

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

Case No. 39584-3-II

LOUIS G. IHRIG,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

FILED
COURT OF APPEALS
10 APR 19 AM 10:12
STATE OF WASHINGTON
BY _____
COURT CLERK

STATEMENT OF ADDITIONAL GROUNDS

On direct appeal from
Clark County Superior Court No. 09-1-00034-4
the Honorable Robert Louis

Louis Ihrig, DOC# 329917
Stafford Creek Correction Center H-2 B-118
191 Constantine Way
Aberdeen, WA 98520

ASSIGNMENT OF ERROR

Prosecutorial misconduct denied Mr. Ihrig a fair trial, in violation of the U.S. Constitution Sixth Amendment; and of due process of law, in violation of the U.S. Constitution Fourteenth Amendment.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the prosecutor vouching for the credibility of the victim's testimony affect the judgment of the jury and influence the result of the trial?

2. Did the prosecutor's evidence fabrications affect the outcome of the trial?

3. Did the prosecutor's evidence fabrications in closing argument deprive Mr. Ihrig of due process or confrontation, since they occurred after any opportunity to refute them had passed?

STATEMENT OF THE CASE

Defendant Louis Ihrig is married to Christina Ihrig. They have three children; Austin, Harmony and Brett. RP 210. Louis was honorably discharged from the U.S. Marine Corps and went to work for the Nutter Corporation. RP 211. Jason Petris and his wife Sarra Bush, and their daughters Cameron (Cammie) and Lily Petris, befriended the Ihrig family, whose children were similar ages. RP 63, 93-94.

Cammie and Lily frequently visited the Ihrig household, to play with Austin, Harmony and Brett. RP 63-64. At Christmas time 2007, Cammie was six years old, and Lily was three. RP 62.

In December 2007, Cammie and Lily spent the night at the Ihrig's house while their parents (Jason and Sarra) went shopping for Christmas presents. RP 65, 99. Cammie and Lily slept in Harmony's bedroom. RP 65, 148.

At some point in the night, a barking dog woke and frightened Cammie, who "ran" to Louis and Christina's bedroom, woke Christina up to ask permission to sleep in her bed, and was placed into the bed between Louis and Christina. RP 65-66, 149.

Later, three-year-old Lily woke up, noticed Cammie was not in the room, and searched for her. Lily's cries woke Louis, who brought Lily into the bed with Cammie and his wife Christina, woke Christina, and told her he was going to sleep out on the living room couch, since the bed was now too crowded. RP 215, 218, 222. While Louis slept on the couch, Cammie woke him up to ask

for a glass of water, which Louis got for her. RP 218.

Cammie did not want to go back into bed with Christina and Lily, who kicks a lot in her sleep, so she asked Louis to put on a movie for her in the living room. RP 73-74, 218.

Louis put on a movie, and fell asleep on the floor. RP 218, 225.

In the morning, Austin (Louis' oldest son) came into the living room, and Austin and Cammie watched another movie while Louis made breakfast for everyone (before waking up the rest of the family and visitors). RP 151.

Later that afternoon, Louis and Christina drove Cammie and Lily to their grandmother's house. RP 99, 121, 127, 152.

Nine days later, Louis told his friend Jason that Jason's wife, Sarra Bush, was cheating on him with another man.

This evidence was excluded from trial.

Ten days later, Sarra came to Jason with Cammie and insisted that Louis had digitally raped Cammie ten days earlier, on the night that Cammie and Lily stayed at the Ihrig house. RP 124.

Jason Petris, Cammie's father, testified that on December 30, 2007 Sarra told Jason about a rape allegation, and told him she had questioned Cammie about it. RP 123. Jason immediately called the police. RP 124. Acting on her own initiative, Sarra brought Cammie to a doctor for a sexual assault examination. RP 115-16. No evidence of abuse was detected, and Cammie's hymen was found to be normal. RP 116.

At Mr. Ihrig's trial for one count of Rape of a Child in the first degree, the prosecution's first witness was the victim, Cameron Petris, now age 7. RP 57.

Cammie testified substantially as above, with one startling difference. Cammie testified that she got into bed with Louis and Christina in the middle of the night, but later woke up with Louis' finger inside her private, at which time Louis picked her up, set her on his lap facing her while his finger was still inside her, somehow (no one asked) her legs were by Louis' head, while Louis was sitting up, Cammie watched a wall in the room as Louis wiggled his finger inside her for a minute or two, and then picked her up and placed her back in the bed with her head on the pillow, and left the room; never exchanging a single word during or after the exchange. RP 66-73, 84-86.

Cammie testified she followed Louis into the living room, where he had fallen asleep on the couch, and asked him for a drink of water. RP 73. Then, without either of them exchanging another word, Louis fell asleep on the floor, and Cammie fell asleep on the couch, until morning, when Austin arrived and Louis put on the Narnia movie for them both to watch. RP 73-75.

Christina testified she was woken up by Cammie asking to sleep in their bed. RP 149. Christina helped Cammie into the bed, they both fell asleep, and Christina slept until morning, waking only when Louis woke her to tell her he was going into the living room to sleep, and she noticed both Cammie and Lily were now in their bed. RP 149, 160-62.

Christina also testified she did not notice anything odd or unusual about Cammie's behavior that next day. RP 163. Nor did Christina hear anyone mention that Cammie was behaving any differently; no more shy or clingy or quiet than normal.

Louis Ihrig testified in his own defense. Louis testified that he slept through Christina's bringing Cammie into their bed. RP 214. However, he woke up when he heard Lily crying in the hall near his bedroom. RP 215. As Lily's crying woke him up, he became aware that (1) Cammie was in his bed, between him and Christina, and (2) Louis' hand was on top of Cammie's pajamas, over Cammie's pelvis. RP 215.

Louis denied any of the details that Cammie testified to which involve intentional touching of Cammie's privates or rape. RP 220-21.

Louis got up and comforted Lily, put Lily in bed next to Cammie and Christina, who were both sleeping, and woke Christina up to tell her he was going to sleep on the living room couch. RP 218.

