

No. 39012-4-II

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

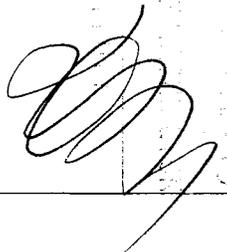
STATE OF WASHINGTON,

Respondent,

v.

NATALIE RAY,

Appellant.



ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable James Orlando (trial), Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Natalie Ray was deprived of her Article 1, § 21 and Sixth Amendment rights to jury unanimity.
2. Ray's Article 1, § 9 and Fifth Amendment rights to be free from double jeopardy were violated.
3. The trial court erred in failing to suppress statements Ray made to officers before she was read her rights. Ray assigns error to the finding on disputed facts contained on page 2 of the CrR 3.5 findings which provides:

During this initial contact, the defendant also made a spontaneous statement to the effect that she did not beat her kids. This statement was not in response to any question by law enforcement, was not solicited by the officers in any way.

CP 188. Ray also assigns error to the court's conclusion on page 3 of the findings which provides:

The spontaneous statement by the defendant that she did not beat her kids is admissible because it was not in response to police questioning [] and was not solicited in any way by law enforcement.

CP 189.

4. The prosecutor committed repeated acts of flagrant, prejudicial misconduct which compel reversal.
5. The trial court abused its discretion in refusing to grant a mistrial.
6. Ray was deprived of her Sixth Amendment and Article I, § 22 rights to effective assistance of counsel.
7. The cumulative effect of the errors compels reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Ray was accused of committing one count of first-degree assault of a child based upon several incidents which took place over several years. During those years, different people had access to the child. Ray also had different defenses for some of the incidents.

Were Ray's rights to jury unanimity violated where no unanimity instruction was given and the prosecution did not clearly elect the incidents upon which it relied?

Further, is reversal required because the jurors could easily have had a reasonable doubt as to several of the alleged incidents?

And was counsel prejudicially ineffective in failing to propose a unanimity instruction or object on the record to the absence of one?

2. To find Ray guilty, jurors had to find not only that there was a "principal" assault in the relevant time period but that this assault was committed after Ray engaged in a "pattern or practice" of assault of the victim.

Were Ray's rights to be free from double jeopardy violated where the jury was never told that the acts it relied on in finding the principal assault had to be separate and distinct from the acts amounting to the "pattern or practice?"

Was this error further exacerbated by the prosecutor's argument that jurors could find the "principal" assault and the "pattern or practice" based upon exactly the same alleged act?

Was counsel again prejudicially ineffective for failing to propose an appropriate instruction?

3. After Ray was handcuffed, she was told repeatedly that she was being arrested for child abuse and her children were being taken away. Officers also told her they needed her to stop crying so they could talk with her about it. Those same officers failed to read Ray her rights. Ray then denied having ever beat her kids and said the officers could look at them to verify that claim.

Did the trial court err in admitting Ray's custodial statement even though the officers' acts and declarations were reasonably likely to elicit an incriminating response and were thus made after the functional equivalent of interrogation?

4. At trial, the prosecutor a) told the jury that it had to decide who was telling the truth and who was lying, arguing that that the child victim was not lying, b) indicated that the jury had not heard all the evidence against Ray and that police and prosecutors had been satisfied by the

investigation, noting they had not charged someone else who could have committed the crime, c) gave a personal opinion about Ray and incited the jurors to decide the case based on passions and prejudices against Ray, d) drew repeated negative inferences from Ray's exercise of her right to counsel and e) failed to inform a crucial witness that the court had excluded highly prejudicial evidence, which was then admitted.

Was all of this flagrant, prejudicial misconduct?

Did the trial court err in refusing to grant a mistrial after the officer testified that Ray had unrelated warrants at the time of her arrest?

Further, was counsel ineffective in relation to the misconduct to which he did not object?

5. Even if the individual errors did not compel reversal, does the cumulative effect of those errors mandate a new trial where the errors all affected the ability of the jury to fairly and impartially decide the case?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Natalie Ray was charged by information with first-degree assault of a child. CP 1; RCW 9A.36.120(1)(b)(ii)(A). Pretrial proceedings were held before the Honorable Ronald E. Culpepper on July 10, August 21 and November 3, 2009, and further pretrial and trial proceedings were held before the Honorable James Orlando on December 10, 2008, January 12-15, 20-22, 26-29, February 2 and March 13, 2009.¹ The jury found Ray guilty as charged and, on March 13, 2009, the court

¹The verbatim report of proceedings consists of 13 volumes, which will be referred to as follows:

the volume containing the chronologically paginated proceedings of July 10, August 21 and November 3, 2009, as "PRP,"
the 11 chronologically paginated volumes containing the remaining pretrial and trial proceedings as "RP,"
the volume containing the proceedings of May 28 and July 2, 16 and 23, 2010, as "1RP."

imposed a standard range sentence. CP 123-35, 147-60.

Ray appealed and this pleading follows. See CP 165.

2. Testimony at trial

Terrance Dwyer was not active in the life of his “surrogate” daughter, Jennifer², when she got pregnant in her teens, ultimately having a boy, N. RP 691-92. Dwyer explained that Jennifer had “gone her own way” when she was 14 and “had issues,” primarily with drugs. RP 690-94. Dwyer’s girlfriend at the time, Lisa Mundt, said Jennifer was always dumping N and, later, N and his baby sister, V, at Dwyer’s house and then not returning “for days.” RP 745, 755.

Ultimately, because Jennifer had tested positive for drugs when she had V (who was born addicted to methamphetamine), she lost custody. RP 693-94, 745. After they were placed in one home, they were moved and then, shortly thereafter, Child Protective Services (CPS) had to get involved again because of concerns of neglect. RP 696, 745, 755. Dwyer and Mundt agreed to take them into the trailer in which Dwyer and Mundt lived, because they wanted them to have some security and structure and they hoped it would allow Jennifer time to “get her act together so she could get her kids back.” RP 715-16, 755.

Dwyer’s adult son, Christopher, was also living in the trailer and, according to Dwyer, was a full-time babysitter for the kids even after V was taken in by someone else. RP 522, 531-32, 696-97. Also living with them was Natalie Ray. RP 522, 531-32. During this time, Jennifer

²Because they share the same last name with Terrance, Jennifer and Chris Dwyer will be referred to herein by their first names, with no disrespect intended.

continued to have access to N, with visits at the home of Marlene Berry, N's great-great aunt and Christopher and Jennifer's aunt. RP 522, 531-32, 863-54.

On October 22, 2007, Stephen O'Keefe, an officer with the Tacoma Police Department (TPD), went to N's elementary school and spoke to the principal about allegations that N might have been abused. RP 480-82. Ray had called the teacher, upset about some marks she had seen on N's back. RP 824-26. N had previously had issues with another child, K, including one incident where the teacher and Ray had talked with K and K had promised to keep his hands to himself. RP 768, 824. K had also previously stabbed N so hard with a stick that it had gone through a t-shirt. RP 825.

Darrell Johnston, the vice principal, admitted K had "very limited impulse control" and was in Johnston's office frequently. RP 667. Johnston said that, on the Friday when K was said to have hurt N with the jump rope, N had cried out suddenly and said K had jumped on his back. RP 671. Johnston conceded that, prior to this, K was running around and "[j]umping on kids periodically," but said he did not think K had a jump rope that day. RP 672-73. When confronted, K had denied everything. RP 672-73.

Johnston, who admitted that he had no medical training or expertise, opined that K could not have caused the injuries on N's back. RP 674. He also said he thought the injury did not look recent. RP 675.

Johnson said that "behavior incident reports" would be filled out by playground monitors if they saw something which was obviously

“assaultive” or a child had a “very strong pattern of unsafe behavior.” RP 679. The school had several such reports on K. RP 679.

After Ray’s call, N’s teacher went and got him from the lunchroom and asked him what had happened. RP 835. N reported that K had hit him on the back with a jump rope the previous Friday. RP 835. Unlike with Johnston, with the teacher K admitted it and apologized, saying he was sorry and had not meant to do it. RP 839. The teacher then called Ray back on the phone, leaving a message saying that K had confessed to accidentally hitting N. RP 839.

Despite K’s confession, the teacher said, “they” still felt “like there is something wrong with the situation” as Ray had described, although there was no explanation of who, exactly, “they” were or on what their speculation was based. RP 827. The teacher took N to the principal’s office where the principal, Renee Rossman, and the school’s guidance counselor, Deborah Kotas, looked at N’s back and saw an “X” mark and some other bruises. RP 763-67, 811-18. Rossman had asked Kotas to join her because she wanted to have another witness in the room, concerned and alarmed about the allegation that a student had caused physical marks on another while on school property. RP 767. Rossman also thought someone should have seen something if the incident had occurred as N was claiming, because the previous Friday had been a “rainy day recess.” RP 772.

Like Johnston, Rossman had no medical training. RP 772. She nevertheless opined that the marks on N’s back “would necessarily taken quite a bit of strength” and said that K was “very petite” and about the

same size or smaller than N. RP 772. Rossman also gave her opinion that the bruises she saw on N's back were "some recent and some old." RP 771.

Rossman admitted she had previously spoken to Ray in September about the issues with K, including complaints about K bothering and hurting N on the bus. RP 766-79. Rossman said, however, that Johnston had told her that the bus driver had not seen anything and none of the other kindergarteners had admitted that anything had occurred. RP 768-69. Rossman complained that Ray was "aggressive" and "verbally hostile" about the issue at that time and Rossman declared that she thought K might be a "target" somehow, although Rossman admitted there was nothing truly indicating as such. RP 769.

Rossman's big concern was that the injuries to N "could not have happened on our school property." RP 771-72, 818.

The guidance counselor, Kotas, had been to "educational presentations" about child abuse and that she thought the "shaping of the bruise" on N's back reminded her of things she had seen in those presentations. RP 818-19. Kotas admitted, however, that she not only had no medical training except for basic first aid but also no expertise in how "high impact strike marks are inflicted and [the] sort of patterns they leave." RP 819.

Coincidentally, a few minutes after Rossman and Kotas looked at N, two CPS caseworkers walked into the office on an unrelated matter, so Rossman asked them to look at N. RP 774. Once they did, they told Rossman to call police. RP 775. By this time, the teacher had left the

message with Ray, conveying K's admission and claim that the assault was accidental. RP 827. According to Rossman, Ray had then started calling and saying she wanted to talk to Rossman, "getting more aggressive" when Rossman failed to respond back. RP 780.

Officer O'Keefe, the responding officer, described N as frail and small and said he had a bruise on his forehead, had an "X" mark and bruising on his back and appeared to have a swollen jaw and be malnourished. RP 484-85. At some point while the officer was there, Christopher, N's uncle, arrived. RP 781. Rossman and Johnston described him as agitated and "very hostile," demanding that the school do something about K's repeated acts against N and upset that Ray's efforts to get the school to take action had met with no success. RP 675, 781. According to Rossman, because Christopher was being loud, she pulled him into her office where he spoke with officer and told him about prior incidents of K assaulting N - claims which Rossman opined were not "founded or documented or witnessed." RP 782.

