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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. Appellant was denied a timely trial in violation of Wash. Const. art. 1, § 22 and the Sixth Amendment.
2. The State violated Due Process by failing to provide the defense with either the name of a forensic sexual assault examiner called as an expert witness, or with that witness's report including 89 photographs of the alleged victim's injuries contrary to CrR 4.7(a).
3. The State violated Due Process by failing to timely disclose medical records of the alleged victim's emergency room treatment in violation of CrR 4.7(a) and a direct order of the court.
4. The probative value of duplicate and triplicate photographs of the alleged victim's injuries was outweighed by their prejudicial effect which inflamed the passions of the jury and denied Appellant a fair trial.
5. The court violated the Sixth Amendment Confrontation Clause by erroneously excluding clear evidence of bias against the State's key witness.
6. Appellant was convicted of both first degree rape and second degree assault in violation of the double jeopardy clauses of Wash. Const. Art. 1, § 22 and the Fifth Amendment.
7. The court erroneously admitted the alleged victim's statements to a police officer at the scene under the excited utterance exception to the hearsay rule.
8. The court erroneously admitted the alleged victim's statements to an evidence collection specialist under the medical treatment exception to the hearsay rule.

9. The court violated the Rules of Evidence and the appearance of fairness by sua sponte giving a limiting instruction on the use of a defense witness's testimony.

10. The prosecutor violated the presumption of innocence by including a "fill-in-the-blank" reasonable doubt argument in closing.

11. Appellant was denied the effective assistance of counsel in violation of Wash. Const. art 1, § 22 and the Sixth Amendment.

12. Cumulative trial errors denied Moeller a fair trial as guaranteed by Const. art 1, § 22 and the Fifth Amendment.

B. Issues Pertaining to Assignments of Error

1. Was Appellant denied his constitutional right to a timely trial by repeated continuances of his trial for 9½ months over his adamant objections?

2. Did the prosecutor's CrR 4.7(a) violations deny Appellant the opportunity to prepare his defense by failing to provide the name of a crucial forensic witness and that witness's reports and photographs?

3. Did the State deny Appellant the opportunity to prepare his defense by failing to provide timely discovery of medical treatment providers and their reports, as required by CrR 4.7(a) and the order of the court?

4. Was Appellant denied a fair trial by the cumulative prejudice of over 100 photographs admitted to show the alleged victim's injuries?

5. Was a letter written to police by the State's key witness admissible to show bias where she admitted she may have falsely accused Appellant in the recent past but could not be sure due to blackouts and memory loss?

6. Do the double jeopardy clauses of Wash. Const. art. 1, § 22 and the Sixth Amendment permit convictions for both first degree rape and second degree assault based on the same alleged infliction of injury?
7. Were the alleged victim's statements to police describing the alleged unlawful conduct erroneously admitted under the excited utterance exception to the hearsay rule?
8. Was the alleged victim's statements to a forensic examiner erroneously admitted under the medical treatment exception to the hearsay rule?
9. Did the court violate Appellant's right to present a complete defense by giving an erroneous limiting instruction regarding the testimony of a defense witness?
10. Did the prosecutor commit reversible misconduct by telling the jury the correct guage of reasonable doubt was a fill-in-the-blank test?
11. Was Appellant denied effective representation where defense counsel (i) failed to promptly follow up on evanescent witnesses and evidence; and (ii) failed to have Appellant testify in his own defense to crucial facts not otherwise before the jury?
12. Did the cumulative effect of errors by counsel, the prosecutor and the court deny Appellant a fair trial?

### III. STATEMENT OF THE CASE

A. Substantive Facts: Appellant David D. Moeller and Deborah Stegner met at an Alcoholics Anonymous meeting in the summer of 2008. RP 47, 141. They soon moved in together in a tiny, poorly constructed apartment in a rough section of Lakewood, Washington. RP 47, 56, 187. In November, 2008, both were unemployed, living on proceeds from selling Moeller's possessions at swap meets. RP 47. On Friday, November 14, 2008, they found a three-day notice to pay rent or vacate posted on their front door. RP 48.

Early in the morning of Monday, November 17, 2008, Stegner hammered on the door of a neighbor, James Hettich, and begged him to let her in, yelling that Moeller wanted to kill her. RP 65-66, 290. Hettich, also a recovering alcoholic, had avoided the couple since Stegner started drinking again in July or August. RP 289. He refused to open his door, but he notified the property manager and called the police. RP 142.