Louis confirmed Cammie's testimony that after he had fallen asleep in the living room, Cammie came into the room and asked him for a drink of water. RP 218. Cammie complained that she couldn't sleep and was afraid of the dark, so Louis put in a movie and fell asleep on the living room floor. RP 218, 225.

Louis, Christina, Jason, Sarra and Cammie's grandmother, Mrs. Evenson all testified that Louis dropped Cammie and Lily off at their grandmother's house the next day. RP 99, 121, 137, 152, 224.

GROUND ONE

Prosecutorial misconduct denied Mr. Ihrig a fair trial, in violation of the Sixth Amendment, and due process, in violation of the Fourteenth Amendment to the United States Constitution.

In closing argument, the prosecutor aptly and correctly noted that the trial centered around the jury's estimate of the relative credibility of Cammie versus Louis. RP 257.

There was no medical evidence; there was no psychological evidence; there were no corroborating witnesses to either party supporting any allegation of rape. Either Cammie was telling the truth and was digitally raped in December 2007 on the night she stayed overnight with the Ihrig family and climbed into bed with Louis and Christina, or she is not.

The jury is the sole trier of fact, and the jury alone determines the credibility of the witnesses. In re Pers Restraint of Gentry, 137 Wn.2d 378, 410-11 (1999).

That is the only question at trial: "Did it happen?" RP 257.

INTERNAL CONSISTENCY

Two of the ways any trier of fact determines believability of a story is to what degree it has (1) internal consistency, and (2) external consistency. The prosecutor closed repeatedly telling the jury that Cammie's story had both. RP 259-261.

"After you listened to what she said, it made sense." RP 259. "And that makes sense if she was..." RP 259. "... facing him, that makes sense." RP 259. "They don't use the terms that we would

use, but it certainly made sense, and was consistent with the story she had told other people." RP 259 (internal consistency over time). "We have a consistent story." RP 260.

"It was consistent with what she had told other people, and then you heard her get up in court and tell you what had happened. All of those - everything was consistent." RP 261.

The evidence adduced at trial did not support the prosecutors eubillent acclamations.

The charge was originally dismissed because Cammie could not remember anything at all about the criminal charge, as late as December 2008, three months before trial. See Findings of Fact and Conclusions of Law, AP A. Even during pretrial, when defense asked Cammie about the evening of her accusations, as just related to the prosecutor in attempting to establish her competency, Cammie testified twice she didn't remember anything about that night. "Q. Do you remember that night? A. No. Q. You don't remember? A. No! That was when I was, like, six." RP 34-35.

Cammie then testified she was touched when she was asleep. RP 35. When counsel asked how she could feel it if she was asleep, Cammie replied, "He touched me, when I was asleep, but I could still feel it. Q. But you were still asleep? A. Yeah." RP 35. Counsel gently redirected, "Q. That's kind of silly, isn't it? A. Yeah. Q. If you're asleep, how do you feel somebody touching you? A. I don't know, but it -- I just did, kind of." RP 35.

At pretrial, Cammie was asked how long Louis had his finger inside her, and replied, "I think like four seconds." RP 37. At pretrial Cammie was asked, "And did his finger move? A. No." RP 37.

At trial, Cammie was asked how long Louis had his finger inside her, and replied, "A minute or two." RP 69. At trial, Cammie was asked, "Did it move around, or stay still? A. Moved around." RP 69.

Cammie and Louis' body positions during the rape was an especially challenging line of questions for Cammie, and her responses varied wildly between pretrial and trial, and even at trial. Please focus on the ground here; the appellant is not arguing witness credibility, he is arguing that prosecutorial vouching and deception of the jury occurred when the prosecutor repeatedly assured the jury in closing that Cammie's story was perfectly consistent.

At pretrial, Cammie was asked, "Q. Was he facing you when he did this? A. No. Q. Was he facing away from you? A. I think so. Q. Were you on your back looking straight up at the ceiling? A. Yes." RP 37. Then later, "Q. Was he facing you? A. Yeah." RP 38. The extent to which Cammie was mimicking the questions both counsel were asking her, is evidenced by this exchange: "Q. Then did he roll over and go back to sleep; or do you know? A. I don't know. I think he rolled over and went back to sleep." RP 38.

At trial, Cammie testified to a unique and original position

configuration that she had never before mentioned to anyone; not to CPS, not to police, not to the DV advocate, not to the defense investigator, not the prosecutor before trial. Cammie testified at trial she was now head to toe with Louis when the rape occurred.

"His head was here (on the pillow), my head right here (at the foot of the bed." RP 70. The prosecutor's response is evidence of her surprise and confusion at this newest turn of events:

"That doesn't make sense to me. I don't understand that..." Id.

Further questions elicited Cammie's head was where Louis' feet are, so she had no pillow, and her feet were where Louis' head was (making six year old Cammie 6' 1" tall), and Cammie was under the covers (apparently smelling Louis' feet). RP 70.

How did she get that way? "A. Okay. I was laying on the pillow, then I moved upside down." RP 70. Well how did you move upside down when you testified you were asleep? Cammie replied, "Louie moved me upside down." RP 71. Cammie explains, when she woke up after falling asleep in Louis and Christina's bed, her feet were by his head, and her head were by his feet. RP 71. Again, making Cammie 6' 1" tall.

So what was Louis' body position? "Was he sitting, or laying down? A. Sitting. Q. He was in the covers. Were you in (under) the covers? A. [Shakes head no.] Q. How did you get out (from under the covers)? A. He just moved me.

Q. Do you remember how you got moved? A. No." RP 72.

"Q. So, what was he, was he sitting up when you got into bed, or was he under the covers? A. Well, he was sleeping sitting up." RP 81.