Officer O'Keefe, in contrast, said that Christopher was acting "unremarkable." RP 483. Indeed, the officer said, Christopher remained "unexcited" even when he was told that N was being taken into custody. RP 487. The officer also said that he had spoken to N in front of Christopher, not apart from him in a separate room as Rossman had said RP 488. The officer said that, when N was being asked questions, he had tried to look at Christopher, so the officer had moved to block the view and N had then started trying to look around him. RP 488.

At trial, O'Keefe opined that the "X" mark on N's back had not

been caused by a jump rope at the school because the mark appeared continuous and the principal had told the officer that the jump ropes at school had “sections” on them. RP 485. O’Keefe admitted, however, that he did not personally investigate or look at any of the jump ropes at the school and had no forensic medical training. RP 492-93.

A jump rope taken into evidence from the school was not tested in any way forensically, whether to determine pattern or anything else. RP 647.

N was taken into custody by O’Keefe and, a few days later, interviewed and examined by doctors and state workers. RP 553-62, 588-94. In the “forensic” interview, Kimberly Brune, a child interviewer for the prosecutor’s office, asked N questions and elicited from N that it was K who had hit him and caused the marks on his back. RP 576-78, 647-51. N also said that no one else had done anything which would have caused those marks. RP 576-78, 647-51. Regarding Christopher and Ray, N said that they gave him “butt spankings” sometimes, using their hands. RP 576.

Dr. Yolanda Duralde physically examined N the same day as Brune’s interview and noted bruising on his forehead, back and both thighs. RP 925-36. Some of the bruising on one thigh extended across his bottom and the bruise on the forehead seemed like it was probably caused by falling on an edge or being hit with an object. RP 925-40. Duralde admitted that this bruising could have happened from something like falling on the side of a slide. RP 925-40, 967.

Duralde disagreed with O’Keefe’s claim that the injuries on N’s

back could not have been caused by a jump rope. RP 640, 941, 950.

When shown a jump rope taken from the school, Duralde said, “[a]bsolutely. This certainly could have caused it.” RP 950, 968. She pointed out how the jump rope could “easily make loop marks” like those on N’s back and the “little plastic segments” on the rope could have caused the abrasions. RP 950, 968. She also noted there was some “skip area” in between the injuries. RP 941, 969. Duralde thought the injuries could have been caused in the previous week. RP 941, 969.

Duralde thought, however, that a five-year old could have inflicted “some injury” with the jump rope but not the injuries she saw. RP 942. She thought the “abrasions and bruises” were “relatively severe” and “probably could not have been caused by a child his own age” because there would not have been enough force. RP 942, 951. Duralde also opined that the jump rope incident with K was “probably not true” because no one at school had seen it happen and she had been told that K was not even there the day it allegedly occurred. RP 958-59. Duralde admitted, however, that she did not know firsthand anything about what had happened at school and had only heard about it from someone else. RP 958.

Duralde admitted that it used to be thought that the age of a bruise could be determined by its color - something now shown to be true. RP 942. Duralde nevertheless gave an opinion that N had “older loop marks” because they appeared “better healed.” RP 945.

Duralde also described what she said was “a grab mark,” two little bruises on N’s left arm on either side. RP 946. She declared that was

“not somewhere where you normally see a lot of bruises in kids.” RP 947. The bruising on N’s butt appeared to be “linear” and Duralde said she “would be concerned it was a belt or some sort of object that caused that type of bruising.” RP 947.

When talking to Duralde during the examination, N said only that K had hit him with a jump rope at school and that Christopher and Ray had spanked him. RP 958.

TPD Officer Gretchen Ellis was assigned to the case after O’Keefe took N into custody. RP 593-652. Ellis arranged and watched the “forensic” interview with Brune, after which Ellis and another officer, Lindsay Wade, went to the home to arrest Ray and take her baby into protective custody. RP 593, 612, 651-52.³ Ray’s other children, D1 and D2, were also taken away. RP 598-602. After Ray consented to a search of the home, the officers took a belt and a standard electrical cord into custody, along with a utility bill in the names “Christopher and Natalie” into evidence. RP 598-602.

Sometime after the incident in October, Rossman was informed by the lunchroom that N had a negative balance on his lunch account which meant that he could not have a hot lunch but could only have a peanut butter sandwich and a carton of milk. RP 788. Rossman was told N had cried one day over the issue, and that D1 and D2 were still getting hot lunches. RP 789. Rossman conceded that the statements about lunch accounts are sent home with the student and, at the time, the school had

³Facts relating to statement made during this arrest are discussed in more detail, *infra*.

Terrance Dwyer, not Christopher or Ray, listed as the custodial parent. RP 789, 795-96. Rossman did not produce a copy of a lunch account statement indicating who was sent the information showing that N's lunch account needed funds. RP 789-96.

Duralde was made aware of this claim and said it appeared that N had "fallen off of his growth curves" and she was afraid he might be failing to thrive for "environmental reasons." RP 955-56, 960. Duralde admitted, however, that N was current on all of his immunizations. RP 964. She also conceded that a kid whose parents were "drugged out and didn't take very good care of them" could fail to thrive and not be fed adequately, and that suffering such treatment in the formative years of 0-3 could lead to being small later. RP 965-66. Duralde conceded she did not have N's records from birth and that a lack of nutrition in ages 0-3 could also play a part in size. RP 965-66.

In December, Brune conducted a second interview of N because of a new claim N had made about having been strangled. RP 561-62. Brune conceded that it was unusual to do more than one interview and that, in general, a child's memory is better when it is fresh. RP 577. In addition, Brune admitted, the decision about whether to do another interview of a child would be up to the lead prosecutor in the unit, usually after discussions about what crimes they thought could be "charged." RP 584.

Brune said N was much more "talkative" in the second interview. RP 575. The "strangling" claim he made was new and it was clear to Brune that N had heard the word "strangle" from some adult and was trying to use it. RP 575. At trial, when the prosecutor specifically asked,

N said he did not know what the word “strangle” meant and had never heard the word. RP 511.

Also new at the second interview were some other claims, such as that N had his head “cracked open” several times, including once in the bathroom and once in the living room, and that he had been hit with a belt. RP 575-76. Based on the new claims, Duralde had a “skeletal survey” done. RP 954. She found only one healing fracture in the humerus in his right arm and one on his left forearm. RP 954. Duralde said the right arm fracture could have been caused by someone pulling N’s arm back, but the injury on the left forearm did not match any claims N had made. RP 954.

Duralde did not testify about seeing any indication that N had ever suffered a head injury like his head being “cracked open” as he now claimed, nor did she say anything about any injuries, however old, consistent with “strangling.” RP 920-74.

Duralde thought that it generally took about three months for fractures to heal on kids, although they are “very difficult to date.” RP 962-63, 970. The right arm fracture had already healed by December, which led Duralde to think it had probably occurred around August. RP 971, 973. The left arm fracture, however, had not yet healed in December. RP 971, 973.

Duralde also now thought that, in this subsequent exam of N, one of his bruises looked “more like a loop mark” from a belt. RP 948. She said that electric cords are “the most common thing that we see in terms of what people hit kids with” because they are “handy.” RP 949. Duralde

admitted, however, that the size of a bruise does not always reflect the size of an object used. RP 949.

By trial, N, who was then 7 years old, was making still more new claims, including that he had been hit with a white coat hanger by Ray on his back. RP 535, 555. N admitted that, although he had talked to his grandma in Arizona all about what happened, he had never said anything about any coat hanger. RP 535. He thought, however, that he had told “Kim” about it, meaning Brune. RP 515, 517, 535. He remembered being “[h]appy” when he was talking to Brune because he “drew pictures with her.” RP 518.

Brune admitted that N never said, in either interview, that he had been hit with a hanger. RP 576.

Another new claim N made at trial was that he had been hit by Ray and Christopher with a belt not only on his bottom but also on his back. RP 510, 541. When talking to defense counsel before trial N had only said he had been hit by a belt on the bottom. RP 537.

At trial, N did not, at first, remember anything else happening to any other part of his body but when specifically asked if anything had happened to make his arms hurt he said it had gotten “twisted” and that Ray had done it. RP 511. At first he said it was one arm but then he said “[d]id same thing both of them.” RP 512. N also said that Ray would sometimes bend his fingers back but did not really do anything else. RP 509.

Brune tried to explain the discrepancies in N’s disclosures, stating that children describing abuse are not always consistent in how they

describe it and what they say depends upon who is asking the question and what questions or “props” are used. RP 580. According to Brune, different things can “cue different memories.” RP 581. Brune said she had encountered children who make an initial disclosure and then, over time, “it gets more detailed, gets bigger as it goes along.” RP 581.

After he was taken into custody, N said, he had talked to people and they had helped him “remember.” RP 540.

At trial, there was conflicting evidence about whether Christopher lived with Ray and whether N lived with Ray, either with Christopher or without. Christopher and Ray both said that neither Christopher nor N lived at the home, that Christopher had a separate apartment and N lived with Dwyer, although Dwyer used Ray’s home as a meeting point for visitation with N’s biological dad, Tulio, as well as dropping him there so Ray would take him to and from the school bus with her own kids. RP 616-17, 1116, 1151-52. Christopher said his dad had not wanted Tulio or Jennifer to know where Dwyer lived so he used Ray’s home for a “drop off/pick up” point. RP 1150, 1218. I

Christopher explained that, at first, when he lived at Dwyer’s trailer, Mundt had watched the kids but then Dwyer had to get a restraining order to throw Mundt out of the house, so Christopher became the main caregiver. RP 1138-1139. Christopher had lived with Ray for a few months in the fall of 2005 in an apartment on Portland Avenue because she had been in a car accident and needed help, but after that Christopher was renting a room from an old man. RP 1139, 1142, 1200-1201. As far as Christopher knew N was living with Dwyer at the time,

and Christopher would see N at Dwyer's when he visited. RP 1142-44. At the same time, Christopher thought, N would sometimes spend time with Jennifer. RP 1145-48.

Penny Franco, who lived down the street from Ray, was with her all the time in the summer of 2007 when their kids played together almost daily and said N was there "a little bit but not that much." RP 1108-1110, 1124-26. Franco was there when Dwyer came by to pick up N. RP 1119.

One of Franco's children had, like N, had difficulties with a kid at school assaulting him, although it was a different kid. RP 1111, 1122. Franco felt the principal was "kind of quick" to deal with it and did not seem to really hear her concerns. RP 1111.

Cynthia Ray, Natalie's mom, visited her daughter and grandchildren routinely, often staying overnight, especially on weekends. RP 1054-55, 1090. She said she saw N there maybe seven times during the relevant time, and it was actually kind of unusual to see N at Ray's because his grandfather had custody and was getting money for having N live with him. RP 1091-92. She recalled a couple of nights N ended up staying at Ray's because his grandfather or whoever he was "supposed to be staying with never came to get him." RP 1055. Cynthia said that people who were supposed to take care of him were so busy with their lifestyle sometimes that they just decided they did not want the responsibility and "he would end up being stuck at Natalie's house," even though he was "supposed to have been living at his grandfather's house." RP 1055, 1057.

Cynthia did remember seeing N at Ray's with Jennifer, his mom,

on Christmas day of 2006. RP 1051-52. Jennifer was supposed to be there to spend time with her son but did not seem to want to stick around and was “antsy.” RP 1052. Jennifer left, promising to come back, but did not, which upset N. RP 1053. Someone else came and picked him up. RP 1054.