The police found Stegner sitting in the bushes outside Hettich's apartment with little or no clothing. Her eyes were swollen shut and her face and neck were bruised. RP 122. Hettich brought her a robe, and the police put her in back of the patrol car. She told the police that Moeller had kept her in the apartment all weekend, periodically hitting and strangling her and demanding sex. RP 126.

Stegner received medical treatment from physicians and nurses at the St. Clare Hospital the emergency room in Lakewood. Ex. 7. When her medical treatment was complete, she was released at her own request to a visiting sexual assault forensic investigation nurse. RP 228. The forensic examiner collected voluminous evidence including almost a hundred photographs and prepared a detailed report. Ex. 8; RP 227, 230.

Stegner went from the hospital to a shelter. RP 266-67. She eventually relocated to Florida where she commenced in-patient treatment for her alcoholism. RP 45.

B. Procedural Facts: Moeller was arrested and charged with first degree rape, second degree assault and unlawful imprisonment. He was convicted by jury on all counts. He has been sentenced to .

Moeller was arraigned November 18, 2008. Supp. CP \_\_\_\_ (order setting conditions of release filed 11/18/2008). He was detained in custody. 4/30RP 4.<sup>1</sup> Accordingly, the last timely trial date was the 60th day, January 19, 2009. The charges on November 18, 2008 were first degree rape, second degree assault DV, and unlawful imprisonment DV, all occurring on November 14, 2008. CP 1-2. Trial was set for January

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<sup>1</sup> Four continuously paginated volumes numbered 1 through 4 contain pretrial hearings and sentencing. These are designated by date. The trial is in eight consecutively paginated volumes beginning again at Volume 1. These are simply designated RP.

13, 2009, but on January 6 the trial was continued to April 30, 2009, purportedly to accommodate the “complexity and seriousness” of the case. CP 11. The charges had not changed, however, and the complexity of the case had not increased since November, 2008. *Id.*

On April 30, 2009, over Moeller’s objection, the court continued his trial until May 11, to accommodate court congestion. CP 65; 4/30RP 4. The prosecutor knew then that Deborah Stegner needed to be transported from Florida to be interviewed by the defense. 4/30RP 4.

On the May 12, 2009 trial date,<sup>2</sup> the case was already six months old but the State had yet to produce the alleged victim for a defense interview, despite requests over several months. 5/12RP 15-16. Moeller moved to dismiss pursuant to CrR 4.7. 5/12RP 16. The Department of Assigned Counsel was ready to pay Stegner’s travel expenses. 5/12RP 18. Nevertheless, the prosecutor’s office did not contact Stegner until the scheduled trial date of May 11, 2009. 5/12RP 19. The court blamed the difficulty on defense counsel for insisting on an in-person interview, rather than a telephone interview. Counsel explained he had learned from experience that eye-contact was essential. 5/12RP 20-21. The court

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<sup>2</sup> Postponed one day because defense counsel was ill on May 11, 2009. CP 66; 5/12RP 15.

denied the motion to dismiss because the State said it would produce Stegner for an in-person interview the following week. 5/12RP 21.

Additional court congestion also was cited as a problem in scheduling a new date. Defense counsel had an upcoming three-week trial followed by vacation; 5/12RP 19-20, 23. The defense was ready to go immediately, however, except for the interviews. Counsel suggested a trial date of July 1, 2009. 5/12RP 22-23. Mr. Moeller objected to any delay. 5/12RP 23, 27. The court continued the trial until July 1, 2009, over Moeller's objection. CP 70; 5/12RP 27-28.

On July 1, 2009, (day 225 since arraignment) the trial was continued another 62 days to August 31, because the prosecutor was busy with other cases and defense counsel had fallen ill so that substitute counsel had to be appointed. CP 71.

August 31, 2009, was day 287, nine and a half months after arraignment. By this time, substitute counsel had settled for a telephone interview in lieu of the promised in-person interview with Stegner. 8/31RP 33. Yet another continuance was still necessary, however, to accommodate continuing scheduling problems of both counsel. 8/31RP 34. The court also had a "significantly older trial" starting the following day. 8/31RP 34, 37.

Also, defense counsel had just discovered the existence of 90 photographs taken during the forensic evidence collection on November 17, 2008. 8/31RP 34. The defense had yet to see these photographs which the prosecutor hoped to obtain the following day. 8/31RP 35-36. The prosecutor explained that acquisition of the photographs had been delayed because Stegner was out of state and the medical information release forms expired for some unspecified reason. 8/31RP 35. The prosecutor said he too had not seen the photographs. 8/31 RP 34. (He did not say he did not know about them, *Id.*, and sexual assault forensic nurses had been operating in the region at least since 2006. RP 218.)