The prosecutor tiptoed away from that uncomfortable assertion, but defense revisited it. "Q. He was sleeping sitting up (when you got into the bed)? A. Well, he was laying down, then he woke up, slee-- well, he woke up, then he just got -- then he woke up, then just went back to sleep, then he woke up. Q. Okay. I'm a little confused... What was he doing when you got into bed; do you remember? A. No. Q. You don't remember? A. Un-uh, but I know he was sleeping... Q. Was he sleeping sitting up, or was he sleeping laying down? A. Laying down." RP 82.

So when Cammie came into the bed, by her testimony, Louis was either sitting up asleep, laying down asleep, woke up and went back to sleep, or she doesn't remember. Yet in closing, the state told the jury four times that Cammie's story made perfect sense, and told the jury four times that Cammie's story was consistent.

And the State correctly surmised that the entire trial hinged on whether Cammie presented the more consistent, reliable story.

"A prosecutor's opinion carries with it the imprimatur of the Government, and may induce the jury to trust the Government's judgment rather than its own view of the evidence. See Berger [v. United States], 295 U.S. [78], at 88-89 [1935]." United States v. Young, 470 U.S. 1, 3-4 (1985).

This prosecutorial vouching "suggested that information was not presented to the jury" but was available to the prosecutor (as in pretrial) or investigators and supported the testimony, "placing the prestige of the government behind a witness." United States v. Necoechea, 986 F.2d 1273, 1276 (9th Cir 1993).

Cammie's testimony about the details involving the rape are as variable and inconsistent as her testimony as to how long the rape lasted. "Were your underwear on? A. No. Q. Where were they? A. Down by my feet. Q. Who moved them down by your feet? A. Louie. Q. Do you remember him moving them? A. No." RP 73.

On cross examination, Cammie continues to vacillate between speculation and self-contradiction. When asked how her body was turned around so her head was by Louis' feet, she replied, "Louie turned me around 'cause I was asleep. Q. And you never woke up? A. Yeah." RP 83.

"Q. And when he turned you around, he took you from underneath the covers and put you on top of the covers?

A. Yeah.

Q. You told Det. Oman he pulled you onto his lap?

A. Yeah.

Q. Did he do that?

A. Yeah.

Q. When?

A. ~~When~~ he was touching me.

Q. So when he was touching you, you weren't laying on the bed with your feet by the pillows?

A. I was on his lap and my feet were kinda by his head.

[Remember: Cammie testified Louis was sitting up in bed.]

Q. Your feet were by his head?

A. Or by his stomach.

Q. And he was on top of the covers?

A. I think he was under the covers. Or on top. I don't know."

RP 84-85.

At pretrial Cammie testified she was looking at the ceiling.

RP 37. Now on cross-exam, Cammie says she was looking at a wall.

RP 85. Cammie repeats that her panties were "kind of to my feet."

RP 85.

Asked to verify her panties were around her ankles, while her feet were by Louis' head (as he was sitting up), Cammie then counters that her panties were "kind of to my knees." RP 85.

The next question then became obvious: "Q. How did he get your legs apart then? A. I don't know. But I remember them being down by my feet." RP 86. Scratch the knees, back to down by my feet. So, the panties are down by Cammie's feet.

"Q. So your legs weren't apart? (Because, how could they be if your panties were binding them together?) A. No.

Q. Were your legs straight, or bent? A. Bent. Q. Bent?

A. They were bent or straight. I think; yeah. ... One knee was bent and one wasn't." RP 86. So her legs were both bent and straight. Missing from the transcript here, but presented by the prosecutor in closing, is Cammie's visual explanation that one of her legs was out straight, and one leg was tucked under her, with her knee bent. RP 259. Missing from the prosecutor's closing is any admission that this position is inconsistent with Cammie's other testimony that her panties were around her feet or her knees, and her feet were by Louis' head while he was sitting up raping her.

"Q. Was he sitting the whole time he did that [rape]?"

A. Yeah." RP 87.

What happened as the incident ended? "A. After he touched me, he put me back how I was sleeping, he pulled up my underwear, and put my head on the pillow." RP 87. But at pretrial, when asked about the incident, Cammie testified, "Q. Do you remember that night?"

A. No. Q. You don't remember? A. No. That was when I was, like, six." RP 34-35.

These wide variations in Cammie's testimony do not support the prosecutor's bold and repeated assertion to the jury that Cameron's testimony was consistent. Consistency is **not** a reasonable inference that logically follows from wide and varied inconsistencies. Prosecutor's repeated assertions to the jury that Cammie's story "makes sense", is **not** an inference reasonably drawn from Cammie's self-contradictory testimony about the gymnastics she performed with her legs here, here, there, now there, and her body being tossed about like a medicine ball, around, upside down, up onto Louis' lap with one leg by his head as he sat up, another bent below her, with her underwear by her ankles. It is merely the personal assurances the government's attorney gave to the jury, without a foundation in the evidence; in fact, despite and in conflict with the evidence, to obtain a conviction.

"I think it's absolutely understandable that this [rape] [actually] happened." RP 285, State's close. But a prosecutor's assurances to a jury that their star witness's story "makes sense" and is "consistent" does not cease to be inappropriate comment, vouching for Cammie's credibility, and misconduct which denied Louis Ithrig a Fair Trial simply because it doesn't contain the expression "I think"; which is implied.

"I think she kind of had her head turned, but if you listened to her words, what she gave you was a clear story of what happened." RP 258. Except, viewing the actual testimony, it wasn't "clear".

Nor was it consistent. What it was (Cammie's testimony), was the only evidence presented which implicated Mr. Ihrig in any criminal activity; which is a usual state of affairs for a statutory rape occurrence. This makes it more, not less, critical for a jury to be permitted to reach a verdict based on their own estimate of the reliability of the two principal witnesses, without the state repeatedly assuring the jury that the victim's testimony "makes sense" and was perfectly "consistent" when it was neither sensible nor consistent.

A prosecutor's opinion of the evidence is both proper and allowed when they accurately summarize evidence or issues. For example, the prosecutor was perfectly correct in closing when she said, "I think this entire case comes down to two questions in that entire instruction -- two words, and that is 'sexual intercourse'; right? Did that penetration happen or not." RP 256.

