 Wash. App. 216, 114 P.3d 1241 (Div. 2 2005), citing Holbrook v. Flynn, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed. 2d 525 (1986).

- A. Mr. Day was denied a fair trial when D.J. was allowed to testify before the jury holding a toy.

Allowing a child witness to testify before a jury over two days while holding and playing with a toy denied Mr. Day a fair trial.

D.J. brought an orange-yellow "Koosh" ball to the stand and continually displayed and played with the toy during his testimony. At one point he played with the toy as he stood directly in front of the jury referring to a diagram. The jury and judge had a clear view of the toy. The toy's coloring made it noticeable and distracting. See Affidavits of Lisa Jensen and Jo Rhodes.

Washington courts have held that testimony given by a child while holding a toy is error without a substantial preliminary showing that the witness had some legitimate need to have the toy on the stand.

In State v. Harper, 35 Wash. App. 855, 670 P.2d 296 (Div. 2 1983), the court expressed concern about a witness holding a teddy bear on the stand. The case was reversed on other errors, but the court noted that on retrial it did not expect the error of carrying a toy to the stand to be repeated. In that case the witness was 11 years old.

In State v. Hakimi, 124 Wash. App. 15, 98 P.3d 809 (Div. 1 2004), two alleged victims testified holding a doll. The appellate court expressed concern but did not reverse only because there had been testimony prior that the girls were reluctant to testify. There was also expert testimony that girls, in particular, may find security holding a toy.

The Hakimi court noted Harper in its decision. While noting that the statement in Harper was dictum, the Hakimi court recognized that the judges were clearly concerned about a child over the age of 11 holding a teddy bear on the witness stand.

In this case, D.J. should never have been allowed on the stand holding and playing with a toy. He was 12 years old, older than the witnesses in the cases above. There was no preliminary inquiry by the judge as in Hakimi. D.J. had not expressed reluctance to testify. There was no testimony that he needed a toy for security. The result was to give an impression that he was a small child who needed a security toy, an image not supported by testimony or demeanor.

The court should have prevented this occurrence. This undermined the fairness of the fact finding process. Reason and common experience makes it obvious that the effect of having a toy on the stand would create sympathy.

In a trial where there is nothing to support the accusation and the accuser is allowed to hold a toy while testifying, the right to a fair trial is lost. Here, the trial judge was not "ever watchful" to prevent a prejudicial occurrence.

B. Mr. Day was denied a fair trial when D.J.'s mother interrupted his testimony in front of the jury and stormed out of the courtroom.

One of the ideals of the criminal justice system is that a defendant is entitled to a calm judicial

atmosphere to minimize any possibility of a decision being rendered on speculation or emotion rather than on facts and logical reasoning. Courts have held that emotional demonstrations are a sufficient basis to reverse a conviction where an outburst might reasonably have affected a jury's verdict or where an incident may have prevented a defendant from having a fair and impartial trial. Collum v. State, 21 Ala. App. 220, 107 So. 35 (1926).

During Mr. Day's direct testimony, D.J.'s mother suddenly stood up in the audience, burst into a loud cry and stormed out of the courtroom. She had been seated 8-10 feet from the jury. At least half the jury turned to see Amber leave when she cried out. She had previously testified so the jurors knew that she was D.J.'s mother. After her loud exit, her hysterics could be heard inside the courtroom. Mr. Day continued to testify but it appeared that the jury was distracted by the outburst and was not paying attention. See Affidavits of Dan Platter, Lisa Jensen and Jo Rhodes.

The judge took no action in response to the ourburst. He did not excuse or question the jury. He did not caution the jury to disregard the incident.

Where emotional outbursts have taken place during trials, a new trial has been avoided only when the trial judge took substantial steps to insure the outburst did not prejudice the defendant.

In State v. Savage, 161 Conn. 445, 290 A.2d 221 (1971), the complainant in an incest case screamed at the defendant as he left the stand calling him a liar. The trial court immediately instructed jurors after the outburst and again during final instructions that the jury should disregard the incident. The appellate court found that the trial court's careful and correct instructions to disregard negated possible harm.