Defense counsel wanted time to show the surprise photographs to a bruising expert who might be able to determine when and how the bruises occurred. The court did not see the point. 8/31RP 39. Accordingly, the court ordered trial to begin the following day. 8/31 RP 43.

#### IV. ARGUMENT

##### A. MOELLER WAS DENIED A TIMELY TRIAL IN VIOLATION OF WASH. CONST. ART. 1, § 22 AND THE SIXTH AMENDMENT.

Speedy trial analysis under the Washington constitution is substantially the same as under the Sixth Amendment. *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). Const. art. I, § 22 provides

that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial.” The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” The speedy trial right is no less fundamental than any other Sixth Amendment trial right. *Iniguez*, 167 Wn.2d at 289-90, citing *Barker v. Wingo*, 407 U.S. 514, 516 n.2, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Review is de novo. *Iniguez*, 167 Wn.2d t 280-81. The primary burden is on the court and the prosecutor to assure that a case is brought to trial. *Barker*, 407 U.S. at 529. If the constitutional speedy trial right is violated, the appellate court must dismiss the charges with prejudice. *Iniguez*, 167 Wn.2d at 290; *Barker*, 407 U.S. at 522.

Before determining whether constitutional speedy trial rights were violated, the Court first asks whether the length of the delay crossed a threshold “from ordinary to presumptively prejudicial.” *Iniguez*, 167 Wn.2d at 283, citing *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992); *Barker*, 407 U.S. at 530. This will depend on the circumstances of each case. *Iniguez*, 167 Wn.2d at 283. The presumption of prejudice intensifies over time. *Doggett*, 505 U.S. at 652. By general consensus, a delay of eight months is presumed prejudicial. *State v. Corrado*, 94 Wn. App. 228, 233, 972 P.2d 515 (1999). A six-months delay is presumptively prejudicial where, as here,

the case is not complex, and where the evidence includes eyewitness testimony. *Iniguez*, 167 Wn.2d at 292. “Complex” charges include conspiracy, for example. *Iniguez*, 167 Wn.2d at 183; *Barker*, 407 U.S. at 531.

The delay here was presumptively prejudicial. Moeller was incarcerated for nine and a half months. Nothing about the case was complex. Moeller was accused of assaulting and raping his girlfriend over the course of a weekend while forcibly keeping her inside their apartment. The State’s witnesses included the alleged victim, police officers who responded to the scene, and a forensic sexual assault examiner who produced a detailed written report and a slew of photographs of the woman’s injuries. Several eye-witnesses were crucial to the defense.

Once the delay is established as presumptively prejudicial, the Court considers the remaining non-exclusive *Barker* factors to determine whether the delay violated the constitution in this particular case. *Iniguez*, 167 Wn.2d at 283, citing *Doggett*, 505 U.S. at 651. These factors include the reason for the delay, whether the defendant asserted his right to speedy trial, and the ways in which the delay may potentially have caused prejudice. *Iniguez*, 167 Wn.2d at 283, citing *Barker*, 407 U.S. at 530.

Moeller was confined for nine and a half months while the lawyers and the court repeatedly delayed his trial to accommodate scheduling and

administrative difficulties that were intrinsic to the court and counsel, not the particulars of Moeller's case. 4/30RP 4; 5/12RP 19; 8/31RP 37, 44.

Overcrowded courts receive more leeway than deliberate delay, but cannot be discounted because the government, not the defendant, is ultimately responsible for court congestion. *Barker*, 407 U.S. at 531. Personal prejudice, while not always readily identifiable, is also a factor in a delay as long as Moeller's. *See Barker*, 407 U.S. at 531.

*Barker* analyzes prejudice in light of those defense interests the speedy trial guarantee is designed to protect. Three defense interests predominate: (1) preventing "oppressive pretrial incarceration"; (2) minimizing the accused's anxiety and concern; and (3) limiting the possibility that the defense could be impaired. The last is the most serious.

The inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

*Barker v. Wingo*, 407 U.S. at 532.

Like personal prejudice, the erosion of exculpatory evidence and testimony over time can rarely be shown. *Corrado*, 94 Wn. App. at 235. *Corrado* did not show impairment to the defense case, even though the

first two interests were prejudiced. *Corrado*, 94 Wn. App. at 235. By contrast, Moeller's ability to defend himself was manifestly impaired by his extended incarceration.