But State's repeated assurance that Cammie, who said it did happen, must be believed over Louis, who said it didn't; on the basis that Cammie's story "makes sense" and is "consistent", is an appeal and an assurance not supported by proof; it is vouching.

"Vouching is especially problematic in cases where the credibility of the witness is crucial, and in several cases applying the more lenient harmless error standard of review, we have held that such prosecutorial vouching requires reversal." United States v. Molina, 934 F.2d 1440, 1445-46 (9th Cir 1991), citing Roberts, 618 F.2d, at 535, West, 680 F.2d 652, 657, and referring to the standard on direct appeal, Chapman v. California,

386 U.S. 18, 18-24, 87 S.Ct. 824 (1967). In Washington, the standard of review for reversal on direct appeal is the standard established by Chapman; any error of constitutional magnitude (e.g. Sixth Amendment Fair Trial) is that the error must be found harmless beyond a reasonable doubt, or else it requires reversal (if the error is of constitutional magnitude). State v. Kitchen, 110 Wash.2d 403, 411-12, 756 P.2d 105 (1988).

See also United States v. Diloreto, 888 F.2d 996, 999 (3rd Cir 1989) "(establishing that prosecutor's remarks regarding defendant's guilt or witness' credibility, if based on evidence not adduced at trial, require reversal per se.)" Molina, 934 F.2d 1440, at VersusLaw ¶ 39.

The United States Supreme Court has observed the danger to Due Process (U.S. Const. 14th Amend.) when a jury relies on a "prosecutor's, rather than its own view of the evidence." United States v. Young, 470 U.S. 1, 18-19 (1985). "By vouching for the truthfulness of his own, unsupported, inaccurate assertions, the prosecutor committed flagrant misconduct. c.f. United States v. Molina, 934 F.2d 1440, 1444-45 ('As a general rule, a prosecutor may not express... belief in the credibility of government witnesses. Such prosecutorial vouching, which consists of either placing the prestige of the government behind the witness through personal assurances of their veracity or suggesting that information not presented to the jury supports the witness' testimony, is improper.)'" Sechrest v. Ignacio, 549 F.3d 789, ¶ 121 (9th Cir 2008).

EXTERNAL CONSISTENCY

The prosecutor vouched not only for the internal consistency and integrity of Cammie's story, but also vouched for, or warranted the reliability of Cammie's story compared to the testimony of other witnesses who testified at trial. RP 259-61.

The State insisted that Cammie's story "was consistent with the story that she had told other people." RP 259. The prosecutor insisted, "We have a consistent story." RP 260. The State continues to insist, "It was very detailed and she-- but it was **consistent** with what she had told other people, and then you heard her... All of those -- **everything was consistent.**" RP 261.

As the prosecutor also pointed out, "the only disagreement we have in this entire case is" about Cammie's actual rape accusation. All witnesses and parties admit Cammie and Lily spent a night at the Ihrig house that night in December 2007, that Cammie woke up and got into bed with Christina and Louis, and later followed Louis into the living room, asked for a drink of water, and fell asleep on the couch while Louis slept on the floor near the couch. Only the four seconds (RP 37) to two minutes (RP 69) of digital rape, and its attendant body positions and clothing positions is at issue.

In closing, the prosecution repeatedly insisted that the testimony offered by the victim was reliable and trustworthy because her story matched every other witness's testimony.

In reality, there were several conflicts between Cammie's testimony and that of other witnesses.

The most significant conflicts "bookend" the time period when Cammie ascribed the digital rape occurred. Cammie testified she got into the bed when both Louis and Christina were asleep. RP 34, RP 81. But Christina testified that Cammie woke her up and that she, Christina, laid Cammie into bed between herself and Louis. RP 149. This is especially significant because in closing, the prosecutor argued in favor of Cammie's version of being raped and tossed about the bed, head moved to where her feet had been, yanked up onto Louis' lap while his finger was inside her, then put back with her head on the pillow, while Christina, lying next to Cammie, slept through the entire event. RP 71-73, Cammie's testimony; RP 285, State's Rebuttal Argument ("They (Louis and Christina) were probably exhausted, and they went to bed and they were tired. She said she slept through the whole thing. [meaning Christina, and the rape allegation.] This woman sleeps hard, she didn't wake up. [again, meaning during the timeframe of Cammie's rape allegation, and not when Christina testified that Christina woke up immediately before the allegation to put Cammie into bed, and immediately after the allegation, when Louis put Lily into bed, and woke Christina up to tell her he was going to sleep in the living room.] Why would we expect Christina would wake up?")

A subtle yet insidious deception offered to the jury here is the State's "She said she slept through the whole thing." RP 285.

It is as if Christina testified that Yes, there was a rape, but I slept through it. This is not what Christina testified. In fact, what Christina testified conflicts with Cammie in a second regard as well.

Cammie testified that after she was digitally raped, Louis went back to sleep; no wait, he rolled over as if to go back to sleep, but then he got up and left and went to the living room. And, Cammie testified, he left without saying a word, and Christina was still asleep. RP 73-74. Per Cammie, Christina never woke up.

But Christina testified that Cammie woke Christina up when Cammie came to the bed complaining that Cammie could not sleep. RP 149. And Cammie did not "run" into the room because she was scared by a dog that frequently attacked her, as Cammie testified (RP 66), Cammie complained that she couldn't sleep, and Christina laid her in the bed between Christina and Louis. RP 149. And when Louis left the bed after he put Lily into the bed next to Cammie, who was still asleep, Christina testified that Louis woke Christina up and told her; told her he was going to sleep in the living room, the bed is too crowded. RP 149. Cammie testifying that Christina was asleep when Cammie came into the bed, and also asleep when Louis left the bed immediately after raping Cammie and moving her all around the bed, is directly contradicted by Christina. Yet in closing the prosecutor promised the jury that "Everything is consistent." RP 261.