Sarah Ray, Ray’s sister, talked to and visited her all the time during the relevant period and said that N was there after school in the fall of 2007 but less in summer of 2007. RP 1008-1011. Sarah knew he was living with his grandpa but did not know exactly where that was. RP 1011. In fact, Sarah was sometimes there when Dwyer was late to pick up N and she and Ray would be waiting so they could go somewhere. RP 1016-20, 1029. Her estimate of how often she saw N at her sister’s house was maybe five or ten percent of the time in summer of 2007, less during the school year ending in June, then more the following fall. RP 1031-38. Sarah conceded that, in a different case, she had gotten charges dropped against her boyfriend by saying she had a mental health disorder which made her delusional. RP 1032-34.

For his part, Dwyer claimed that N, who had been placed with him originally, had lived with him in Dwyer’s trailer but had moved out with Christopher into Ray’s place when Dwyer loaned them a little money and they got the Portland Avenue apartment. RP 701. Dwyer also said, however, that, when they had an apartment, “it was kind of back and forth,” so that he would sometimes have N. RP 708.

Mundt, who could not remember when she lived with Dwyer in the trailer, said she had just moved back in after being out of the home for

months when Christopher had moved out with N to live with Ray on Portland Avenue. RP 749. According to Mundt, she picked N up from that apartment several times to have him spend the night at Dwyer's and afterward, "[h]e never wanted to go back." RP 749.

Dwyer admitted that N had a bedroom of his own at the trailer and that he would stay with him "on weekends sometimes and stuff like that." RP 701. N said he had "kind of visited" his grandpa Dwyer but did not remember how often and could not initially say who else lived there. RP 525. N remembered his bedroom and the "Star Wars" sheets on his bed there, but did not think he had ever slept at Dwyer's house before he went to live with Ray and Christopher. RP 527.

Dwyer lost his trailer in May or June of 2007 and said N never stayed with him after that anymore. RP 708, 718. Mundt said that, after she and Dwyer had moved into an apartment in June of 2007, N did not come to visit. RP 752. An officer said she did not see "kid's" items at that apartment when she went there. RP 621-23, 659.

During this time, Dwyer admitted, he was receiving money from the state for taking care of and having custody of N. RP 641-62. He said he did not ask for it and only took it because it would look bad if he did not. RP 705. He claimed that he gave the card to Christopher until about July of 2007, when he went to fill out the paperwork but it did not get renewed and Dwyer told Christopher he would have to go try himself if he wanted the money. RP 705-710.

Dwyer said that, at some point before July of 2007, his daughter Lisa, then in high school and estranged from her brother, Christopher, had

said she thought N was being hurt, but Dwyer did not believe it, having seen nothing to indicate anything like that. RP 704, 708. There had been another time when Lisa had raised some issues about N's health, based on something he said and having "something to do with Marlene's house or something." RP 720. Again at that time, Lisa and Christopher were fighting, so Dwyer did not believe what his daughter was saying. RP 720.

According to Dwyer, when he and Lisa had gone to pick up N and take him to the park about four months before the allegations were raised, Dwyer had noticed that N had a mark on his face. RP 710. Christopher had said N was "kind of accident prone" and Dwyer did not think anything of it, knowing that a five-year old like N in a house with two other boys probably got involved in "rough housing." RP 710. Dwyer described Lisa taking pictures of the bruise on his face with the camera on her phone and saying, "I know you don't believe me." RP 710.

Lisa was clear that she had never taken any such pictures. RP 907. Indeed, she said, she did not have a camera phone at the time. RP 907.

Lisa had lived at Dwyer's trailer when N was there and, later, lived at Ray's, sleeping on the couch for about a month and saying that Christopher was there, too. RP 894-905. Lisa said she saw some bruises right underneath N's butt cheek one day, but he did not say what had caused it. RP 905. Lisa admitted, however, that she had never made this claim until after she was kicked out and left on bad terms. RP 905.

Lisa also claimed that she thought that her brother hit the kids with a belt sometimes, because she watched him walk into their room with a belt and then heard them crying. RP 912-13. She never heard anything

sounding like impact, though. RP 912-913.

In her sworn statement to police, Lisa had told them N was living with Dwyer. RP 909. At trial, she said she had been lying. RP 909. She claimed she had done that, despite her estrangement with her brother, because she did not want her brother to get into trouble. RP 909.

At some point in the past, Jennifer had made claims to CPS against Christopher, to retaliate against him for refusing to let her take N after she showed up drunk at 10:30 in the morning one day and demanded to take him. RP 1165-66.

At trial, when asked if there was physical violence in his household when N was around, Dwyer first denied it. RP 721. A moment later, however, he changed his testimony to, “maybe between my girlfriend and I.” RP 721. Dwyer nevertheless claimed that it “wasn’t real physical or anything like that” between him and Mundt. RP 721. Ultimately, Dwyer admitted having taken out a protective order against Mundt for her having kicked him and punched him. RP 721-29. He conceded there was, in fact, “physical violence” in the house when N was there. RP 730. Indeed, he admitted, police had to respond to the house eight times in less than two years because of it. RP 730.

Dwyer admitted he never once saw Christopher or Ray lay a hand on any of the kids at the time they lived with him or any other times. RP 720.

Marlene Berry, N’s great-great aunt and Christopher’s aunt said that, when Christopher and Ray got together, Dwyer let them take him to live with them. RP 863-65. Berry admitted, however, that even though

they lived very close by, she only went over to the home once during the relevant time and then simply stayed outside. RP 866-68. Because she never visited, Berry admitted, her opinions about where N was living and how often he was at Ray's was not based on actual knowledge. RP 866.

Berry said that, on some unspecified date, she had seen bruises on N's face around his eyes and on his body and he had told her he had run into a wall. RP 869-70. Berry had previously called CPS for some unspecified reason about N after hearing some claims from someone named "Philip." RP 870-76. The claims she had reported came from someone who had just had a fight with Christopher at the time. RP 880. Berry admitted that CPS investigated and taken no action because they had found nothing. RP 870-76. Berry also conceded that a lot of her claims were based upon what she was told by others, although she thought there were times she had been speaking to Ray on the phone and Ray had put N on at Berry's request. RP 885-90.

Several witnesses saw Tulio, N's biological father, assault N. Cynthia saw it happen sometime in the month of July or August of 2007, when Tulio had brought N to Ray's as a "dropoff" point where Dwyer was going to pick him up. RP 1057-58. N was trying to get back in the car and Tulio grabbed him, slapped him in the face and yelled at N. RP 1058. The slap was hard enough to leave a handprint and caused a welt on N's face. RP 1059.

Christopher had seen something similar on July 4, 2007. RP 1237. He had been there when Tulio yanked N up off the ground with both arms and spanked him with a hand. RP 1163, 1237. Christopher had told Tulio

something like, “we will have problems if you do it again,” because Christopher did not believe in treating kids that way. RP 1163. Tulio told Christopher something like “let me do my own parenting.” RP 1163.

N said that, when he lived with his mom, his dad, Tulio, would sometimes live with them or visit for awhile. RP 522. Other times, Jennifer and N would live with “other guys besides Tulio,” i.e., his mother’s boyfriends. RP 524-33. N did not remember saying in a pretrial interview that one of the reasons he had to stop living with Jennifer was that some of those guys were mean. RP 524, 533, 534. He also denied any of those various men was ever mean to him or to her. RP 524, 533, 534. When pressed, he then said he did not remember. RP 533. A moment later, however, he admitted that he remembered telling defense counsel he was worried “these guys” would be mean to him if he did not tell the truth and that some of the things he might say “might cause these guys to be mean” to him again. RP 534.

Officers never interviewed Tulio or Jennifer in investigating the alleged abuse. RP 641.

For his part, N said he had lived with Ray and Christopher and slept in a room with D1 and D2 while he was there. RP 502-508. N did not remember Christopher taking him to school or to Ray’s house from Dwyer’s. RP 532. He did not remember telling defense counsel that Ray would pick him up after school at the bus stop sometimes. RP 533. Despite all of the adults who testified talking about him living with Dwyer prior to allegedly living with Ray, N said he had gone straight from living with his mother, Jennifer, to living with Ray, and that he had not lived

with Dwyer in between. RP 523.

N did not remember having visits at the CPS office with Jennifer. RP 522. Dwyer, however, was clear those visits had occurred, as Dwyer had taken him there himself. RP 706. N was positive there was no little dog living at Ray's house, even saying if the prosecutor told him to the contrary, he would think the prosecutor was making it up. RP 519. The officer who went to arrest Ray, however, saw such a dog and, in fact, had to make arrangements for someone to take it when Ray was taken into custody. RP 617.

N remembered telling people that K had hit him with a jump rope, but said it was a lie. RP 518. By the time of trial, he was saying that the truth was that Ray had hit him with a coat hanger. RP 519.

Franco was there with Ray picking up the kids from the bus stop one day when they saw bruises on N and N said a kid was picking on him. RP 1128. Ray touched N's back and asked if N was okay and when N said, "[o]w," Ray lifted up his shirt. RP 1128. He had marks on his back and he told them he had gotten hit with a jump rope. RP 1128.

Christopher and Ray were concerned and talked to Dwyer, telling him he needed to go talk to the school about it. RP 1154. Christopher had gone to pick up Dwyer to drive him to the school for that purpose but, when Dwyer failed to show, Christopher had gone to the school himself to try to talk to someone on N's behalf. RP 1155-56. Like Franco, Christopher thought talking to the principal was like "speaking to the wind" because she did not seem to be listening. RP 1157.

D1, D2 and the baby were ultimately returned to Ray by CPS. RP

1160-61.

D. ARGUMENT

1. RAY'S RIGHTS TO JURY UNANIMITY AND TO BE FREE FROM DOUBLE JEOPARDY WERE VIOLATED AND COUNSEL WAS INEFFECTIVE

Under Article 1, § 21 and the Sixth Amendment, a defendant has the right to have a jury be unanimous in concluding that the criminal act for which he was charged was committed. See State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Further, under Article 1, § 9 and the Fifth Amendment, defendants are entitled to be free from double jeopardy, defined as including, *inter alia*, multiple convictions for the same conduct. See, In re Personal Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Both of these constitutional principles were violated in this case. In addition, counsel was prejudicially ineffective in failing to protect his client's rights.

a. Relevant facts

The prosecutor's theory of the case was that Ray had committed the assault of N at some point between October 19, 2005, and October 18, 2007, based upon any of the following incidents/injuries: 1) the fracture which was thought to have occurred in around August of 2007, 2) the fracture on the other arm of unspecified date prior to the other fracture, 3) the "back" incident with the marks and the jump rope allegation in October of 2007, or 4) for the bruises on N's body. RP 1551-53.

Instruction 12, the "to convict," told the jury that they had to find the following elements for the offense:

- (1) That during the time period between October 19, 2005, and October 18, 2007, the defendant intentionally assaulted N[] and caused substantial bodily harm;
- (2) That the defendant was 18 years of age or older and N[] was under the age of 13;
- (3) That the defendant had previously engaged in a pattern or practice of assaulting N[] which had resulted in bodily harm that was greater than transient physical pain or minor temporary marks[.]