In Kreutz v. State, 293 So. 2d 451 (Miss. 1974), a defendant on a rape charge was testifying when defense counsel heard the alleged victim's brother say, "He's lying." Though the trial judge did not hear the remark, he cautioned jurors immediately to decide the case only on the testimony and not on the basis of noise, language, or anything extraneous. He asked jurors if they could render a verdict based solely on the evidence. The judge's immediate, positive action to insure there was no prejudice avoided a new trial.

In another rape prosecution, State v. Sorrels, 33 N.C. App. 374, 235 S.E. 2d 70 (1997), a new trial was

avoided only because of "prompt and decisive" judicial action following an outburst. When the defendant denied the accusation, the alleged victim shouted, "You no good black so and so. You did it. You know you did." The appellate court noted that when unexpected emotional outbursts occur, a trial judge must act promptly and decisively to restore order and to erase any bias or prejudice which might have occurred. In this case, the trial judge immediately sent the jury out and admonished the alleged victim. The judge then instructed jurors not to consider the outburst.

In Adkins v. State, 524 N.E. 2d 1274 (Ind. 1988), during closing argument, the alleged victim's mother interrupted and said, "Why don't you tell the truth and stop lying?" A new trial was avoided only because the trial judge immediately excused the jury, determined the jurors did not know who the mother was and then cautioned the jurors when they returned to disregard the incident.

In Mr. Day's case none of the remedial actions took place. The outburst occurred 8-10 feet from the jury during a critical stage of Mr. Day's testimony and attracted the jury's attention. The judge did not immediately excuse the jury. He did not question jurors to

see if they had been unduly influenced. He did not issue any caution to disregard the incident. There was no prompt and decisive action to erase any bias or prejudice that might have occurred.

Ultimately, this case came down to a credibility dispute. Particularly because there was no corroborating evidence, to allow the outburst to go without inquiry or caution by the judge on his own was an error which deprived Mr. Day of a fair trial.

- C. The court denied Mr. Day a fair trial when it prevented him from raising or discussing any details of his legal representation of the alleged victim.

It is fundamental that a defendant charged with commission of a crime should be given great latitude in examination of a prosecution witness to show motive or credibility. This is especially so in the prosecution of a sex offense where the defendant is often disproportionately at the mercy of a complaining witness's testimony. State v. Peterson, 2 Wash. App. 464, 469 P.2d 980 (Div. 2 1990).

A criminal defendant's right to cross examine witnesses against him is a fundamental constitutional right.

To allow no cross examination into an important area is an abuse of discretion. Denial or diminution of that right calls into question the integrity of the fact finding process. State v. McSorley, 128 Wash. App. 598, 116 P.3d 431 (Div. 2 2005), citing State v. York, 28 Wash. App. 33, 621 P.2d 784 (Div. 3 1980).

In cross examination of Mr. Day, the prosecutor repeatedly focused on Mr. Day's taking D.J. to McDonalds on various occasions, particularly on the first time he did so. The prosecutor also repeatedly questioned Mr. Day about the fact he knew that date of D.J.'s birthday. RP 448-50, 466-67, 469:22. He also repeatedly noted that Mr. Day had gained D.J.'s trust and argued the only reason was so that he could later commit the alleged abuse.

The prosecutor argued:

The defendant discovered very early on that D.J.'s mom couldn't afford to take him to McDonalds and the defendant took advantage of that.

RP 525: 19-21.

It is undisputed that the defendant took D.J. out to dinner,..this was his first date. He learned that D.J. liked McDonalds and he knew Amber could not afford it so he jumped all over that one right away.

RP 533-34

The defendant established a trust between himself and D.J. The defendant established some sort of relationship between himself and D.J. and built it from there.

RP 526

The defendant made efforts to gain D.J.'s trust. He made efforts to gain his friendship and he succeeded in both of these things.

RP 532.

The defendant seduced D.J. He gained his trust, he gained his friendship, got him to spend the night, got him to feel comfortable.

RP 545

He knows when D.J.'s birthday is. Of the thousands or more clients that the defendant has had, D.J. is the only one whose birthday he can recall.

RP 532.