Also inconsistent is the story Cammie told about being

picked up and moved head to foot area, picked up and put onto Louis' lap while she was being raped, (and still experiencing no pain in her six year old vagina when she was picked up with a man's finger inside her, RP 36), and then picked up and put back the right way, head on a pillow. RP 70-73, 83-87. But both Louis and Christina testified that no such gymnastics occurred in the bed between the time Cammy woke Christina up to sleep with her, and Lily was placed in the bed by Louis when Lily was crying about missing her sister Cammy, and Louis woke Christina up to tell her he was going into the living room. RP 149, RP 160-62, RP 229.

Cammy also testified Louis did not speak a word to still-sleeping Christina when Louis went to the living room. RP 73-74, RP 81, RP 87-88. But both Christina (RP 149) and Louis (RP 218) testified that Louis woke Christina up to tell her Louis was going to the living room to sleep, and Cammy was asleep when this happened.

Cammy testified her parents picked her up later that afternoon of the rape. RP 78. Cammy is adamant that she did not go to her grandmother's house that afternoon. RP 78.

But every other witness testified that Cammy did go to her grandmother's house that afternoon; including Cammy's grandmother. RP 99, 121, 137, 152, 224.

Cammy has no memory of Lily crying and coming into bed with Christina and Louis that evening. RP 88. Nor would she, because Cammy was asleep. But both Christina and Louis

testified that Louis woke Christina up when Lily came to their bedroom door crying, and Louis put Lily into bed with Christina and Cammie. RP 149, RP 215. Since this is the instant Louis left the room to go sleep on the couch, and since Cammie testified she was awake that moment and saw Louis leave, and that Christina was still asleep, and Lily was nowhere to be seen, there is a tangible conflict between the several testimonies.

Yet the prosecution insisted repeatedly that "everything was consistent", everyone's testimony confirmed and mirrored Cammie's testimony; that Cameron should be believed, and Louis should be disbelieved, because everyone confirms that Cammie got all of the details right, owing to her extraordinary recollection of the events of that evening (e.g. RP 260, "That's an incredible fact for anyone to remember, let alone a child.").

FABRICATED EVIDENCE

And why does the prosecutor insist that Cammie's extraordinary and completely accurate memory of the events of that evening affect her credibility? The prosecutor explains, "Well, I think that's pretty obvious. She remembers these details because something traumatic happened to her. And when something traumatic happens, you remember the details around it." RP 260. "You remember these things because that's a night she's not ever going to forget." Id.

The conclusion might be sound psychology, but the premise is established on the opposite of the facts. The State here

invents the trauma that a reasonable juror could expect to result in an actual rape of a six year old, when nothing in Cammie's testimony supports this assertion of trauma. Then, to build an entire house of cards on the fabricated premise, the State insists, "Kids can't fake that" emotional devastation resulting from a rape trauma. RP 260.

But all during Cammie's testimony, Cameron was oblivious to the prosecutor's repeated hints and nudges to establish any kind of adverse emotional reaction resulting from the alleged rape. The State asked, "What did you feel (about being raped)?

A. I don't know, cause that was a long time ago." RP 68.

Asking what happened after the rape, perhaps expecting Cammie to say she cried, or shook in fear, Cammie answered, "He left to go to the living room. I lay in the bed. Then I got up and went out in the living room to get a drink." RP 73. Then after she got her drink of water, "Louie was on the floor; I was on the couch in the living room. I went back to sleep. Louis was sleeping." RP 74.

"How were you feeling? A. Like I was tired, still. I fell asleep ..." RP 77. "How do you feel about going to Louie's house after

that happened? A. I don't know. Q. You don't know? (translation: try again! Give me something to work with here, kiddo!)

A. I was still sleepy. Q. Remember when mom told you you were going back to Louie's house? A. No. Q. And spend the night?

A. No." RP 79.

On cross-exam, Cammie describes the incident with perfect aplomb and detachment. RP 83-88.

In closing, the prosecution simply manufactures trauma and psychological devastation, perhaps on the magnitude that other cases involving an actual rape of a child have manifested in the past for the State, and attributes (1) Cammie's flawless memory of all the perfectly consistent events of that night, to (2) the trauma Cammie experienced as a result of being raped, when in reality neither (1) nor (2) appear anywhere in the record of or about Cammie's testimony. The State simply fabricates it all. "It's pretty obvious. Something traumatic happened to her." RP 260. "She's **extremely upset.**" RP 267. Really? Says who? Cammie?

"The prosecutor presented **no** evidence to back up this **outlandish** statement (made by the prosecutor in closing). Thus, this statement constituted improper testimony." Sechrest v. Ignacio, 549 F.3d 789, ¶ 115 n.15 (9th Cir 2008).

"The relevant question is whether the (prosecutor's closing) comments so infected the trial with unfairness as to make the resulting conviction a denial of Due Process. Did the prosecutor's comments manipulate or misstate the evidence?" Darden v. Wainwright, 477 U.S. 168, ¶ 14 (1986).

Next, prosecution manufactures insomnia for Cammie resulting from the alleged digital rape she just endured. "This little girl can't sleep. She goes out into the living room and she lays there watching a movie. She said she kind of drifts in and out of sleep. She is tossing and turning and having a hard time sleeping. ... She certainly wasn't getting any good sleep... So this kid's UP, from 2:00am until the morning. That's not normal!

So we not only have that..." RP 261-62.

Not only doesn't the State have that, they don't have the insomnia they infer resulted from a rape. It too, is merely manufactured to infer the precedent (rape) from the fabricated subsequent result (insomnia).

Cammie testified she was woken up by a dog barking. We can reasonably presume this was not caused by the rape, since it is alleged before the rape was to have occurred. Then Louis left the bed, and Cammie followed him to ask for a drink of water. RP 74. After she got her drink, "Louie was on the floor, and I was on the couch in the living room. I went back to sleep. Louis was sleeping." RP 74. "Q. Did anyone watch TV? Yeah. I woke up again and he turned on a movie. It was in the morning." RP 75. So after a peaceful night's sleep on the couch next to the man she later accused of rape, who slept next to on the floor without ever saying a word to her, nor molesting her again in any way, Cammie fell asleep and slept all night. The next morning she woke up and Louis put in a movie for her: per her testimony.