CP 109. The jury was not instructed that the conduct which amounted to a “pattern or practice of assault[.]” had to be separate from the primary assault which was the subject of the crime, nor did counsel request a unanimity instruction. CP 73-80, 94-122.

After deliberating for about a day, jurors sent out the following note:

On Instruction #12 item #1 October 19, 2005 to October 18, 2007, item #3 is “previously” inclusive Oct 18, 07, or exclusive, prior to October 19, 2005.

CP 87. The court’s answer was “[a]ny and all acts need to have occurred during the charged time period.” CP 87. Just about two hours later, the jury returned the verdict of guilt for the offense.

b. Ray’s rights to unanimity and to be free from double jeopardy were violated

Reversal is required, because Ray’s rights to juror unanimity and to be free from double jeopardy were violated. As a threshold matter, these issues are properly before the Court. Even if counsel fails to propose a proper jury instruction on unanimity or fails to object to the lack of such an instruction below, the issue may be raised for the first time on appeal as a manifest error affecting a constitutional right. See State v.

Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991), cert. denied, 501 U.S. 1237 (1991), overruled in part and on other grounds by, In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 982 (2002); State v. Price, 126 Wn. App. 617, 646, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005). Further, counsel's ineffectiveness in failing to propose a unanimity instruction is also separate grounds for reversal. See, e.g., State v. Studd, 137 Wn.2d 533, 550-51, 973 P.2d 1049 (1999).

In addition, the question of whether a defendant's rights to be free from double jeopardy were violated is an issue of manifest constitutional error which may be raised for the first time on appeal under RAP 2.5. See State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010); State v. Brewer, 148 Wn. App. 666, 205 P.3d 900, review denied sub nom State v. Danielson, 166 Wn.2d 1016 (2009). Notably, in Carter, this Court addressed this issue for the first time on appeal as a manifest error affecting a constitutional right under RAP 2.5. 156 Wn. App. at 565.

On review, this Court should reverse. First, Ray's rights to juror unanimity were violated. As charged and alleged here, the crime of first-degree assault of a child requires the prosecution to prove not only the relevant ages of the parties but also that the defendant intentionally assaulted the child, causing substantial bodily harm **and** that the defendant had "previously engaged in a pattern or practice" of assaulting the child and causing "greater than transient physical pain or minor temporary marks." RCW 9A.36.120(1)(b)(ii); CP 1. Because the crime often involves a "series of violent acts rather than a single act," there is no need for the jury to be unanimous about what part of the "entire episode of

assaultive conduct” was the “principal assault.” See State v. Nason, 96 Wn. App. 686, 697, 981 P.2d 866 (1999), review denied, 139 Wn.2d 1023, cert. denied, 531 U.S. 831 (2000). Instead, the jury must only unanimously agree that there was a principal act resulting in substantial bodily harm preceded by the required pattern or practice of assault. State v. Kiser, 87 Wn. App. 126, 128-30, 940 P.2d 208 (1997), review denied, 134 Wn.2d 1002 (1998).

Nevertheless, there is an issue of juror unanimity which arises “if the evidence discloses more than one distinct episode of assaultive conduct during an extended charging period.” Kiser, 87 Wn. App. at 130. This could occur if there is evidence of specific assaults at different times, “perhaps in a different location where different people had access to the child.” Id. In such situations, because “[t]he defendant may have different defenses as to these different episodes,” it is possible that jurors could find the defendant accountable for one series of assaults while other jurors believe him accountable only for a separate series. Id. Jury unanimity is therefore an issue and a proper unanimity instruction should be given, or the prosecution required to elect the principal act upon which it relies. Id.

Thus, in State v. York, 152 Wn. App. 92, 216 P.3d 436 (2009), this Court recently reversed a conviction for second degree child rape where no unanimity instruction was given. The defendant had been accused of four counts, including three based upon specific instances and one based on claims that the defendant had sex with the girl when she spent the night at his aunt’s house once a week for about a year. 152 Wn. App. at 94.

The prosecutor did not identify a specific act for that count “and the evidence at trial included multiple acts that could have provided the basis for a guilty verdict,” this Court said. 152 Wn. App. at 95. As a result, this Court held, a unanimity instruction was required. 152 Wn. App. at 96.

Notably, in reaching this conclusion, this Court specifically rejected the state’s argument that the “evidence showed multiple acts making up a ‘pattern’ of abuse.” 152 Wn. App. at 95-96. Instead, the Court found, while “[i]t is true that in some situations ‘a continuing course of conduct may form the basis of one charge in an information,’” the victim in York had testified about numerous separate rapes over the course of the year, each of which could have been the basis for the relevant charge. 152 Wn. App. at 95-96, quoting, Crane, 116 Wn.2d at 356 (quotations omitted). As a result, a unanimity instruction was required. York, 152 Wn. App. at 95-96.

This case falls squarely in the category of cases like Kiser. Just as in Kiser, here, the alleged act was charged as occurring at some point over a long period of time - October 19, 2005 to October 18, 2007. CP 1. And just as in Kiser, there were several different incidents or acts, each of which could have been the basis for the charge. These several different acts included - and the prosecutor argued that the jury could find the primary assault based upon - 1) the fracture of the right arm which was thought to have occurred in July or August of 2007, 2) the fracture on the left arm of unspecified vintage, 3) the “back” incident in October of 2007, or 4) the bruises seen on N’s body indicating some previous assaults had occurred at some time. RP 1551-53.

But the evidence and Ray's defenses to those alleged assaults were different. Taking the most obvious first, for the "back" incident, there was conflicting evidence about whether it had been caused by a jump rope and whether it was - or could have - been caused by K. Ray's defense to that allegation was markedly different than the defense for the fractures, which could have been caused by Tulio's assault of N that summer, either the one seen by Christopher or the one seen by Berry. And Ray's defense and the relevant evidence for the bruises which were alleged to indicate older assaults were also different, because there was evidence that others, such as Jennifer, Dwyer and Mundt, had regular access to N. Indeed, until June or July of 2007, according to Dwyer and Mundt themselves, they regularly had N at their home and he even had his own bedroom there, so that they had access to N during part of the charging period, even if the jury believed they had almost no such access after June or July of 2007.

Thus, this is not a case where N was living in one place over the entire time period, with the very same people having access to him and similar alleged assaults were claimed to have occurred as a "continuing course of conduct." This was a case where, during the relevant charging period, there were multiple, distinct allegations upon which the state relied in arguing guilt. There was evidence that different people had access to N at different times and places during the charging period, and Ray's defenses for many of the alleged episodes were different because of those differences in facts. As a result, because the "evidence discloses more than one distinct episode of assaultive conduct during an extended charging period," it is clearly possible that some jurors could have found

Ray guilty based upon believing the state's claims about one of the incidents (such as the fractures) while finding the evidence regarding the other incidents insufficient, while other jurors could have found the evidence regarding the fractures insufficient but based the conclusion of guilt on another incident (such as the jump rope incident). Put simply, because there was no election or instruction, it is "impossible to know" which assault, if any, the jury found had actually been proven beyond a reasonable doubt, because some could have believed Ray was not responsible for the back "jump rope" injuries but was responsible for one of the fractures while others might have had a reasonable doubt that Ray was responsible for that same fracture (given Tulio's assault) but thought the state had proved she committed the "jump rope" assault. See, e.g., State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). As a result, an unanimity instruction was required.⁴ See Kiser, 87 Wn. App. at 130.

In addition, Ray's rights to be free from double jeopardy were violated, because the instructions failed to inform the jury that it had to rely on separate, distinct acts in finding the "pattern or practice" element and the element of the principal assault. State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), is instructive. In that case, the defendant was charged with and convicted of four counts of first-degree child rape. 140 Wn. App. at 362. The allegations arose after the 11-year old daughter of Borsheim's girlfriend, with whom he lived, told her grandparents in 2003 that Borsheim had been sexually abusing her. Id. The charges were

⁴Counsel's ineffectiveness in relation to this error is discussed, *infra*.

framed in identical counts, alleging rape “during a period of time intervening between September 1, 2000 through September 8, 2003.” 140 Wn. App. at 363. The jury instructions included one which told the jury that, because the state was alleging acts which occurred “on multiple occasions,” to convict Borsheim, “one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt” but need not unanimously agree that “all the acts have been proved beyond a reasonable doubt.” 140 Wn. App. at 364. The jury was also told that a separate crime was charged in each count, and in the “to convict” instructions as to each count, the same language was used, saying the jury had to find as an element “[t]hat during a period of time intervening between February 1, 2001, and September 5, 2003, the defendant had sexual intercourse with” the girl. *Id.*

On review, Division One reversed. 140 Wn. App. at 362. The Court found that the trial court’s instructions “allowed the jury to base each of [the] four convictions on proof of a single underlying event, in violation” of the defendant’s right to be free from double jeopardy. 140 Wn. App. at 362. Because none of the instructions “specifically state[d] that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count,” the Court held, there was a violation of the defendant’s rights to be free from double jeopardy, irrelevant to any claim of a violation of unanimity. 140 Wn. App. at 365.

Put another way, Division One held, because the jury was told it

had to unanimous as to the specific act in order to convict, unanimity was not implicated. Id. But because they were not told that the same act could not be relied on for more than one conviction, the defendant's rights to double jeopardy were violated and reversal and dismissal of all but one of the convictions was required. 140 Wn. App. at 365; see also, State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) (where no "separate and distinct act" instruction was given and no other instructional language made the requirement clear, reversal and dismissal of all but one of the relevant counts required); and see Carter, 156 Wn. App. at 564-67.

Here, the "to convict" did not make it clear that jurors had to rely on separate acts in finding the principal assault and the "pattern or practice." Instruction 12 told the jurors only that they had to find the principal assault had occurred between October 19, 2005 and October 18, 2007, giving no separate time period for the "pattern or practice" except to say it had occurred "previously." CP 109. Nothing in that instruction or any other instruction given told the jury that it could not find the "pattern or practice" based upon the same act that it found amounted to the primary assault. See CP 94-122.

And in fact, the prosecutor actually told the jury that it should rely on the same acts for finding the "pattern or practice" and the primary assault. In closing argument, the prosecutor declared that the jury could find the intentional assault based not only upon the right arm fracture but also "those bruises that he had," such as those on his back and elsewhere on his body. RP 1553. But then, in arguing there was proof of a "pattern or practice," the prosecutor argued, *inter alia*, that the bruises on the

child, which could not be aged, “weren’t all in one single whooping” and “that’s what we believe the evidence has shown satisfies” the element of a “pattern or practice.” RP 1554.

Indeed, the jury’s confusion about the issue is made plain by its question, sent out after lengthy deliberations, asking whether the “pattern or practice” had to have occurred before or during the charging period. See CP 87. And the possibility of the jurors relying on the same acts as the “pattern or practice” and the primary assault was further cemented by the court’s response that both those elements of the crime had to have occurred during the same time period. See CP 87.