Moeller lived in a poor neighborhood from which witnesses not quickly brought into court would likely fade away, either by relocating or forgetting. The apartment manager, Sizemore, for example, was not interviewed until March, 2009, four months after the events. RP 153. Even more significantly, Moeller claimed Stegner was brought home on the Friday evening in a battered condition by a neighbor lady who had cleaned her up in her own apartment and that Moeller tried unsuccessfully to persuade Ms. Stegner to be treated at the emergency room. 10/23RP 58. Nine and a half months later, this "lady" had evaporated.

The record is replete with instances where the State's primary witness manifested serious impairment in perceiving and accurately recalling significant events. Ms. Stegner repeatedly admitted being in an alcoholic blackout or otherwise simply having no memory of whether she did or did not do things most people would be unable ever to forget — self-reporting having filed a false crime report against the man she just moved in with, for example. RP 49, 51, 196; Ex. 159. She wrote to the police in October, 2008, saying she maybe filed a report accusing Moeller of assaulting her which was utterly false; she had been beaten by an

unidentified assailant outside the apartment at at ime when Moeller was living elsewhere. Ex. 159.

The former apartment manager, Dale Sizemore told the defense investigator another former neighbor, James Hettich, called his attention to Moeller and Stegner in rather dramatic circumstances<sup>3</sup> during the period Stegner claimed to have been forcibly confined. RP 164-65. Hettich refused to talk to the defense, and the State declined to assist with arranging an interview. RP 176. Hettich moved away in December, 2008, shortly after the incident. RP 286, 287. As of the trial, the defense investigator had been unable to locate him. RP 178. But, lo and behold, after the prosecutor learned during the trial that the defense intended to call Sizemore, Hettich just happened to telephone out of the blue and so was available to testify for the State that he never saw the couple that weekend, they never ever set foot in his apartment, and he never told Sizemore they had sex on his couch. RP 176, RP 293, 297.

When the defense investigator went in search of Sizemore on September 5<sup>th</sup>, 2009, the apartment complex had been converted to a gated community and Sizemore was incommunicado until the court issued an order during trial. RP 153, 158.

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<sup>3</sup> He said they were having public sex on Hettich's couch. RP 164.

A corollary to the prejudice resulting from extended pretrial confinement is that a defendant who is locked up cannot gather evidence, contact witnesses, or otherwise assist with his defense. *Barker*, 407 U.S. at 533. Here, Moeller believes exculpatory evidence existed in the form of a witness who brought Stegner home in a beaten-up condition and security camera images showing his car pulling up and immediately departing from the emergency room on Friday evening because Stegner refused to go in to seek treatment.

The factor requiring a defendant to assert his speedy trial rights also favors Moeller, who relentlessly and adamantly demanded his constitutional rights. CP 6-7; CP 8-9; CP 16, 18; CP 20-39. He was simply ignored by the court and counsel. CP 6-7, 8-9, 13-19; 4/30RP 4; 5/12RP 16; 8/31RP 39.

The nine-month delay in bringing relatively simple charges to trial was presumptively prejudicial. The particular factors of the case resulted in actual prejudice by compromising or completely destroying Moeller's opportunity to present vital evidence in his defense. The Court should vacate the judgment and sentence and dismiss the charges with prejudice.

B. THE STATE VIOLATED DUE PROCESS AND  
CrR 4.7 BY NOT NAMING THE FORENSIC  
EXAMINER OR PROVIDING THE THE  
FORENSIC REPORT AND PHOTOGRAPHS.

The State essentially ignored CrR 4.7(a) in this case, and the trial court abused its discretion in denying the defense motions for relief.

U.S. Const. amend. XIV, section 1 provides: “No state shall . . . deprive any person of life, liberty, or property, without due process of law.” The puprpose of CrR 4.7 is to provide criminal defendants with “adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.” *State v. Dunivin*, 65 Wn. App. 728, 733, 829 P.2d 799 (1992).