Yet in closing, the prosecution manufactures a night of tossing and turning and insomnia and "certainly wasn't getting any good sleep" and "this kid's up, from 2:00am until the morning." RP 261.

This is the opposite of the testimony at trial. It is manufactured only to infer that Cammie was upset and sleepless after being raped. She was neither.

Next in closing, the prosecution manufactures some corroborative testimony from other witnesses, including the accused, to prove extrinsically this victim "trauma". State tells the jury, "Another thing that he (Louis) says that's interesting is how when he goes and drops these girls off, he sees the grandmother and says to grandma, 'Yeah, CLP woke up at 2:00am. She seems upset, but I don't know why.'" RP 266.

The actual testimony at trial shows that Louis was never questioned about this dropping the children off at their grandmother's house, apart from the fact that he did bring them there after they stayed the night (in contradiction to Cammie's testimony that she did not go to her grandmother's house that day, RP 78). RP 224.

Police questioned the grandmother after the accusation was made, and the grandmother admitted in her testimony that she did not ever say anything to the police about Cammie seeming upset, or about Louis saying anything about Cammie seeming upset. RP 142. Christina testified that Cammie seemed "normal"; not noticeably shy or withdrawn or, to use the prosecutor's word, "clingy". RP 163.

Yet the prosecutor puts words into Louis' mouth, contained nowhere in the record, that Louis confides in the grandmother that Cammie seems upset and he doesn't know why. RP 266. Then State smugly assures the jury with a wink that "He perfectly well knows why she's upset, right?" RP 267. Oh, right, she's upset because she was raped. Except she wasn't upset. So that would mean...

Cammie never testified she was upset, that night or the next morning or when she went to her grandmother's house. Louis never testified Cammie was upset, that night or the next morning or when Cammie went to her grandmother's house. Christina never testified Cammie seemed upset, that night or the next morning or when she went to her grandmother's house. The grandmother never testified that Cammie seemed upset, or that Louis said anything to the grandmother about Cammie seeming upset. Yet State insists that Cammie was upset and withdrawn after being brought to her grandmother's house, and tells the jury Louis confessed this altered emotional state; this emotional abnormality; to Cammie's grandmother. Why? "I think, you know, that's normal behavior for this kid who's had **something traumatic happen** to her." RP 262.

"Again, even if a kid made up a story, how could you make up the behavior? ... They can't do that, they're not sophisticated enough to do that... No, she's scared." RP 263. The State is correct; a six year old is not sophisticated enough to fabricate emotional withdrawal in order to corroborate a rape accusation. But do you know who is sophisticated enough? A prosecutor.

And State testifies to the jury "she's scared", Id, based on Cammie's testimony: "Q. Were you scared? A. No." RP 38. After you were raped, Cammie, "How were you feeling? A. Like I was still tired." RP 77. The prosecution manufactured evidence.

Finally and most egregiously, the prosecution manufactures a confession from the defendant; this misconduct requires reversal.

At trial, Louis made a candid admission against interest by testifying that when Lily came to the closed bedroom door, crying in the hall, it woke Louis up, and as he regained consciousness, he became aware for the first time that (1) Cammie was in his bed, and (2) Louis' hand was draped over Cammie. RP 222.

Had Louis been sleeping with his elbow bent, his hand would have been on Cammie's face. But since he was sleeping with his arm straight, his hand was covering Cammie's pelvic, pubic, and abdomen area. RP 222. When prosecution cross-examined Louis and asked if Louis thought it was appropriate to touch a six year old's pubic area, Louis replied he didn't "think", but that "I know that it was not an appropriate position." RP 222. Which is why he removed his hand as he got out of the bed, got Lily, put Lily in the bed next to Cammie, woke Christina up, and told her he was going into the living room to sleep. RP 218.

Prosecutor conceded in closing that "as soon as he realized that that's where his hand was, he removed it." RP 266. So far, so good. But then the State took the exchange from RP 222, above, and extrapolated. "But he also said a few other things. He described his behavior several times as inappropriate. Inappropriate means guilty." RP 266. In what universe is describing the discovery that your hand was on the pajamas of a six year old while you were asleep a confession of rape? Only in the State's closing.

Even the jury, during deliberations, sent a question to the court asking if Louis was guilty of rape if he was sleeping when

he touched Cammie. RP 289.

The trial court conducted a diligent analysis and arrived at a sound conclusion: the legislature incorporated intent into the statutory definition of rape, on the sound basis that rape is intentional; as distinguished from molestation, which requires a finding of deliberate intent, to protect from prosecution against accidental touches. RP 290. However, a sleeping person is not guilty of a criminal action if his hand wanders into a molesting position while he is asleep, and has no knowledge of the event. RP 291. The very question shows that the jury was at least divided about whether Louis could be found guilty if he was telling the truth about being asleep when his hand came to rest on Cammie's pubis.

But then the trial court gave a devastating answer to the jury's question. Intent is not an element of the crime; and any crime has to be a conscious act. RP 292. *AP B, Jury Question.*

A jury deliberating a rape of a child case is not readily inclined to acquit; nor does the public wish to be inundated with child rapists at large. Without the benefit of the trial court's sound analysis, all the jury heard was that it doesn't matter if it was intentional or not, intent is not an element of the crime; and it doesn't matter if he was sleeping or not, as soon as he became conscious, as he testified he was, he is guilty of that crime; because intent is not an element of that crime, per the court.

What "tipped the balance" in the jury's deliberations, was the prosecutor manufacturing Louis' confession.

"He described his behavior several times as inappropriate. Inappropriate means guilty." RP 266. First, no he didn't, and second, no it doesn't.