The jury instructions in this case not only violated Ray’s rights to jury unanimity but also her rights to be free from double jeopardy and this Court should so hold.

c. Reversal is required

Both the lack of a unanimity instruction and the lack of an instruction preventing a violation of Ray’s rights to be free from double jeopardy compel reversal. First, harmless error analysis cannot be applied to errors in jury instructions that result in double jeopardy violations. See, e.g., Berg, 147 Wn. App. at 937. In addition, the failure to give a unanimity instruction is constitutional error, presumed prejudicial unless the state can meet the heavy burden of proving it constitutionally “harmless.” See Kitchen, 110 Wn.2d at 405. As a result, reversal is required unless the prosecution can prove that no rational juror could have had a reasonable doubt about whether one of the alleged acts occurred. See, State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007).

The prosecution cannot meet that burden here. Where, as here, the victim made several contradictory statements, there was conflicting evidence on many crucial points and credibility was crucial, the failure to give the constitutionally mandated unanimity instruction cannot be deemed “harmless.” Coleman, 159 Wn.2d at 513. Thus, in York, supra, this Court reversed because the victim’s aunt testified that the defendant never stayed at her home during the relevant period when he was alleged to have raped the child there, even though there was evidence indicating he had been there. York, 152 Wn. App. at 96. Because “the evidence was conflicting,” this Court held, “jurors could reasonably disagree about” whether the crimes had occurred and the constitutional error was not harmless. Id.; see also, State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (even where evidence against a defendant is strong, where there is some conflict in the evidence which requires evaluation of credibility, constitutional error cannot be harmless).

Here, the evidence was clearly conflicting on several crucial points, including whether N was even living with Ray at the relevant time. Further, N gave conflicting statements about what occurred for many of the allegations, such as repeatedly telling adults that K had hit him with a jump rope and then saying it was Ray or Dwyer, and making new claims for the first time in the second interview and, indeed, at trial. The jurors could have reasonably disagreed about whether Ray was guilty of the offenses based upon the conflicting evidence, and the error in failing to give a unanimity instruction is thus not constitutionally harmless.

Finally, counsel’s ineffectiveness presents a separate ground for

reversal. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See Studd, 137 Wn.2d at 551.

Here, there could be no legitimate tactical reason for counsel to fail to propose a unanimity instruction and fail to submit an instruction which would have made it clear that the act or acts the jury relied on in finding the "pattern or practice" had to be separate from the act amounting to the "principal assault." Further, those failures clearly prejudiced Ray, whose rights to unanimity and to be free from double jeopardy were violated. Because counsel was prejudicially ineffective, on remand, new counsel should be appointed in order to ensure that Ray's rights to effective assistance are not further violated.

2. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS RAY'S STATEMENTS

Under the Fifth Amendment and Article I, § 9, because statements

made in custody are presumed to be involuntary and unconstitutional, when a state agent subjects a person to custodial interrogations, the agent must give Miranda warnings to the person being interrogated. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Denney, 152 Wn. App. 665, 218 P.3d 633 (2009); Fifth Amend.; Fourteenth Amend.; Art. I, § 9. Statements made in violation of this rule are inadmissible. See, e.g., Missouri v. Siebert, 542 U.S. 600, 608, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004); see State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

In this case, this Court should reverse, because the trial court erred in refusing to suppress Ray's statements and the prosecution cannot meet the heavy burden of proving this constitutional error harmless.

a. Relevant facts

Before trial, Ray moved to suppress statements she made after she was arrested and before she was read her Miranda rights. CP 81-86; RP 1-8. At the suppression hearing, Ellis testified about going with Wade and several other officers to the home to arrest Ray after the forensic interview of N. RP 19-25. When Ray answered the door, they told her she was with the police and asked if they could come inside. RP 25. After she said "yes" and the officers entered, they immediately placed Ray in handcuffs. RP 25. Ellis told Ray she was "going to explain everything, we were trying to work through it," then had Ray sit on the couch. RP 25. Ray was crying and visibly upset when handcuffed. RP 26-27.

According to Ellis, the officer next told Ray she was under arrest because she had four outstanding warrants. RP 25. They also told Ray

protective custody. RP 111-14. Ray was so upset, Wade said, that Ellis had to tell Ray she needed to stop crying so Ellis could explain what was going on. RP 114. Even after she calmed down a little, Ray kept “crying intermittently throughout the whole contact.” RP 114.

Wade recalled Ellis telling Ray “why we were there, that we were there because of the abuse allegations.” RP 118-19. Wade also said that, in addition to denying that N or Christopher lived there, Ray also “denied that she abuses the children.” RP 118-19.

In arguing that the statements should be admitted, the prosecutor said they were “spontaneous” and therefore not in violation of Ray’s Miranda rights even though she had already been arrested but not read her rights. RP 171-73. Counsel argued that the statements were not spontaneous because they were made in a “coercive” environment, while she was handcuffed, and after they told her they were investigating her for child abuse and taking away the kids. RP 171-74. As a result, he said, the statements about not beating her kids was in reaction to the accusations, not spontaneous. RP 175.

In ruling that the statement was admissible, the trial court first found that there was no question that the officers went to the home not only to arrest Ray and take the children but also “to question her [Ray] on the allegations regarding alleged abuse of Nicholas.” RP 176. The court nevertheless thought that the statement by Ray that she did not beat her kids and the officers could look at the kids if they wanted to was “of a spontaneous nature.” RP 177. The court reached that conclusion because it believed the statement “did not appear to be given in response to any

kind of questioning by the officer, was not solicited by the officer, even though Ms. Ray was under arrest and in custody, which is an inherently coercive part of the process.” RP 177-78. Although the statement was “self-serving at best and possibly could be excluded” if the prosecution wanted to do so, the court ruled, it was admissible. RP 178. The court later entered findings and conclusions in support of the decision. 1RP 7-8; CP 187-90.

At trial, Ellis testified about the alleged statement. RP 615. In cross-examination, Ellis admitted that this statement occurred only after Ray had been told that the children were being taken into custody and that N was alleged to have been abused. RP 630-31. Later, in redirect examination, the prosecutor asked if the officer had been “specific about the allegations of abuse before she said that” or had just “said generically that there was allegations of abuse,” and the officer responded that it was “generic to start out with” and that the officer had not advised Ray “anything specific about what the allegations were.” RP 642.

The following exchange then occurred:

Q: So actually [it] is the case that before you ever said anything about beating or bruises or anything like that, she spontaneously denies beating her kids.

A: I don’t know the exact statement, but they were real generic allegations that I told her.

Q: When she said that, was it clear from [the] context whether she said she doesn’t beat her kids, did she include [N] in that group or [was she] just talking about D[.] and D[.] at that point?

RP 643. Counsel objected to the speculation and the prosecutor withdrew the question. RP 643.

In closing argument, the prosecutor declared that the jury should not believe Ray's claim that she was not guilty, in part because of the "spontaneous statement,"

What's the spontaneous statement she makes, 'I don't hit my kids,' before she's even being asked any detailed questions other than the very basic stuff that as Ellis is coming in the door.

RP 1537 (emphasis added). Ray was unbelievable when she said she did not ever hit N and was not guilty, the prosecutor said, because "[s]he doth protest too much," as evidenced in part by her statement to the police that she did not hit her kids. RP 1537.

b. The trial court erred in failing to suppress the statement

The statement should have been excluded, because it was made as a product of custodial interrogation and the police had not read Ray her Miranda rights. The purposes of the Miranda requirement are to protect citizens from the compulsion and coercion inherent in being in custody and being interrogated by a state agent. See, State v. Hensler, 109 Wn.2d 357, 362, 745 P.2d 34 (1987). Thus, the crucial questions are 1) whether the person was in custody, 2) whether he was subject to interrogation and 3) whether that interrogation was by a state actor. See, e.g., Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 63 L. Ed. 2d 297 (1980), recon. denied, 456 U.S. 930 (1982).

Here, there is no question that Ray - who had already been arrested - was in custody at the time, or that the police were "state actors." The only question is whether Ray was subjected to "interrogation." As a threshold matter, the proper standard of review needs to be addressed. In

[T]he term “interrogation” under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, supra, 446 U.S. at 301 (emphasis added).

The reason for this expansive definition of “interrogation” was to ensure that the rights protected by Miranda were protected. Innis, 446 U.S. at 299, n. 3. Limiting the definition to only those situations where there was explicit questioning would “place a premium on the ingenuity of the police to devise methods of indirect investigation,” the Innis Court held. Innis, 446 U.S. at 299, n.3, quoting, Commonwealth v. Hamilton, 445 Pa. 292, 297, 285 A.2d 172 (Pa. 1971).

Thus, applying the expansive definition in Innis, when an officer notified the defendant that the victim of the stabbing the defendant was suspected of committing had died, the officer should have known that was reasonably likely to elicit an incriminating response and, as a result, those acts were the functional equivalent of interrogation. State v. Wilson, 144 Wn. App. 166, 184, 181 P.3d 887 (2008). Similarly, when an officer stated in the defendant’s presence, “we are looking for terrorists,” that was reasonably likely to elicit a response and was the functional equivalent of interrogation. See U.S. v. Ayalew, 563 F. Supp. 2d 409, 417-18 (N.D. N.Y. 2008). And where an officer said he knew there was some marijuana growing in the house and would like to take a look at it, that was reasonably likely to elicit a response and was the functional equivalent of interrogation. See State v. Wood, 45 Wn. App 299, 310, 725 P.2d 435, review denied, 107 Wn.2d 1017 (1986).

Here, the acts and comments of the officers were clearly the functional equivalent of interrogation. At the outset, it is important to note that it is not the officer's intent which is relevant. See State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992); State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). Regardless whether the officer intended to elicit a response, the defendant's "perception of an interrogation, not the questioner's intent, is determinative." Denney, 152 Wn. App. at 672; see Sargeant, 111 Wn.2d at 651.

Here, the trial court specifically found that the officers intended to question Ray about the alleged abuse when they went to arrest her - and they nevertheless failed to read her rights to her after arresting her and before talking to her at length. RP 176. Further, objectively viewing the circumstances from Ray's perspective, the words and acts of the officers were more than reasonably likely to elicit an incriminating response. After identifying themselves and entering the home, the officers immediately arrested Ray, telling her not only that she was under arrest for the outstanding warrants but also that her children were being taken into protective custody **and she and Dwyer were being accused of child abuse**. RP 27, 114-19. Indeed, she had to be told this repeatedly because she was so upset the officers wanted to make sure she understood. RP 27. And the officers, after telling her twice that there were child abuse allegations, then tried to calm Ray down so they could **talk** with her about those allegations. RP 27, 114-19. At the suppression hearing, Ellis specifically said that she told Ray she had to stop crying because Ellis "kind of had to work through everything" with her and had a "lot of

information” for her about the allegations. RP 27.

In this context, Ray’s statement that she does not abuse her kids and the officers could confirm this by looking at her kids was not a “spontaneous” or unexpected declaration. Instead, it was the logical response any reasonable officer should have expected after handcuffing someone, telling them their kids were being taken away and that they were being arrested for and had been accused of child abuse. Just as the officer telling the suspect that the victim had died was reasonably likely to elicit an incriminating response in Wilson, supra, the officers here telling Ray not only that she was under arrest for child abuse but that they were taking her children away and that they needed to talk to her to “work through everything” and give her “information” about the allegations of abuse was reasonably likely to elicit an incriminating response. The trial court’s conclusion that Ray’s statement was “spontaneous” and not “elicited” by the officers in any way is thus unsupported by the evidence and wrong as a matter of law.