Discovery decisions based on CrR 4.7 are reviewed for abuse of discretion. *State v. Venegas*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 1445673, filed 13 April, 2010, Slip Op. 37828-1-II at 11, citing *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). A trial court abuses its discretion when it makes decisions based on untenable grounds or for untenable reasons. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007), quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Whenever a not guilty plea is entered, the court must set a date for an omnibus hearing. CrR 4.5. No later than date set for the omnibus, the prosecutor is required to provide certain mandatory discovery to the defense. First, the names and addresses of all witnesses along with any written statements and the substance of their anticipated oral testimony are required. CrR 4.7(a)(1)(i). The prosecutor also must provide reports of experts connected with the case, including results of physical examinations. CrR 4.7(a)(1)(iv). Specifically, the prosecutor is supposed to turn over any photographs the State intends to use at trial. CrR 4.7(a)(1)(v). And the prosecutor has to name any expert witnesses to be called, the subject of their testimony, and all reports. CrR 4.7(a)(2)(ii).

Dismissal may be the appropriate remedy for failure to comply. CrR 4.7(h)(7)(i). If the violation is willful, the court also may subject the prosecutor to additional sanctions. CrR 4.7(h)(7)(ii). The constitution does not require a trial court to declare a mistrial in every instance where the State violates a discovery rule. *State v. Greiff*, 141 Wn.2d 910, 920, 10 P.3d 390 (2000). But evidence may be excluded when that is the only effective remedy. *Hutchinson*, 135 Wn.2d at 881-883. And a mistrial should be granted if “the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.”

*Greiff*, 141 Wn.2d at 921, quoting *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

Here, the court set an omnibus hearing for December 30, 2008. Supp. CP \_\_\_\_ (Order for Hearing, filed Nov. 18, 2008). This hearing was continued and never reset. 5/12RP 24. Instead, the court issued a belated omnibus order after a continuance hearing on May 12<sup>th</sup>. CP 67. The prosecutor states on the face of the omnibus order that all appropriate (a) material has been disclosed. CP 69. This is false. In fact, the prosecutor had still not named the forensic sexual assault examiner three and a half months later on August 31st. 8/31RP 44.

In addition, the day before trial, the defense investigator found that over 100 forensic photographs had not been disclosed. 8/31RP 34. In light of this surprise discovery, counsel asked to continue the trial so he could show the photographs to an expert in hopes of establishing what caused the bruises and when they occurred. 8/31RP 39. The court did not see the point and declared that examining the photographs would not yield any relevant evidence. 8/31RP 39. Instead, the court ordered trial to begin immediately the following day. 8/31 RP 43. This was error.

Ironically, during trial, the prosecutor loudly objected to proposed defense evidence he thought the defense should have disclosed. RP 162-63. The court was outraged and chastized defense counsel for the

perceived rule violation. The judge tried to persuade the prosecutor to request sanctions, and sua sponte considered declaring a mistrial. RP 168-69, 178. This error is discussed in Issue G at page 36 of this Brief.

Both the prosecutor and the court misinterpreted the rule. CrR 4.7's forced pretrial disclosures by criminal defendants satisfy due process solely where they do not infringe on the Fifth Amendment right not to be compelled to disclose information the State can use to incriminate. Accordingly, only evidence that will inevitably come to light if the defendant asserts an affirmative defense are subject to forced discovery. State rules that require pretrial discovery of the identity of witnesses who are to be called to testify for the defense in criminal cases are lawful solely in connection with affirmative defenses, such as alibi. *Jones v. Superior Court of Nevada County*, 58 Cal.2d 56, 61, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (CAL. 1962), citing *Louisell*, CRIMINAL DISCOVERY: DILEMMA REAL OR APPARENT?, 49 Calif. L. Rev. 56, 61, n. 13; 6 *Wigmore on Evidence* (3d ed.), § 1855(b), pp. 418-420; 30 A.L.R.2d 480. Due process is not offended because the rule merely accelerates the timing of an inevitable disclosure. *State v. Nelson*, 14 Wn. App. 658, 664, 545 P.2d 36 (1975). Moeller's defense was general denial, not an affirmative defense. RP 23.

The Moeller court's failure to follow through on its statutory obligation to hold a timely omnibus hearing and the State's failure to provide critical evidence until the first day of trial nine months after the guilty plea prevented Moeller from preparing an adequate defense.

***Denying the Defense a Remedy Was An Abuse of Discretion:***

The court should consider four factors when determining whether to exclude evidence as a sanction for a discovery violation: (1) the effectiveness of less severe sanctions; (2) the impact on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the opposing party; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-83, citing *Taylor v. Illinois*, 484 U.S. 400, 415 n.19, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

At minimum, it is an appropriate remedy when a party fails to identify witnesses and critical evidence in a timely manner is to continue the proceedings to give the surprised party time to locate an expert and prepare a defense. *Venegas*, Slip Op. 37828-1-II at 13, citing *Hutchinson*, 135 Wn.2d at 881.