Then State manufactures Louis telling Cammie's grandmother that Cammie "seems upset, but I don't know why." RP 266. "He perfectly well knows why she's upset, right?" RP 267. Because, State concludes from the evidence they fabricate, he raped her.

Then the prosecutor manufactures insomnia for Louis, too, as proof of his guilt, and to infer that Louis can't stop thinking about the rape he just committed. "But it wasn't intentional and but he feels bad and he doesn't want to stay in bed, so he leaves. He tells us he can't sleep. He maybe drifts off, kind of like CLP, right? He's drifting off a little bit, but he said he didn't sleep very well. Why? Why can't you sleep well? You did not do anything wrong. Well, he can't sleep because he's thinking about what happened..." RP 269-70.

State begins with a factual statement, blends in manufactured evidence, and concludes with blatant fiction. Cammie testified Louis left the bed, she followed him, got a drink, and they both fell asleep until morning. RP 74-75. Louis testified that Lily woke him up, he put Lily into bed with Christina and Cammie, both sleeping (which actually corroborates Cammie's testimony that she doesn't remember Lily crying, or Louis putting Lily into bed next to her, RP 88), and immediately left the room for the living room, pausing only to wake Christina to tell her where he was going. RP 218-22. Louis confirmed Cammie's testimony that Cammie came

out into the living room, woke him up asking for a drink, got it, and they both went back to sleep; Louis on the floor, Cammie on the couch where Louis had been sleeping.

If the prosecution wanted to infer to the jury that Louis gave Cammie the couch because he felt guilty about raping her, that would be permitted, because the inference is based on an actual factual event, and some testimony.

But when the prosecution manufactures insomnia for both Louis and Cammie, when both of them explained exactly when and why they woke up (Lily crying; thirst) and testified they went back to sleep, then tells the jury that Louis is guilty because he tossed and turned and spent the night remembering his rape and never slept, it is misconduct; a false conclusion founded on manufactured evidence.

Without debating the "reasonable" in "reasonable inference", a "reasonable inference", had Louis actually slept poorly that night, would be that he was sleeping on the floor, and not in bed with his wife. (Cammie was afraid to sleep in a room by herself.)

"Inappropriate means guilty... Inappropriate **implies intent**, or wrong... IF it was just an accident, don't you think there's some things he would have done and said differently?" RP 266. A state telling a jury "whatever he did and said proves his guilt, because if he was innocent, he would have said and did something other than what he said and did" is not a reasonable inference.

"He woke up and suddenly his hand's on this little girl's

Vagina and she's extremely upset." RP 267. The "extremely upset is refuted earlier; where does the skin to skin, hand on vagina inference come from?

Because, State tells the jury, Louis actually confessed to it during his testimony, confirming and corroborating Cammie's rape accusation; not completely, but, as State reminded the jury, to constitute rape, only a millimeter penetration is required.

Prosecution tells jury, "He verifies everything about her (Cammie's) case. ... the last question I asked him on cross-examination was, 'Basically, everything Cammie said was the truth except the penetration and where her underwear were?' and he (Louis) said 'Yes.'" RP 268.

"So the **only** disagreement we have in this **entire case** is -- where is the underwear and where is the finger? That's it." RP 269.

State admits that when Louis testified, he said his hand was over Cammie's pajamas, and that there was "no skin to skin contact." RP 269. "But he also agreed with me (prosecutor) when I said the **ONLY TWO** differences are **this**. So he's **actually** even **AGREEING** that **his hand ACTUALLY TOUCHED HER VAGINA** -- what Cammie said was the truth; at least the vast majority of it." RP 269.

Prosecution manufactures a nearly full confession - certainly manufactures enough of a confession that permits a jury to convict of "any penetration, no matter how slight", as the jury was instructed. Intent is not an element, per the court's response to jury's question during deliberations. RP 292. Louis regained consciousness and realized, consciously, where his hand was, even for a second, so

the Court's response that it must be a conscious act is no barrier; even Louis testified he was conscious that his hand was there, in the split second it took to realize where his hand was, and on the who (Cammie) who had apparated into his bed while he slept; so now the only question or issue is whether there was any penetration.

The prosecution manufactures that evidence to permit the conviction. Let's look at how the magic trick works.

By simply exchanging the word "basically", i.e. in general, or in essence; and substituting the word "only", i.e. exclusively, or nothing else except this; the prosecutor concludes that now, using the new definition of what Louis disputes ("only"), Louis has admitted every single other detail of Cammie's testimony, up to and including waking up with his bare hand against her naked vagina. RP 269. Whether his finger penetrated Cammie for either four seconds (Cammie at pretrial) or two minutes (Cammie during trial) is irrelevant; the penetration could have occurred while Louis slept with his hand on Cammie's bare vagina; intent is not required as an element of the crime, as per the court.

"So he's actually even AGREEING that his hand actually touched her vagina," because when he agrees that "basically" the only significant differences are the finger and the underwear, he is explicitly admitting every and any other conflicting testimony from every source must be resolved in favor of Cammie, who testified she didn't remember over a dozen times, and whose testimony conflicted with every other person's at trial on several points. This fabricated confession probably won a guilty verdict.

"Where deliberate deception of the court and jurors has occurred, reversal is required." Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763 (1972).

"Improper suggestions, insinuations, and, especially assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none."

Berger v. United States, 295 U.S. 78, 88 (1935).

"We reiterate that credibility was especially important in this case in which two sets of witnesses all alleged participation in one or more stages of a criminal enterprise presented irreconcilable stories... failure of the Government to correct the false impression given ... shielded from jury consideration yet another, more persuasive reason to doubt their testimony..."

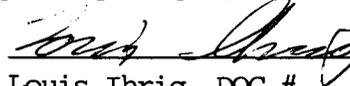
United States v. Barham, 595 F.2d 231, ¶ 126 (5th Cir 1979).