Reversal is required. Admission of a statement made in violation of a defendant’s Miranda rights is constitutional error. See Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1967); State v. Cervantes, 62 Wn. App. 695, 701-702, 814 P.2d 1232 (1991). As a result, reversal is required unless the prosecution can meet the heavy burden of proving the error harmless, beyond a reasonable doubt. Cervantes, 62 Wn. App. at 701-702. The prosecution can only meet that burden if it can convince this Court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412,

425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. 104 Wn.2d at 425.

It is important to note that the “overwhelming evidence” test is *not* the same as the test used when a defendant argues that there is insufficient evidence to support a conviction. See Romero, 113 Wn. App. at 786. Thus, in Romero, the same evidence which was sufficient to support a conviction against a challenge of insufficiency was insufficient to satisfy the “overwhelming evidence” test. Id. The defendant had been arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home park in the middle of the night. 113 Wn. App. at 783-84. An officer using a flashlight responded and saw Romero coming around the front of a mobile home holding his right hand behind his body. Id. The officer repeatedly ordered Romero to show his hands, but Romero refused, finally running around the side of the home. Id. He was later found inside as was a shotgun, and shell casings were found on the ground next to the home’s front porch. Romero, 113 Wn. App. at 783. Descriptions of the shooter seemed to point to Romero, and an eyewitness also identified him. 113 Wn. App. at 784. Although the witness was “one hundred percent” positive about the identification, she also said the shooter was wearing a blue-checked shirt. Id. Romero’s shirt was grey-checked, not blue, and another man seen with Romero that night had on a blue-checked shirt. Id. When shown the shirt Romero was wearing, however, the eyewitness identified it as that of the shooter. Id.

On appeal, the defendant argued both that there was insufficient evidence to support the conviction for unlawful firearm possession and that comments the officer had made in his testimony were constitutional error compelling reversal. 113 Wn. App. at 783-95. The Court found, taken in the light most favorable to the state, the evidence was sufficient to support the conviction. 113 Wn. App. at 794. But that very same evidence was insufficient to satisfy the constitutional harmless error test. 113 Wn. App. at 794. Because the state's evidence was disputed and the jury was "[p]resented with a credibility contest," the Court held, it could not be said that the error was constitutionally harmless. 113 Wn. App. at 795-96; see also, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (even where the untainted evidence of a child's testimony of rape was strong, because there were some discrepancies in her claims and the defendant denied committing the crimes, the constitutional harmless error test was not met). Put simply, where there is disputing evidence, it cannot be said that the prosecution's evidence "necessarily" leads to a finding of guilt as required to meet the "overwhelming evidence" standard. Keene, 86 Wn. App. at 594-95.

Here, even if the evidence was sufficient to withstand a challenge based on sufficiency of the evidence, the prosecution cannot meet its heavy burden of proving the admission of the testimony meets the standard for constitutional harmless error. The evidence of Ray's guilt was far from "overwhelming" under Romero and Keene. There was conflicting evidence on essentially every part of the state's case, from not only Ray and Dwyer but other witnesses, as well, about whether N even

lived with Ray. Further, the fact that Tulio and Jennifer still had access to N raised serious questions about who might have been the perpetrator, especially given the evidence of Tulio being seen assaulting N just around the time one of the fractures occurred and Jennifer's neglect of N in the past. Indeed N's failure to make consistent disclosures - and the increasing nature of the disclosures after the unusual second interview - would alone have been more than enough to cause any juror to have a reasonable doubt as to guilt.

In addition, at trial, the prosecutor specifically elicited the testimony about the "spontaneous" statement that she did not hurt her kids and officers could look at them. RP 615. And then, after counsel attempted, in cross-examination, to minimize the prejudicial impact of this testimony, the prosecutor then, on redirect, made a point of eliciting testimony that Ray had made the statements before the officers had given her any specifics. RP 642-43. To complete the prejudice, the prosecutor then argued the obvious inference from this evidence in closing, telling the jury that they should not believe Ray was innocent in part based upon that statement. RP 1537.

The prosecution cannot prove the constitutional error of admitting Ray's statements, made in violation of her Miranda rights, was harmless beyond a reasonable doubt. Reversal is required.

3. THE PROSECUTOR COMMITTED FLAGRANT, PREJUDICIAL MISCONDUCT, THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

Unlike other attorneys, prosecutors are "quasi-judicial officers"

who shoulder duties other attorneys do not bear. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied sub nom Washington v. Huson, 393 U.S. 1096 (1969). Among these duties are the duty to act at trial in the interests of justice and refrain from becoming just a “heated partisan,” trying to “win.” See State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Instead, because prosecutors represent the state, they must seek convictions based solely upon the evidence and must refrain from engaging in misconduct in an effort to “gain” a conviction. Id.

In this case, reversal is also required because of the prosecutor’s repeated, pervasive, flagrant and prejudicial misconduct, the trial court’s failure to grant a mistrial and counsel’s further ineffectiveness.

a. Misstating the jury’s role and minimizing his own constitutionally mandated burden of proof

i. Relevant facts

In initial closing argument, the prosecutor started by telling the jury that the case “comes down to . . .do you believe N[] or do you believe the defendant.” RP 1525-26. The prosecutor then told the jury the state’s theory of the case was that “Nick is telling the **truth** about what happened.” RP 1525-26 (emphasis added). A few moments later, he argued that certain evidence raised “questions about what the real **truth** is,” and that no one had known, on October 22, when the marks were first seen, “what the real **truth** is,” but they had found out when N gave his first statement on the 25th. RP 1531 (emphasis added).

A moment later, the prosecutor told the jurors their role was not just to reach a verdict but to reach “[a] just verdict.” RP 1531. The

prosecutor then said a verdict was “veredictum” which “comes from the old Latin word. Basically it means **seeking the truth.**” RP 1531 (emphasis added). He said that was “not impossible” for jurors to seek the truth and that juries were able to do that across the country every day and what they did was “evaluate evidence and reach a conclusion and **seek the truth** and reach just verdicts.” RP 1532 (emphasis added).

Later, when discussing N’s disclosures, the prosecutor declared repeatedly that N had “no motive to **lie,**” that he told Brune “what he’s not supposed to talk about, and that’s just enough to find out the **truth,**” and that the way in which the information came out “shows there’s no motive to **lie.**” RP 1535 (emphasis added). The simplest explanation was “usually **true,**” the prosecutor said, and the injuries on N matched what he said because “it’s the **truth.**” RP 1537.

A few minutes passed and the prosecutor then told jurors there were “really two things that you look at when you are trying to **get the truth,**” which were credibility and reliability. RP 1546 (emphasis added). He said Berry was an example of someone who thought she was telling the truth and was not necessarily lying but believed what people told her and did not see the difference between that and what she perceived herself. RP 1546. Next, the prosecutor said that Christopher and Ray had the opportunity to commit the acts, that the evidence showed that opportunity “[a]nd that’s all you need to believe in order to be convinced of what [N] told you being **the truth** about how he had those injuries.” RP 1549 (emphasis added). In concluding his initial closing argument, the prosecutor told the jurors their jobs were to look at the evidence,

“apply your skills to **seek the truth.**” RP 1555 (emphasis added).

In rebuttal closing argument, the prosecutor again presented argument about why jurors should find that N was not lying. RP 1613. The prosecutor asked if N could have kept up the “same story” over time if he was lying. RP 1613. The prosecutor then declared, “[w]hen kids **lie** they forget which version of the **truth** or what version of the **lie** they gave.” RP 1613 (emphasis added). The prosecutor then said, if N was just “**lying** because he’s scared or doesn’t want to tell the **truth,**” jurors could expect to hear different stories each time about “who did it,” so that “Bobby did it one time, Judy did it one time, Larry did another time.” RP 1614 (emphasis added). The prosecutor finally then exhorted the jury to “believe” N, which required them to convict. RP 1613-14, 1655.

ii. These arguments were flagrant, prejudicial misconduct

The prosecutor’s repeated arguments about figuring out the “truth” were serious, prejudicial misconduct. It is well-settled that it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Indeed, this type of “false choice” argument has been roundly condemned as misstating the law, the state’s burden of proof and the jurors’ role. See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). The argument misstates the jury’s role because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. Id.

Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn. 2d 1010 (1995).

Further, the choice presented by the argument is “false” because it improperly tells jurors that either the state’s witnesses or defense witnesses are lying and there are no other options. Barrow, 60 Wn. App. at 876. But this is not true even if the various versions of events are inconsistent, because:

[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

Casteneda-Perez, 61 Wn. App. at 362-63; Wright, 76 Wn. App. at 824-26

In this case, while the prosecutor did not explicitly say “you have to find that N is lying in order to acquit,” he nevertheless made that point abundantly clear. Repeatedly, he framed the issue before the jurors as not just deciding who to believe but deciding who was telling the “truth” - with the unmistakable corollary that someone was lying. RP 1525-26, 1531, 1532, 1535, 1537, 1546, 1549, 1555, 1613, 1555. And the prosecutor made it clear that it was N the prosecutor was saying was telling the truth, and not lying, when he accused Ray and Christopher of the crime. And as if that was not enough, the prosecutor went through “tools” jurors could use to decide who was being “truthful,” then told jurors the officers, N, and other state’s witnesses had “no motivation to be untruthful.” By focusing on the “truth,” who was “truthful,” who had a “motive” to be “untruthful” and who was lying, and telling the jurors they

had to make those decisions, the prosecutor made it absolutely clear that the jurors were required to find N was lying in order to acquit.

Thus, the prosecutor gave the jurors a “false choice” - find that N was lying and had a motive to lie or find Ray guilty. Not only did these arguments misstate the jury’s role; they also misstated and minimized the prosecutor’s burden of proof. Telling jurors they have to figure out who they thought was telling the “truth” and decide based upon that choice is essentially the same as tasking them with choosing “which version of events is more likely true, the government’s or the defendant’s.” See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true - a decision which effectively applies only a “preponderance” standard of proof, instead of the constitutionally mandated, far greater burden of proof beyond a reasonable doubt. Id.

The prosecutor’s arguments about the jury having to decide who was telling the “truth” in order to perform its role and decide the case were flagrant misconduct and this Court should so hold.

b. Implying that the jury had not heard all the evidence against Ray and that it should convict because the state had charged Ray rather than someone else

i. Relevant facts

At trial, when Dwyer was testifying, he said his home was searched after the allegations were made and that he was treated as a “suspect” but told them he was not “capable” of committing the alleged

assault. RP 712-13.

Also at trial, when a state social worker was asked to say whether N had identified the people who had abused him, counsel objected and the prosecutor asked for a recess to address the issue. RP 982-83. When the jury returned, the objection was sustained on the record and the prosecutor said “I have nothing further at this time.” RP 985. Later, when cross-examining Christopher, the prosecutor asked him about his statement that he would “never do something like that to any child,” saying, “[w]ere you familiar with the interviews that were done of the other children in this case, sir?” RP 1220-21. Counsel’s objection led to the jury being removed and, when the jury was returned, the interviews were not discussed further. RP 1226.