By preventing Mr. Day from discussing his legal representation or allowing any questions in cross examination of the State's witnesses, Mr. Day could not explain that he first took D.J. to McDonalds to discuss D.J.'s case in a place where D.J. might feel comfortable. Mr. Day could not counter the prosecutor's insinuation that this was a "first date" or that going there had some ulterior purpose.

Mr. Day chose McDonalds because he had heard D.J. ask his mom to take him there. Mr. Day wanted to inter-

view D.J. outside an office setting to assess how he might perform at trial and to question him about inconsistencies between his story and the witness reports. Mr. Day felt this would be more successful with a 10 year old if he did so in a familiar setting, not in a formal office. See Affidavit of Jeffrey Day.

D.J. had been charged with arson. A plea agreement was not an option. The case would likely go to trial. Mr. Day had never represented anyone this young. As his attorney, it was critical for Mr. Day to gain D.J.'s trust.

The court's prohibition prevented any explanation or questioning as to why gaining D.J.'s trust was critical. It could not be brought out that D.J. faced a felony charge or possible payment of \$70,000 in restitution. Mr. Day could not explain that a defense attorney has to gain the trust of a client to effectively represent the client and learn everything about a case. He could not explain that D.J.'s birthday was critical because, with a criminal charge, there were potential issues regarding competency and whether a 9 year old would have the capacity to commit the charged crime.

The prosecutor took away the ability for Mr. Day to explain his knowledge and actions which had no

sinister purpose and then attributed an ulterior, sinister motive to them. Already at the mercy of a complaining witness who told a very inconsistent, contradictory story, Mr. Day was further handicapped when prevented from bringing out information to rebut these arguments and insinuations. As a result, the integrity of the verdict is called into question. The error denied Mr. Day a fair trial.

III. Prosecutorial Misconduct

Prosecutors have a duty to seek convictions based solely on probative evidence and sound reason. State v. Neidigh, 78 Wash. App. 71, 895 P.2d 423 (Div. 1 1995). Every prosecutor is a quasi-judicial officer of the court charged with a duty of insuring that an accused receives a fair trial. In order to show misconduct, the defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. Prejudice is established when there is a substantial likelihood that the instance of misconduct affected the jury's verdict. State v. Boehning, 127 Wash. App. 511, 111 P.3d 899 (Div. 2 2005).

A prosecutor may not make heated partisan comments which appeal to the passion of the jury in order to

pressure a conviction at all hazards. State v. Rivers, 96 Wash. App. 672, 981 P.2d 16 (Div. 1 1999).

A. Comment on Credibility

It is improper for a prosecutor to express his personal opinion about the credibility of a witness. State v. Sargent, 40 Wash. App. 340, 698 P.2d 598 (Div. 1 1985).

In closing argument, the prosecutor stated:

There's no reason to doubt D.J. He's credible. He was not mistaken about what occurred, wasn't making it up.

RP 547: 20-22. At this point in his argument, the prosecutor was not arguing any inference from the testimony. He was stating his own opinion on D.J.'s credibility which was improper.

In fact, as will be discussed in Section IV, D.J. was not credible. He was frequently mistaken about what happened and when it happened. There were many reasons to doubt D.J..

B. Comments Appealing to Passion and Prejudice

The prosecutor's comments focusing on D.J.'s financial status and repeated references to Mr. Day as a judge were improper and denied Mr. Day a fair trial.

Appeals to the prejudice and passion of the jury and references to matters outside the evidence are improper. The defendant bears the burden of establishing that

the remarks are improper and that there is a substantial likelihood that the misconduct affected the verdict.

State v. Belgarde, 110 Wash. 2d 504, 507, 755 P.2d 174 (1988).

At trial, D.J. wore a suit several sizes too large for him making him look small and vulnerable. It did not even appear to be a suit bought specifically for him. See Affidavits of Jo Rhodes and Lisa Jensen.

In closing argument, the prosecutor drew specific attention to the clothes:

But look at D.J. and you can truly appreciate that he knows this is serious. Certain events in our lives are significant enough where we dress up; weddings, funerals, court. Most 12 year old children don't have a wardrobe full of fine suits that lawyers do, but D.J. came to court dressed like he would for a significant event. He wore the one suit he had. He was here for two days and he wore it twice, but that should tell you how he appreciates that this was serious.