Moeller first moved to dismiss for failure to produce the chief witness, Stegner. 5/12RP 16. Instead, the court ordered the State to produce Stegner for an in-person interview by May 29<sup>th</sup>. 5/12RP 24. The

State simply ignored this. By August 31, defense counsel had given up and settled for a telephone interview. 8/31RP 33. The defense also sought a continuance to deal with the just-discovered photographs and the still-unnamed forensic evidence expert. 8/31RP 35, 39, 43. The court summarily refused: “I will honor [the prosecutor’s] request that we start tomorrow.” 8/31RP 43.

Here, as in *Venegas*,<sup>4</sup> denying a continuance strongly undermined Moeller’s defense. It is manifestly clear from the record — and the judge acknowledged at sentencing — that the impact of the photographs on the jury was determinative of the outcome of this trial. 10/23RP 61. As in *Venegas*, had the defense received timely discovery that Lopez did not provide medical treatment but rather amassed data, including 89 photographs for forensic evidence purposes, the defense could have called the medical treatment providers as defense witnesses. Counsel would also have been better prepared to object to the spurious application of the medical treatment exception to permit Lopez to freely regale the jury with Stegner’s inadmissible hearsay.

Given that the trial was already nine and a half months overdue, avoiding a few more weeks’ delay was an inadequate reason to relieve the State of any penalty for what can most charitably be described as a

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<sup>4</sup> Slip Op. 37828-1-II at 13-14.

catastrophic failure of diligence and oversight that denied Moeller fundamental due process.

Moeller was seriously prejudiced by the court's misguided view of the State's discovery violations and the potential benefit of having a defense expert examine the forensic evidence and photographs. Some of Stegner's bruises already were shades of brown and yellow on November 17<sup>th</sup> 2008. RP 258. An expert might have identified these as pre-existing bruises. Stegner admitted some preexisting bruises. RP 236. The potential effect of this error is incalculable, because Stegner said she was shocked that Moeller hit her that weekend. She testified unequivocally that that he had never laid a hand on her before. RP 50.

The failure to provide discovery of the forensic examiner effectively obliterated Moeller's ability to prepare his defense. Without an opportunity to interview the forensic examiner and examine her report, the defense was unaware that the State's purported "medical" evidence would not come from a physician or other emergency room staffer who actually provided medical treatment to Stegner. If the contents of the forensic report and the photographs had been disclosed, further investigation by the defense likely would have suggested supplementing its own witness list with emergency room personnel who actually performed the medical evaluation of Stegner's injuries and provided medical treatment.

The forensic examination, by contrast, was primarily concerned with collecting evidence for use in a future prosecution. RP 220-22. Lopez testified unequivocally that the evidence collection was entirely separate from treatment. If the patient reports medical concerns, Lopez brings back the physician or technician who did the medical exam. RP 222-23.

The Court should vacate the convictions and dismiss with prejudice.

C. THE STATE VIOLATED A DIRECT ORDER OF THE COURT AND CrR4.7(a) BY NOT TURNING OVER MEDICAL RECORDS.

At the May 12 hearing, six months into the 60-day speedy trial period, defense counsel specifically asked the court to order the State to provide records of relevant medical treatment Stegner received. 5/12RP 25. The State objected. 5/12RP 26. After again requesting clarification from the defense as to any conceivable relevance, the court ordered the prosecutor to turn over the medical records forthwith. 5/12RP 27. As of August 31, the day before trial commenced, the records had not been produced.

This prejudiced Moeller by preventing the defense from vigorously challenging the significance of the forensic evidence. This was particularly damaging because the State was seeking an exceptional

sentence for deliberate cruelty based on the photographs. 5/12RP 26; RP 89, 340; 10/23RP 51.

D. THE PREJUDICE OF DUPLICATIVE  
PHOTOGRAPHS OF STEGNER'S BRUISES  
OUTWEIGHED THEIR PROBATIVE VALUE.

The court admitted 130 to 140 photographs of Stegner's bruises, mostly over the defense objection that the probative value could be achieved with many fewer photographs. RP 68.