Later, in closing argument, the prosecutor denigrated counsel’s suggestion that the officers stopped looking for the culprits once they had Ray and Christopher, saying the officers continued to talk to other people, including people the jury “**didn’t get to meet or hear from.**” RP 1617 (emphasis added). The prosecutor then said that the officers had found out from people that N did not stay with Dwyer and they still interviewed him, but that after they did so, “[t]hey were satisfied.” RP 1617 (emphasis added). The prosecutor said this showed the officers had continued to investigate and went on, “as it turns out, based on that information, **Terry Dwyer isn’t charged with these crimes.**” RP 1618 (emphasis added).

ii. These arguments were flagrant misconduct

The prosecutor’s arguments, implying that jurors had not heard all

the evidence against Ray and that Ray's guilt had effectively been predetermined by officers and the prosecutors were serious, prejudicial misconduct. It is misconduct for a prosecutor to give his personal opinion on guilt or imply that the defendant has only been charged because the prosecution believes she is guilty. See e.g., State v. Susan, 152 Wash. 365, 278 P. 149 (1929); see also United States v. Bess, 593 F.2d 749, 754 (6th Cir. 1979). It is also misconduct to imply that, "if there were any question of the defendant's guilt, the defendant would not even be in court." See State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993). Such comments effectively amount to "the prosecutor's personal assurances to the jury as to the defendant's guilt" and imply that trial was essentially a formality. Id. And our Supreme Court has said:

A jury might well believe that such a statement by a sworn officer of the law, in whom they have confidence, might indicate that such officer was acquainted with facts which had not been disclosed to the jury by the testimony. Such a statement throws into the scales the weight and influence of the personal character of counsel for the state, and to some extent at least, calls upon the jury to support his judgment.

Susan, 152 Wash. at 378. Indeed, one court has noted, such arguments are, at the least, "an effort to lead the jury to believe that the whole governmental establishment had already determined appellant to be guilty on evidence not before them." Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969).

Here, the prosecutor's arguments were designed to do just that. First, the prosecutor told the jurors that the officers had continued to investigate after they had arrested Ray and Christopher and that they had gotten evidence from people the jury "didn't get to meet or hear from" -

thus implying there was evidence that the officers had gotten and the prosecutor knew about but the jurors had not heard. RP 1617. Then, he said the officers had found out from people that N did not stay with Dwyer and they had still interviewed him, but that after they did so, “[t]hey were satisfied,” thus again implying that there was evidence the jurors had not heard and further implying that the officers, trained investigators, had then been “satisfied” i.e., sure they had gotten the right perpetrators. RP 1617. And as if it was not clear enough that the prosecutor was telling the jury that the officers and prosecution believed Ray was guilty and that Dwyer had not committed the assaults, the prosecutor then told the jury that, based upon the information - not all of which the jury had been given - both the police and the prosecutor’s office had concluded Dwyer was not guilty, because he was not charged. RP 1618.

Further, these arguments cannot be seen as a permissible response to counsel’s arguments in closing. There is no question that a prosecutor may make arguments in response which might seem impermissible but were in fact invited or provoked by the arguments of counsel. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Such arguments, however, must be a “pertinent reply” and must not exceed a reasonable amount for such a reply. Id.; see State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008).

There is no question that counsel argued that the officers had not done a thorough investigation - and there was, in fact, evidence of that. See RP 1578-82, 1604. But that argument was on a total of five pages of transcript in a closing which was 49 pages long and was only one

relatively small portion of the defense claims. RP 1555-1604. While it would have been perfectly permissible for the prosecutor to remind jurors that officers had continued investigating even after arresting Ray and Christopher - and even to detail that investigation - here the prosecutor went much too far. The issue raised by counsel was that the investigation was not thorough. The “response” was that the investigation was thorough **and** that the investigation had proven Ray’s guilt - and Dwyer’s innocence - to the satisfaction of the officers and prosecution - and that the jury was not being given all the information those state agents had.

Notably, at trial, several witnesses had already very obviously been prevented from answering questions the prosecutor tried to ask because Ray’s counsel objected. One of those questions involved whether N had identified who had abused him. RP 982-85. Even more egregious, one of those questions implied *uncharged abuse* on the part of Ray’s alleged co-perpetrator, Christopher. After the prosecutor asked him about his statement that he would “never do something like that to any child,” the prosecutor then alluded to other allegations of abuse *by the other children*, asking “[w]ere you familiar with the interviews that were done of the other children in this case, sir?” RP 1220-21.

Thus, there were already indications to the jury that there was evidence which they were not hearing which was potentially bad for Ray - and which the objections of Ray had prevented them from hearing. In this context, the prosecutor’s arguments were even more offensive misconduct. This Court should so hold.

- c. Misconduct in repeatedly giving a personal opinion on Ray's demeanor, inciting prejudice against Ray, drawing negative inferences from Ray's constitutionally protected right to counsel and urging the jurors to convict in order to show the victim he was believed and hold Ray "accountable"

i. Relevant facts

In cross-examining Ray, the prosecutor questioned Ray's version of many of the events, such as asking about her statement that Dwyer had told her to mind her own business when she had said he should contact the school about the injuries N had said were caused by K. RP 1413-14. The prosecutor then asked Ray about those claims, stating that she "certainly" had known about those alleged statements "if these statements were actually said," at the time that Dwyer was on the stand. RP 1412-13.

When Ray answered in the affirmative, the following exchange occurred:

Q: Yeah. And he wasn't really asked any questions about that, was he?

[DEFENSE COUNSEL]: Your Honor, I am going to object, getting into the professional conduct of her lawyer at this point.

THE COURT: I think that's an improper question.

RP 1413. The prosecutor withdrew the question. RP 1413.

Also in cross-examination, the prosecutor characterized Ray as talking about the car accident she had been in "as a reason for people to feel sorry for" Ray. RP 1388. Ray said that was not accurate, and the prosecutor then said "[y]ou weren't trying to win the sympathy of the court yesterday by talking about how injured you were?" RP 1388. After the court sustained the objection, the prosecutor then went on to confront Ray about when she was "weeping yesterday in the courtroom," stating

she had “cried a lot” when talking about the allegations and how she had been treated by police. RP 1389. He demanded, “[d]o you see yourself as a victim in this case, ma’am?” RP 1389. When Ray said she did not, the prosecutor asked, “[w]hy not?” RP 1389. When Ray did not understand, the prosecutor said, “[d]on’t you feel like this is just - - you have really been victimized by this whole process?” RP 1389. Ray finally said, “[t]here’s been a lot of stress, yes, there has.” RP 1389.

In initial closing argument, the prosecutor told the jury the case was, in part, all about “denial,” then went on to tell the jurors, “I hope at the end of this trial, that there will also be some measure of accountability.” RP 1524.

Several times in closing argument, the prosecutor gave his personal opinion on Ray’s “demeanor” in the courtroom and the fact that she had cried. First, he told the jury, “[y]ou have to decide who those tears are being shed for. **We would submit they’re being shed for herself, not for [N].**” RP 1537 (emphasis added). A moment later, he commented on her crying again, saying that jurors “may have noticed things about her body language,” then going on:

You may have had your own opinions about the crying, you may think I’m being too harsh about that, but be that as it may, from the State’s perspective, the weeping isn’t for Nick; it’s for Natalie.

RP 1539. After counsel’s objection to improper opinion was overruled, the prosecutor then moved on to denigrating Ray’s defense as just trying to make jurors feel sorry for Ray, saying, “you are supposed to be feeling sorry for poor Natalie, who is . . . the real victim here,” was “being falsely

accused” and was “laid up, horrible car accident, not her fault,” then pointing out that it had been a DUI which had occurred when the kids were in the car. RP 1540. The prosecutor declared Ray’s description of events to be “self-serving testimony” and her different version of the arrest as “just another effort to play the victim,” accusing Ray of trying to distract jurors from what “really happened and to hold out Natalie’s the real victim in this case.” RP 1541-42.

The prosecutor then moved on to argue that the defense theory was to try to shift blame to someone else and keep the focus off “what happened to N.” RP 1542. The prosecutor moved on to discuss people the defense could target as suspects and “point fingers at,” such as Lisa Mundt, who the prosecutor said the defense might think was a “good candidate” because jurors “won’t like her very much” and would want to think “she did it.” RP 1544. N’s parents were also “great candidates” to accuse, the prosecutor declared, “because they are not here.” RP 1544. The prosecutor said the “strategy” of the defense should be dismissed by jurors because the first person they “tried that strategy” with was a “five-year-old kid,” K:

Well, when a person’s strategy is to shift blame in their first prime candidate is K[], because he was the easiest, what the heck was going to happen to him if they blame K[]? They are not going to get in trouble, no family member’s going to get in trouble.

...

They don’t want to necessarily get anyone in their immediate circle in trouble; they don’t want to be in trouble, either, so K[]’s great. After [K], the next best target is the school. When that’s not working well, I guess the next reluctant thing we can do: Throw Terry under the bus and later it’s going to be Lisa, the mom- - excuse me, Jennifer the mom, Tulio. Everyone’s

going to get thrown under the bus as long as it isn't either Chris or Natalie.

That pattern of laying blame elsewhere shifts the spotlight elsewhere is desperate. Desperation of it casts a shadow on the believability and credibility of it.

RP 1545-46.

The prosecutor then said that Ray and Christopher had sought to “shift blame” for the harm done to N and the jurors “now have an opportunity to shift from their blame game to holding Natalie Ray, the defendant, accountable for what happened. We would urge you to do that, believe [N] and convict the defendant.” RP 1555.

ii. These arguments were flagrant, prejudicial misconduct

All of these arguments were serious, flagrant and prejudicial misconduct. First, the prosecutor's opinion about Ray's emotions during trial was wholly improper. It is completely inappropriate and misconduct for a prosecutor to express his personal opinion about the accused. See State v. Armstrong, 37 Wash. 51, 54-55, 79 P. 490 (1905). While a prosecutor is not precluded from arguing an opinion based upon the evidence, argument which makes it “clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion,” is prohibited. See State v. McKenzie, 157 Wn.2d 44, 53, 54, 134 P.3d 221 (2006), quoting, State v. Papadopoulos, 34 Wn. App. 397, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983), overruled in part and on other grounds by, State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). Further, it is misconduct for the prosecutor to attempt to sway the jury to decide a case based upon emotion rather than the evidence at trial.

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

Here, the prosecutor's repeated comments denigrating Ray for having cried during trial were clearly the prosecutor's improper personal opinion, no matter how he tried to couch it. It was not an argument based upon the evidence but rather the prosecutor's own personal belief about why Ray was crying. In fact, he specifically admitted that it was his own "harsh" opinion. See RP 1537, 1539.

Further, whether Ray felt sorry for N or even herself was irrelevant to whether the state had proven its case. Instead, it was simply an effort by the prosecutor to further paint Ray as an evil person who was thinking only of herself and callous about what N might have suffered - so as to make the jurors have strong prejudices against Ray and convict her on that basis. And indeed, just as the jury did not have to decide who was telling the truth and who was lying in order to decide the case, it also did *not* have to "decide who those tears are being shed for," as the prosecutor declared. Instead, it was only required to decide if the state had proven its case beyond a reasonable doubt - not whether Ray's emotions at being on trial for alleged abuse were proper.