RP 589:19-590:3.

There had been absolutely no testimony about how many suits D.J. or Mr. Day owned or whether D.J. thought anything was important. There was no evidence that Mr. Day, as a lawyer, had a "wardrobe full of fine suits." The prosecutor clearly referenced matters outside the evidence in these comments. The only motivation was to arouse sympathy for D.J. and prejudice against Mr.

Day, an attorney.

This was further aggravated by the prosecutor's repeated references to Mr. Day as a judge, an issue that had nothing to do with the charge. In his final argument, the prosecutor stated:

He wants to intimidate you by the defendant's stature in the community, that he's a lawyer, that he's a part time judge.

RP 549: 10-21.

He's a lawyer, he's a pro tem judge and he knew who his accuser was, an 11 year old boy at the time.

RP 590: 16-18.

He was willing to stand up and say, no witnesses. It's going to come down to D.J. and to me. I'm the lawyer. I'm the part time judge. I'm the adult.

RP 590-91.

The repeated focus on a defendant's status as a judge caused the Supreme Court to reverse a conviction in State v. Simmons, 59 Wash. 2d 381, 368 P.2d 378 (1962). The defendant was a municipal court judge accused of assault. The prosecutor, through questions and argument, focused on the fact that the defendant was a judge and, said the court, capitalized on the concept that a judge should be above suspicion.

The court found that the comments, questions and

insinuations deprived Simmons of a fair trial. The court stated:

The accumulation of prejudicial incidents and misconduct in a case where the factual basis was very close tipped the scale so heavily against the defendant that any semblance of a fair trial was lost.

Simmons, 59 Wash. 2d at 382-83.

In Mr. Day's case, his infrequent service as a pro tem judge had nothing to do with the case. The prosecutor simply wanted to appeal to the prejudice and passion of the jury as the prosecutor did in Simmons. The prosecutor wanted to suggest that simply an accusation should be enough for a conviction because Mr. Day was a judge. These repeated comments made during the prosecutor's final closing argument could have had no other purpose. They were not arguments on the issues or the law. The comments were improper and had a substantial likelihood to affect the verdict.

IV. The errors and misconduct were prejudicial and were not harmless.

The errors committed during the trial including the toy, the disruption, the limits on testimony and the prosecutorial misconduct were not harmless and prejudiced Mr. Day denying him a fair trial.

Constitutional error is harmless only when the conviction is supported by overwhelming evidence. Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. State v. Russell, 125 Wash. 2d 24 at 94, 882 P.2d 747 (1994). Under either standard the errors were not harmless.

This case was completely a credibility contest. There were no eyewitnesses and no physical evidence. There was no suggestion of alcohol or drug use or pornography. There were no threats alleged to have been made or other incriminating statements. There were no other alleged victims. Mr. Day consistently denied the accusation. For a jury to convict, it necessarily would have to believe D.J.'s testimony, testimony filled with inconsistencies and contradictions.

D.J. continually mixed events which happened on two distinct occasions. On February 6, Mr. Day went to D.J.'s home for a haircut. D.J. was upset over not being able

to go to Katelyn's home. Mr. Day took D.J. to the Supermall where D.J. bought a bracelet. At D.J.'s request they stopped by Katelyn's home, then went to eat pizza and later stopped by Mr. Day's home for 10 minutes where D.J. borrowed the Hulk DVD. Mr. Day then took D.J. home. RP 407-15.

On Saturday, February 14, Mr. Day picked D.J. up at his home. They stopped by McDonalds to eat and then went to Mr. Day's home where they watched DVDs. They watched the Hulk, then went to a store to rent Grind, a skateboard movie. After Grind, they watched X-Men 2. RP 421-23.

D.J. claimed all of this happened on February 14 when he stayed overnight. He did not recall going to Mr. Day's home on February 6 or borrowing the Hulk DVD. RP 162:12-24. D.J. claimed he stayed overnight on the same night he bought the bracelet and stopped by Katelyn's house. RP 162:10-13, 213:6-13. But when challenged on that recollection, he agreed it was unlikely it all happened the same night. RP 232-33. Then he changed his story again claiming they watched movies first and then went to Katelyn's home. Id. But a moment later he changed his story again saying the movies may have happened on a different night or that they watched them

after dropping off the bracelet. RP 233:12-16. He changed his story again moments later saying the movies and bracelet incident all happened on the same day. RP 243:17-20.