"It is of no consequence that the falsehood bore upon the witness' credibility, rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the (State) has the responsibility and duty to correct what he knows to be false... that the (State's) (actions) was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

CONCLUSION

Reversal is warranted, and a new trial should be ordered. Done this 13th day of April, 2010. Affirmed that all of the above is true and correct under penalty of perjury of the laws of the State of Washington.


Louis Ihrig, DOC #
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520

6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED

DEC 05 2008

Sherry W. Parker, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,)	Case No.: 08-1-00687-5
)	
Plaintiff,)	FINDINGS OF FACT AND CONCLUSIONS
)	OF LAW
vs.)	
)	
LOUIS G. IHRIG,)	
)	
Defendant)	

THIS MATTER having come on the motion of the State of Washington pursuant 9A.44.120 for the admission of child hearsay statements, the Court having heard the testimony and having considered the arguments of counsel, now, therefore, hereby makes the following:

Findings of Fact

1. On December 30, 2007, when CLP was told by her parents that she and her sister were going to spend the night at the Ihrig's residence, CLP stated to her parents:
 - i. "I don't want to go to Louis"
 - ii. "I don't like Louis."

FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 1

Vancouver Defenders
500 W. 8th St. Ste. 230
Vancouver, WA 98660
360-906-7234 FAX 906-0211

1 vi. "He was sitting up. He put his finger in my private, and it hurt, and I feeled
2 [sic] it, and he wiggled it around for a long time."

3 vii. "No, I pretended like I was asleep so he didn't talk to me."

4 viii. "That's about it. He went out to the living room, and then I went out there
5 too."

6 ix. "He asked me if he woke me up, and I said no."

7 x. "Well, I didn't go to sleep the whole night."

8 xi. "He did it one time, but he did it for a long time that time."

9 xii. "Well, at first I didn't want think they [CLP's parents] would want to know.
10 Then Mom said I was going back to Louie's house, and I told her I didn't
11 want to go. I was scared of Louie, so I told her. She said that she was glad
12 that I told her."
13

14 4. "He's mean and he killed kids because he was in the war."

15 5. On September 26, 2008, CLP testified before the court. CLP was able to respond to
16 general questions, however whenever asked about Mr. Ihrig or the alleged incident
17 CLP responded with either "don't know" or "forgot" or words to that effect.

18 6. Previous to December 30, 2007, CLP had always expressed excitement at the
19 prospect of going to the defendant's residence.
20

21
22 **Conclusions of Law**

23
24 The Court makes the following conclusions of law:
25

- 1 3. Balancing the above listed *Ryan* factors the Court finds that the timing, content, and
2 circumstances of the statements provide a sufficient indicia of reliability.
- 3 4. CLP is not competent to testify in regards to the alleged abuse, therefore CLP is
4 unavailable as a witness. Pursuant to 9A.44.120 the Court requires other evidence
5 that would sufficiently corroborate the statements of alleged abuse prior to their
6 admission of CLP's hearsay statements at trial.
- 7 5. Contrary to the State's argument the following does not show sufficient
8 circumstances, which would support a logical and reasonable inference that the act
9 of abuse described in the CLP's statements occurred: 1) CLP's sexual knowledge of
10 digital penetration; 2) CLP's shyness, trying to cover her face up when discussing
11 the alleged acts with her parents, Detective Oman and in court; 3) CLP's behavioral
12 changes after the alleged abuse, trouble sleeping well, increased sleepwalking, and
13 sudden and contrasting desire not to go to the defendant's house.
- 14 6. CLP's statements shall not be admissible at trial.

15
16
17 It is here by ordered, this 5 day of December 2008.

18
19
20 
21 Judge Barbara Johnson

22 Presented by:

23 
24 _____
25 Antoine Tissot
Attorney for the defendant

FINDINGS OF FACT AND CONCLUSIONS
OF LAW - 5

Vancouver Defenders
500 W. 8th St. Ste. 230
Vancouver, WA 98660
360-906-7234 FAX 906-0211

Appendix B

DATE: 4-15-09

TIME: 3:31 p.m.

Do not disclose any information or state how the jury has voted.

FILED

APR 16 2009

Sherry W. Parker, Clerk, Clark Co.

10:43 am

09-1-00034-4

JURY QUESTION

~~##~~ Is "intent" / sleep / awareness of an act relevant to 1st degree rape. If he (the defendant) ^{was} asleep, does that matter?

Intent is not an element of the crime of rape of a child in the first degree. The law does require a conscious act.

A. Lewis
3:57 pm

Michael L. Leste
FOREMAN/PRESIDING JUROR

FILED
COURT OF APPEALS
DIVISION II

10 APR 19 AM 10:12

STATE OF WASHINGTON

BY _____
DEPUTY

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

LOUIS G. IHRIG,)
Petitioner/ Plaintiff,)
v.)
STATE OF WASHINGTON,)
Respondent/ Defendant.)
_____)

Clark County 09-1-0034-4
No. C.O.A. 39584-3-II

**DECLARATION OF SERVICE
BY MAILING**

I, Louis G. Ihrig, declare that, on 15th day of April,

2010, I deposited the foregoing document(s) or a copy of;

Statement of Additional Grounds, and this Declaration of Service by Mail.

In the internal mail system of the Stafford Creek Correction Center and made arrangements
for postage, addressed to:

David C. Penzoha, Clerk

Arthur Curtis

C.O.A., Division II
450 Broadway, Suite 300
Tacoma, WA 98402-4454

Clark County Prosecutor Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

Anne M. Cruser

Attorney at Law

P.O. Box 1670

Kalama, WA 98625

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 15th day of April, 2010, in the City of Aberdeen,
County of Grays Harbor, State of Washington.



Louis G. Ihrig

DOC # 329917, Unit H-2; B-118
Stafford Creek Correction Center
191 Constantine Way
Aberdeen, WA 98520-9504

Louis Ihrig #329917
H-2; B-46
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

RECEIVED

APR 16 2010

CLERK OF COURTS
STATE OF WASHINGTON

David C. Penzoha, Clerk
C.O.A, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

9 APR 16 2010

Widman 4/15

100