The prosecutor's repeated improper argument about Ray's demeanor was not only personal opinion but also amounted to an inappropriate effort to sway the jury's emotions against Ray. The court should have upheld counsel's objection instead of overruling it. See RP 1540.

This misconduct was only exacerbated by the emotional impact of the prosecutor's repeated efforts to fault Ray for counsel's performance

and characterize her - and counsel - as trying to distract jurors from the “truth” of Ray’s guilt. Arguments which seek to “align the jury with the prosecutor” or the victim and against the defendant are improper. See Reed, 102 Wn.2d at 146-47. Further, it is completely improper to indicate that counsel is acting in “underhanded and unethical ways” such as trying to hide or distract from the relevant evidence. See e.g. Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984).

Here, first, the prosecutor implied that Ray must be lying about her conversation with Dwyer about the injuries K had caused to N at school because counsel had not cross-examined him about that. RP 1413. Even after counsel’s objection was sustained, the prosecutor persisted in trying to cast not only Ray but also counsel as trying to mislead jurors, i.e., distract them from what “really happened and to hold out Natalie’s the real victim in this case.” RP 1541-42. The defense was trying to “point fingers” at others, the prosecutor said, in order to keep the focus off “what happened to N.” RP 1542. Indeed, the defense was portrayed as using the “strategy” of trying to “play” jurors by trying desperately to find someone else that jurors might not “like” and thus might want to think was guilty instead of Ray. RP 1544. The prosecutor declared this “strategy” of the defense as “desperate” and proof of guilt because it started with K and ended up as a mad rush to “throw” people “under the bus” as long as it was not Ray and Christopher. RP 1545-46. These arguments were clearly denigrating counsel for putting on a defense and, indeed, arguing Ray’s guilt on that basis.

As if that was not enough, the prosecutor then exhorted the jurors

to rely on the improper argument and “shift from their blame game” to holding Ray “accountable” by convicting her and thus send a message to N that he was “believe[d].” RP 1555. This last comment dovetailed with the prosecutor’s declaration, in initial closing, that the case was all about “denial” and that the prosecutor personally had the “hope” that at the end of trial “there will also be some measure of accountability.” RP 1524.

Such arguments are improper and misconduct because they “divert the jury’s attention from its true role of deciding whether the state has met its burden of proving defendant guilty beyond a reasonable doubt.” See State v. Montjoy, 366 N.W. 2d 103, 109 (Minn. 1985). These arguments urge the jury to “send a message” about child abuse, an improper emotional appeal. See, e.g., State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Further, such arguments, like the arguments denigrating counsel and the defendant, “intend to promote a sense of partisanship with the jury that is incompatible with the jury’s function” of deciding based on the facts of the case, rather than emotion. See State v. Neal, 361 N.J. Super. 522, 537, 826 A.2d 723 (2003). These arguments were further flagrant misconduct, and this Court should so hold.

d. Failing to prepare his witness, resulting in admission of prejudicial evidence and the court’s failure to grant a mistrial

i. Relevant facts

Before the prosecutor’s opening statement, defense counsel moved to exclude evidence that Ray had outstanding warrants at the time of her arrest, arguing it was inadmissible under ER 404(b) and had no other

purpose except to impugn Ray's character to the jury. RP 473-74. After first stating he wanted to admit the evidence, the prosecutor then agreed that it was "safer and better to not seek to admit" it unless counsel somehow opened the door. RP 475-76. The court agreed, ordering the evidence excluded. RP 477.

Later, at trial, when Officer Ellis was testifying about going to Ray's home to arrest Ray take the children into custody, Ellis was asked the purpose of having a patrol unit back her up and she responded, "[f]or one, we knew Natalie had some warrants." RP 611. Counsel objected and moved to strike, also saying "[h]ave another motion, Your Honor." RP 611. The court sustained the objection and struck the "last response." RP 611. A few moments later, with the jury out but Ellis still present, counsel moved for a mistrial. RP 638. The prosecutor then stated that it was not Ellis' fault because the prosecutor had "neglected to advise" Ellis of the court's ruling excluding the evidence. RP 638-39. The court did not grant the mistrial but said that it would "certainly consider some kind of a limiting instruction," although later recognizing that it might not make sense to give one as it would emphasize the evidence. RP 638; see RP 1442-43.

In closing argument, the prosecutor referred indirectly to the warrants:

Nick was being beaten by Natalie and by Chris Dwyer.

And they knew what they were doing wasn't right. They knew they would get in trouble for what they were doing. **Natalie had already been in trouble.** They knew what they were doing.

RP 1528 (emphasis added).

- ii. These acts were further flagrant, prejudicial misconduct and a mistrial should have been granted

Once again, the prosecutor committed serious misconduct, this time by violating the court's explicit rulings excluding the evidence and failing to properly advise his witness of the court's rulings. Taking the latter issue first, it is every attorney's duty to "prepare witnesses for trial." State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008). Indeed, advising witnesses of any orders excluding evidence is the "minimum" required. Id. Failure to do so is a violation of the court's order. Further, permitting such violations would create the risk that losing parties would simply ignore the court's orders and suffer no consequence, so that courts will apply "stringent remedies" to such violations. See State v. Ransom, 56 Wn. App. 712, 713 n. 1, 785 P.2d 469 (1990).

There is no question that the prosecutor failed in that duty here - he admitted it. See RP 638-39. The trial court thus properly struck the improper testimony.

But the trial court should have granted the mistrial. Not only was the fact of the prior warrants itself inherently prejudicial, it was even more so here, in context. The officer said she had other officers with her as backup **because** Ray had outstanding warrants. RP 611. The obvious implication was that the warrants were for something dangerous so that backup was needed.

Further, the prosecutor ensured that the already considerable prejudice was exacerbated when, in closing, he argued that Ray and Christopher knew they would get in trouble for beating N because

“Natalie had already been in trouble.” RP 1528 (emphasis added).

Here, the implication was that the reason Ray and Christopher knew they would get in trouble if they were beating N was because Ray had been in the same kind of trouble before.

Nor was the trial court’s “curative” instruction at trial sufficient. Where, as here, the evidence admitted is of prior criminal activity excluded by the trial court, even a curative instruction will be insufficient and a court’s failure to grant a mistrial will be an abuse of discretion when the evidence against the defendant is not overwhelming and there are issues of credibility. See State v. Escalona, 49 Wn. App. 251, 252-56, 742 P.2d 190 (1987). Such evidence is likely to impress itself in jurors’ minds and be difficult to cure, so that in a “close” case its admission can require a mistrial. 49 Wn. App. at 256. Here, the serious impact of the improper “warrants” evidence was not mitigated by and could not have been cured by the court’s instruction - or indeed, any instruction at all. And the state’s evidence was not overwhelming, given the different statements N had given, that he had initially accused someone else of the abuse (K), that Dwyer’s credibility was challenged, that Mundt had a history of violence and access to N, that Tulio had been seen assaulting N, and all of the other problems with the state’s case.

Once again, the prosecutor engaged in serious, prejudicial misconduct, this time in failing to advise a police officer about a crucial court ruling excluding evidence highly prejudicial to the defense. The trial court should have granted a mistrial once the evidence was admitted, even if the prosecutor’s further misconduct did not compel dismissal.

e. Reversal is required

The repeated, pervasive acts of misconduct in this case compel reversal. For the misconduct to which counsel objected, reversal is required if there is a “substantial likelihood that the misconduct affected the jury’s verdict,” after looking at the strength of the state’s case. See State v. Thomas, 142 Wn. App. 589, 593, 174 P.3d 1263, review denied, 164 Wn.2d 1026 (2008). For misconduct which did not garner an objection below, reversal is still required if the misconduct is so flagrant or ill-intentioned that it caused prejudice that could not have been cured by instruction. 142 Wn. App. at 594.

Here, counsel specifically objected to the prosecutor’s cross-examination of Ray about her trying for “sympathy” by talking about her accident (RP 1388) and her lawyer not having asked Dwyer certain questions (RP 1413), as well as the prosecutor’s opinion in closing about why Ray was crying at trial. RP 1539. Further, the “truth” argument has been repeatedly condemned as flagrant and ill-intentioned. See Castaneda-Perez, 61 Wn. App. at 357-59.

Ultimately, even if each individual type of misconduct was not sufficient, standing alone, to compel reversal, the cumulative effect of all of the misconduct would. Where, as here, the prosecutor commits misconduct over and over, reversal will be required because of the cumulative effect of that misconduct where it deprives the defendant of a fair trial. Jones, 144 Wn. App. at 300. Here, all of the misconduct - misstating the jury’s role and duties, minimizing his own constitutionally mandated burden of proof, denigrating Ray and her counsel, inciting the

jury to decide based upon emotion, failing to inform a crucial witness of the court's ruling so that highly prejudicial evidence was admitted, telling the jury to effectively send a message to a young child that he was "believed" by convicting Ray, and accusing Ray and her counsel of trying to distract the jury from the truth - all went directly to the jury's ability to fairly and impartially decide this case. And again, the prosecution's evidence against Ray was far from overwhelming, given the credibility issues of Dwyer and Mundt, their access to the child, the access of Tulio and Jennifer and indeed Tulio's assaults of N, and the testimony about K.

Put simply, the prosecutor lost sight of his duties in his zeal to gain a conviction against Ray. Whether this was through personal belief that his cause was just or not, it was not his role to decide Ray's guilt - that role belonged to jurors. And in repeatedly committing serious, prejudicial misconduct, all of which went directly to the jury's ability to fairly and impartially decide that guilt based upon proper consideration of only the evidence, the prosecutor further lost sight of the reason he is saddled with his duties: his special position representing the sovereign and, by extension, the people, who expect him to act only in pursuit of justice. But "[t]he first, best, and most effective shield against injustice for an individual accused. . . must be found. . . in the integrity of the prosecutor." Corrigan, *Commentary on Prosecutorial Ethics*, 13 HASTINGS CONST. L. Q. 537 (1985).

Finally, it must be noted that several of the interrogation techniques used in this case are well-recognized to run serious risk of resulting in unreliable and false claims. Conducting multiple interviews,

interviewer bias by being aware of and believing the allegations and asking the same or similar questions multiple times as happened here all are known to be “highly suggestive” techniques, likely to lead a child to give unreliable information. See Ceci and Friedman, “The Suggestibility of Children: Scientific Research and Legal Implications,” 86 CORNELL L. REV. 33, 52, 60 (2000). Indeed, controlled studies with 3-6 year olds found that, when interviewed more than once, the false reports of improper touching increased substantially - telling, in this case, as N’s claims of abuse became much more expansive in the second interview and even more so in the “interview” of being asked questions at trial. See id.

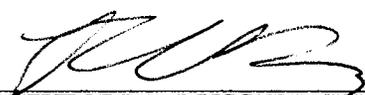
There is simply no way that Ray received a fair trial, given all of the misconduct which occurred. Even if the Court does not find that each of the individual types of misconduct committed in this case compel reversal, this Court should reverse based on the cumulative corrosive effect of the misconduct in this case.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 30th day of December, 2010.

Respectfully submitted,


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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

- TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;
- TO: Natalie Ray, DOC 831576, WCCW, 9601 Bujacich Rd. N.W., Gig Harbor, WA. 98332-8300.

DATED this 30th day of December, 2010.


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