Even stranger was that D.J. said he stayed overnight on a Friday when Mr. Day did not pick him up until 5 p.m. on Saturday. RP 129:1-2.

Even on the date of the alleged incident, D.J. and Mr. Day related very different versions.

D.J. did not recall stopping at McDonalds for dinner. RP 165:5-7. Yet this was where the dicussion took place about D.J. being threatened with boot camp. RP 419.

D.J. claimed they first watched the DVD "Grind" saying they had rented that before watching anything else. RP 172. In fact, they rented it at a store after watching the Hulk. D.J. had selected an R-rated movie at the store which Mr. Day would not let him see. RP 421-22. D.J. testified he had not asked to rent such a movie or that Mr. Day had refused to rent it for him. RP 172-73. D.J. also denied that watched X-Men 2 that night. RP 422-23, 234:19-20. Then when confronted with an earlier statement in which he said they had watched X-Men, he simply denied he ever said that. RP 234-36.

When he awoke a little after 6 a.m., D.J. said he asked to watch a movie. Mr. Day set up X-Men 2 in the media room where they had left off the night before. Mr. Day left D.J. in the media room to watch it and he returned to his own room to go back to sleep. RP 433-34. About 7:30 a.m., D.J. woke Mr. Day and asked to use his computer. Mr. Day returned to the media room, got the computer running for D.J. and returned to his own room. RP 434. At 9 a.m. D.J. woke Mr. Day and told him he had to be home by 10 a.m. RP 435:3-8. Mr. Day showered, dressed and left home about 9:30 dropping D.J. off about 20 minutes later. RP 438-39.

D.J.'s version of events was radically different and made no sense. At trial he claimed he awoke about 6 a.m. RP 176:1. In a prior interview he recalled he had said it was 6:17 a.m. RP 176:21. In a different prior interview he was sure he awoke at 5:32 a.m. But at trial he denied that he ever told that to defense counsel when he was interviewed. RP 176:5-10.

D.J. testified that 4-5 minutes after Mr. Day started the movie, he told Mr. Day that he had to be home by 10 a.m. He said that Mr. Day immediately showered for 5-10 minutes and took him home. RP 180:21-25.

According to D.J. this all happened shortly after 6 a.m. RP 137:3-16, RP 178-80. D.J. denied that he ever asked to use Mr. Day's computer. RP 178:16-22.

If D.J.'s version was accurate, given the 20 minute drive from Mr. Day's house to D.J.'s home, D.J. would have been home before 7 a.m. Yet, his mother testified that D.J. came home between 9:30 and 10 a.m., a fact consistent with Mr. Day's testimony and which contradicts D.J.'s story. RP 61.

Among other numerous inconsistencies and contradictions in D.J.'s testimony was his claim that when he stayed overnight with Mr. Day in November 2002, he stayed 2 nights in a row. RP 152:11-17. In fact, he never stayed 2 nights in a row on any occasion. RP 509-10. He only made the statement when confronted with inconsistencies in his testimony that he could not explain. When challenged on the statement, he admitted that he had never said that he had stayed 2 nights in a row in any prior interview. RP 238-39.

Another key issue which showed D.J.'s inconsistency was the issue of whether Mr. Day had ever invited D.J. into his room. When D.J. first visited in November, 2002, Mr. Day told D.J. to sleep in either the guest room or the media room. RP 378-79. On the February

14 visit, at no time did Mr. Day invite D.J. to sleep in his room. RP 425:13-14.

D.J. recalled that on his first overnight Mr. Day told him to sleep in the guest room or the media room. RP 169:17-23. But then he added that Mr. Day said he could sleep in his room. RP 169:25. But a few moments later he admitted that he previously stated to defense counsel that he had only been told to use the guest or media room and that Mr. Day never mentioned he could sleep in his room. RP 170-71. Under cross examination, D.J. conceded that Mr. Day did not even show D.J. his room and did not ask him to go into the room on any occasion. RP 171:12-19, 188:1-3.