Evidence may be unfairly prejudicial if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action. *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

A trial court's decision to admit photographs is discretionary and will be reversed only if that discretion is abused. *State v. Crenshaw*, 98 Wn.2d 789, 806, 659 P.2d 488 (1983); *State v. Stackhouse*, 90 Wn.App. 344, 357, 957 P.2d 218 (1998). Gruesome photographs are admissible so long as their probative value outweighs their prejudicial effect, but the prosecutor must exercise restraint in offering evidence that is inflammatory and unnecessarily cumulative. *Crenshaw*, 98 Wn.2d at 806-07. Photographic evidence is cumulative if the photographs depict substantially the same material. *See State v. Pirtle*, 127 Wn.2d 628, 654-55, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

The worst injuries are to the soft tissue around Ms. Stegner's eyes, which is swollen and discolored. The true medical report says all the injuries were soft tissue bruises, with no intracranial or facial fractures, including the orbits. Ex. 8 at 28, 32. The court admitted 25 photographs of the eyes, which are truly horrifying: Exhibits 9, 10, 12, 13, 14, 16, 17, 18, 19, 24, 59, 60, 61, 62, 63, 64, 65, 67, 68, 131, 135, 138, 139, 140, 141. Some of these show one eye or the other, several show both eyes. Any one or two of these could have established the probative value. The rest were entirely prejudicial.

The other photographs included fourteen of the back: Ex. 72, 73, 78, 113, 114, 125, 116, 117, 118, 119, 121, 125, 126 and 127; six of the neck: Ex. 66, 132, 142, 143, 144 and 145; fifteen of the arms: Ex. 82, 88, 89, 90, 94, 111, 112, 121, 122, 120, 123, 151, 155, 156, 157. One or two of each of these would have sufficed.

The exhibits also include seventeen photographs of bruises on the legs: Ex. 92, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109 and 110. These have zero probative value, because the bruises on the legs were preexisting. Ex. 8. In addition, thirteen exhibits show unidentified bruises that cannot be located from the photographs: Ex. 73, 74, 75, 76, 77, 79, 80, 81, 82, 84, 85, 86 and 90. No probative value can

be attributed to these. They likely duplicate existing exhibits or show pre-existing leg bruises.

In addition to admitting wave after wave of images of the same injuries, the court declined to mitigate the prejudice by hearing argument on the photographs during a single session without the jury. This suggestion came from the prosecutor himself, perhaps embarrassed by the mounting appearance of unfairness. The court refused and insisted on sending the jury out and addressing each group of photographs as they were introduced. RP 77. This prejudiced Moeller by forcing the defense continually to object in front of the jury who would then be sent out of the courtroom one more time, doubtless grumbling that the defense was trying to withhold relevant evidence. This exacerbated the court's abuse of its discretion in admitting the excessive numbers of photographs.

At sentencing, the court conceded that the photographs were a huge factor in the verdict. 10/23RP 61.

**E. THE COURT ERRONEOUSLY EXCLUDED EVIDENCE CRUCIAL TO THE DEFENSE.**

The defense offered a letter written by Stegner for the purpose of proving bias. The letter tended to prove she had falsely accused Moeller before. A second proposed exhibit showed Stegner deliberately injured

herself in order to control Moeller and keep him from leaving her. Ex. 159, 160; RP 196-204.

The Sixth Amendment confrontation clause guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937, 946 (2009); *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). This right includes the right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). The trial court may limit the extent to which defense counsel may employ harassment, prejudice, or confusion of the issues, and counsel may not use interrogation that is “repetitive or only marginally relevant.” *Fisher*, 165 Wn.2d at 752; *Van Arsdall*, at 679. However, defendants enjoy greater latitude to expose the bias of a key State’s witness. *Fisher*, 165 Wn.2d at 752, citing *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Here, the court once again failed to see the relevance of bias evidence from which the jury could infer that Stegner falsely accused Moeller in the past and had manufactured injuries in an attempt to control him.

As discussed in Issue B at page 18 of this Brief, the court wrongly believed the defense violated the discovery rules by not turning over this material sooner.

More serious than perceiving an imaginary discovery violation, was the court's failure to grasp the evidentiary significance of the letter offered as Ex. 159. The court thought it was relevant solely to impeach Stegner with a prior inconsistent statement in the event she denied having falsely accused Moeller before. RP 207. This was wrong. If believed by the jury, the letter to the police was substantive evidence that Stegner was a blackout drunk who a few weeks earlier had falsely accused Moeller of beating her up and then completely blacked out any memory of having done so.

The State erroneously dismissed the letter as character evidence. RP 196. This was wrong. First, the letter was offered to prove past conduct, not character. Second, even if it was character evidence, it was admissible as a pertinent trait of a victim offered by the accused. ER 403(a)(2).