D.J. changed his story when re-examined by the prosecutor and said that Mr. Day invited him to sleep in his room. RP 213:22-3. Then again, in cross examination, when confronted with his July 26 interview by defense counsel, D.J. reversed himself and agreed that Mr. Day said only that he could sleep in the media or guest room. He agreed that Mr. Day never said he could sleep in Mr. Day's room. RP 222-26. Yet a few minutes later, when again questioned by the prosecutor, he changed again simply saying that Mr. Day had invited him into his room earlier in the day on the 14th. RP 241. Yet, Mr. Day

never even saw D.J. until 5 p.m. that day.

D.J. continually changed his story on various facts. He took unrelated events and strung them together to create a story. When challenged, he simply denied he had made previous statements or he changed his testimony to fit the story he had told, like claiming he stayed 2 nights in a row. He appeared to say whatever the person examining him at the time wanted him to say. Due to space limitations the above examples are just a few of many.

The errors and misconduct in this case were prejudicial. In State v. Boehning, 127 Wash. App. 511, 111 P.3d 899 (Div. 2 2005), this court reversed a conviction on stronger evidence than exists here. The result in Boehning justifies reversal here.

In Boehning, the defendant was charged with rape of a child and molestation. H.R., the alleged victim, resided with Boehning in foster care. Id., 127 Wash. App. at 514.

At trial, H.R., then 11 years old, testified that Boehning had pulled her into a bathroom, removed her clothes and his pants, kissed her, laid her on the floor, and rubbed his "dick" in a circle on her vagina. She claimed Boehning told her not to tell anyone because

it was a "naughty thing." She claimed that this happened more than twice. Id. at 515.

A caseworker and a detective also testified that H.R. had told them of the abuse. Id.

Boehing testified in his own defense and denied that the acts occurred.

The Court found that a number of questions and statements in closing argument were improper. With those comments eliminated, the court then found that the testimony of H.R., the foster parent, the caseworker and the detective was insufficient to prove guilt beyond a reasonable doubt.

The court recognized the verdict depended almost entirely on H.R.'s credibility. There were no witnesses and no physical evidence. In closing, the prosecutor argued that H.R. had no motivation to fabricate a story.

Upon consideration of these facts, the court concluded

[T]he evidence arguably supported either party's version of events. We cannot conclude that a rational jury probably would have returned the same verdict without the prosecutor's improper remarks,

Id. at 523.

If the evidence in Boehning was insufficient to prove guilt beyond a reasonable doubt without the prosecutor's comments, then the evidence in Mr. Day's

case, which is far weaker, cannot support guilt beyond a reasonable doubt.

As in Boehning, the alleged victim's mother testified but could only repeat that there was a complaint. The detective in this case never interviewed D.J. leaving that to a prosecution employee, so there is even less testimony here than in Boehning. What testimony there is is far from the detailed version of events given by H.R. in Boehing.

Mr. Day adamantly denied any improper contact and provided consistent oral and written statements to the police. No threats or incriminating statements were attributed to Mr. Day by D.J. as H.R. alleged in Boehning. In fact, D.J. testified that Mr. Day acted normal after D.J. awoke, action one would expect from an innocent person. RP 135:22-24.

D.J. testified as did H.R. in Boehing, but here D.J.'s testimony was contradictory, inconsistent and incredible. He mixed dates and events which could not have occurred as stated. He appeared to concoct a story as he testified. He contradicted earlier statements to police and defense counsel. He did not even know what day of the week he stayed overnight.

Considering all of that, the prosecutor's bold statement that D.J. was credible and was not mistaken or making things up makes absolutely no logical sense. It was not a statement based on testimony. It was clearly a personal opinion.

Finally, unlike H.R., D.J. had a significant motive to fabricate a story. He had been having increasing problems at home and he was not getting enough attention since the birth of his sister. RP 147-48. His mother would not let him do what he wanted or let him go to his friend's houses. He was afraid his mother was going to send him to a boot camp. RP 157:9-21. He had stolen items he was not supposed to have from his mother the night before he made the accusation against Mr. Day. He knew he would be in trouble the moment he got home. RP 165:8-12.

His mother corroborated this admitting she had threatened D.J. with boot camp the very day he visited Mr. Day. And then one week after getting a letter from a girlfriend that said she may be sent to a boot camp where a cousin's friend was beaten and raped, D.J. is telling a story which eerily contains the same type of elements.

It is well accepted that reversal may be required due to the cumulative effects of trial court errors even if such error, examined on its own, would otherwise be considered harmless. Russell, supra. The accumulation of prejudicial incidents and misconduct in a case where the factual issue is very close can tip the scale so heavily against a defendant that any semblance of a fair trial is lost. State v. Simmons, supra.

Each instance of misconduct or each error such as the toy, the disruption, the limited testimony or the prosecutor's comments and opinions would warrant reversal on its own, but the cumulative effect of all these errors undoubtedly denied Mr. Day a fair trial.

Given complete lack of corroboration, a complete lack of witnesses or physical evidence and D.J.'s strong motivation to say anything to direct attention away from him, no rational jury on this record should have found proof of this charge by a preponderance of the evidence let alone beyond a reasonable doubt.

The conviction was obtained in violation on the constitutional right to fair trial. The court was not alert to factors which undermined the fairness

of the fact finding process. The court was not ever watchful to prevent prejudicial occurrences nor did the court make any effort to determine the effect of these occurrences.

The prosecutor sought a verdict based on appeals to passion and prejudice rather than doing his duty to seek a verdict free of prejudice and based on reason.

The principle that a person is entitled to have guilt or innocence determined solely on the basis of evidence and not on circumstances not adduced as proof was lost in this trial.

Whether it was the toy on the stand, an outburst during testimony, the prosecutor's appeal to passion and prejudice, the improper comment on D.J.'s credibility or the limits placed on Mr. Day's testimony and his ability to cross examine witnesses, under Olmedo these errors are presumed prejudicial. The State cannot prove beyond a reasonable doubt that such errors and misconduct were harmless. The evidence of guilt is far from overwhelming. Given the lack of evidence and the contradictory testimony of the alleged victim, there is more than a preponderance that Mr. Day was actually and substantially prejudiced. This conviction should be reversed.

- V. Defense counsel did not provide effective assistance when he failed to put on an available character defense and failed to object to the presence of the toy, improper prosecutorial statements and the lack of any judicial corrective action after the outburst during testimony.

Both the Sixth Amendment to the U.S. Constitution and Article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. State v. Brett, 142 Wash. 2d 868, 16 P.3d 601 (2001). The test is whether, after considering the entire record, can the court say that the accused was afforded effective representation and a fair and impartial trial. State v. Sardinia, 42 Wash. App. 533, 713 P.2d 122 (Div. 2 1986).

To demonstrate ineffective assistance, a defendant must first show that counsel's performance was deficient. This is made by demonstrating that counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show that counsel's deficient performance prejudiced the defendant. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. A reasonable

probability is a probability sufficient to undermine confidence in the outcome. Dorsey v. King County, 51 Wash. App. 664, 754 P.2d 1255 (Div. 1 1988).

An attorney's presumption of competence can be overcome by showing that counsel failed to conduct appropriate investigation, either factual or legal, to determine what defenses were available. State v. Jury, 19 Wash. App. 256, 576 P.2d 1302 (Div. 2 1978). A lawyer who fails to investigate and introduce evidence that raises sufficient doubt that undermines confidence in the verdict renders deficient performance. Riofta v. State, ___ Wash. App. ___, 142 P.3d 193 (Div. 2 2006).

In State v. Sherwood, 71 Wash. App. 481, 860 P.2d 407 (Div. 2 1993), the defendant identified three witnesses favorable to his cause. The attorney interviewed one but did not call the witness to testify. The lawyer did not interview the others. The court noted that assistance of counsel could be deemed ineffective if failure to call the witnesses was unreasonable and resulted in prejudice or created a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would have been different.

In State v. Visitacion, 55 Wash. App. 166, 776 P.2d 986 (Div. 1 1989) counsel failed to contact and

interview witnesses provided by the defendant. The defendant provided an affidavit from an experienced trial attorney who stated that, under the circumstances, he could not conceive of any reason for not contacting the witnesses. The court agreed noting that counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed.

Sexual morality is a pertinent trait in sex offense cases. State v. Griswold, 98 Wash. App. 817, 991 P.2d 657 (Div. 3 2000). Evidence of good character may, in a given case, create a doubt in an of itself to the guilt of the accused. State v. Allen, 89 Wash. 2d 651, 574 P.2d 1182 (1978). Evidence of good character is as much a part of the evidence as any other evidence. Reasonable people may, upon consideration of all the evidence, reach the conclusion that even though other evidence, if believed, would point to the guilt of the accused, it is doubtful that a person of defendant's character would commit the crime charged. Id. In such a case, the jury cannot say beyond a reasonable doubt that he is guilty. In effect, the evidence of good character weakens the credibility of other evidence. Id., 89 Wash. 2d at 657.

In this case, Mr. Day provided the names of witnesses who could have testified to his character for sexual morality. These witnesses were not interviewed or called to testify. Mr. Day had been an active member of the Pierce County legal community for 12 years. Outside his practice, he worked with a high school music program for 12 years which brought him into frequent contact with hundreds of students, parents, staff and alumni. In all those years, Mr. Day's relationships with the students was never questioned. He was highly regarded by his colleagues in both the legal community and by the students and parents with whom he worked. These were two significant communities from which witnesses were available. See affidavits of James Johnson, Lisa Jensen, Alvin D. Mayhew, Jr. and Jeffrey Day.

In Mr. Day's case, where credibility was a key factor, failing to put on an available character defense was not reasonable. In such a close case, this evidence could easily have created a doubt in an of itself.

In his affidavit attached to the PRP, Alvin Mayhew, an attorney with more than 30 years experience, states that a character defense should have been presented. He notes that it is often a defendant's only real

defense against such an emotionally charged accusation. Based on his personal knowledge of Mr. Day's case and the witnesses who would have been available to testify, Mr. Mayhew states that a character defense should have been put forward and could have easily made the difference in the trial. See Affidavit of Alvin D. Mayhew, Jr.

Given the lack of evidence, the failure to put on an available character defense prejudiced Mr. Day. Failure to put on this defense was unreasonable. Had such a defense been presented, there is more than a reasonable probability that the jury would have returned a different verdict.

Similarly, counsel's failure to object to the toy on the witness stand or to request a judicial caution after the outburst of the alleged victim's mother or to object to the prosecutor's opinion of D.J.'s credibility or to other prosecutorial statements directly aimed at the passion and prejudice of the jury demonstrated deficient performance.

It is impossible to have any confidence in a verdict which has been tainted by the errors and misconduct which occurred in this trial. Mr. Day was denied

effective representation and, as a result, a fair and impartial trial.

VI. CONCLUSION

It has been demonstrated by far more than a preponderance that this conviction must be reversed. The court allowed the alleged victim to testify holding a toy without any reason. It let an emotional outburst during Mr. Day's critical testimony go unchecked. The court, at the prosecutor's urging, prevented Mr. Day from being able to explain his actions and motivations by prohibiting any specific discussion or questioning about his legal representation of D.J.

The prosecutor further exploited these errors by eliciting a witness comment on the credibility of the alleged victim, by clearly stating his own opinion on D.J.'s credibility and by repeatedly seeking to appeal to the passion and prejudice of the jury by referring to matters never testified to or by unfairly focusing on Mr. Day's infrequent status as a judge. Any one of these errors alone is enough to warrant reversal. Together, they tipped the scale so heavily against Mr. Day that any semblance of a fair trial was lost.

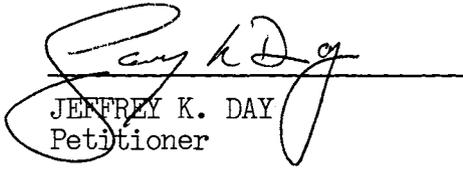
Our courts have noted:

If prosecutors are permitted to convict guilty defendants by improper means then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.

State v. Rivers, 96 Wash. App. 672, 981 P.2d 16 (Div. 1 1999).

That moment has arrived. The conviction was obtained by unfair means. The conviction should be reversed.

DATED this 20th day of MARCH, 2007


JENFREY K. DAY
Petitioner