Moreover, the letter was not excluded under ER 404(b) as a prior bad act offered to prove action in conformity therewith. Stegner's current action of accusing Moeller was not in dispute; it certainly was not a fact the defense was offering evidence to prove. Rather, evidence that Stegner

falsely accused Moeller of beating her up the previous month was sufficient, if the jury believed it, to raise a big fat reasonable doubt that Stegner was lying again now. Not that she was a liar by nature. The fact she she had lied on a particular occasion in the past was substantive evidence of the fact that she had lied in the recent past.

Ultimately, the court did not admit either of these exhibits. CP 123; RP 203.<sup>5</sup>

This was devastating to Moeller's defense. Reversal is required.

F. MOELLER WAS CONVICTED OF BOTH FIRST DEGREE RAPE AND SECOND DEGREE ASSAULT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF WASH. CONST. ART. 1, § 22 AND THE FIFTH AMENDMENT.

Convicting and sentencing Moeller for both first degree rape and second degree assault violated double jeopardy.

The double jeopardy clauses of the state and federal constitutions protect defendants against multiple punishments for the same offense.<sup>6</sup>

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<sup>5</sup> When defense counsel tried to clarify the court's ruling, the judge cut him off. RP 204. Then the court sent the jury out so he could "have a little discussion with counsel" about how Ex. 159 could be used. RP 205. This needlessly belittled defense counsel in the presence of the jury. Rebuking counsel in front of the jury warrants reversal if prejudice is shown. *State v. Stamm*, 16 Wn. App. 603, 615, 559 P.2d 1 (1976), *review denied*, 91 Wn.2d 1013 (1977); *State v. Whalon*, 1 Wn. App. 785, 798, 464 P.2d 730, *review denied*, 78 Wn.2d 992 (1970). This was prejudicial.

*State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). The federal and state constitutions are identical in this regard, and are interpreted in the same manner. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

This Court reviews double jeopardy challenges de novo. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). Double jeopardy is analyzed under the “same evidence” test. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007). Multiple convictions are prohibited unless each offense contains an element not contained in the other, and each offense requires proof of a fact that is not essential to prove the other. Otherwise, the offenses are the same. *Borrero*, 161 Wn.2d at 537.

Specifically, when an assault elevates another charged offense to a higher degree, the two offenses generally merge and are the same for double jeopardy purposes. *Freeman*, 153 Wn.2d at 772. The two offenses are compared as charged and proved. *Freeman*, 153 Wn.2d at 777. The legislature is presumed not to intend multiple punishments when facts the State must prove to support a conviction on one of the charged crimes

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<sup>6</sup> U.S. Const. amend. V: “No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb.” The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). Wash. Const. art. I, § 9: “No person shall be . . . twice put in jeopardy for the same offense.”

“would have been sufficient to warrant a conviction upon the other.”

*Freeman*, 153 Wn.2d at 776.

Washington courts also examine double jeopardy in light of the merger doctrine. *Freeman*, 153 Wn.2d at 778. In *Freeman*, a charge of robbery<sup>7</sup> merged with an assault charge based on the same conduct that elevated the robbery to first degree. *Id.* Likewise, here, if the conduct constituting the assault either constitutes the forcible compulsion element of first degree rape or elevates the degree of a rape accomplished by a different act of forcible compulsion, then the offenses merge and double jeopardy precludes convictions for the same conduct under both the first degree rape and assault statutes. Given that this couple were having sex several times a day rain or shine, as charged and proved, without the conduct amounting to assault, the State could not establish rape in any degree, let alone the first degree.

The Court should remand for resentencing and dismissal of one of the charges. Based on the statutory construction discussed in the previous issue, the erroneous charge is Count I, the rape. To avoid a future sufficiency challenge, the Court should dismiss Count I and remand for resentencing only on Counts II and III.

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<sup>7</sup> Taking property “by force or fear.” RCW 9A.56.190.

G. STEGNER'S STATEMENTS AT THE SCENE  
WERE NOT EXCITED UTTERANCES.

Over a timely defense objection, the court admitted Stegner's statements to Lakewood police officer Greg Richards. RP 123. Richards first testified without objection that Stegner told him, "he beat the shit out of me." The defense objected to any additional statements by Stegner to Richards as inadmissible hearsay. The court adopted the prosecutor's characterization of these statements as "excited utterance" admissible under ER 803(a)(2). RP 132.

Interpretation of an evidentiary rule is reviewed de novo as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). The trial court's factual determination of whether a statement falls within an exception to the hearsay rule is reviewed for abuse of discretion. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). But the Court reviews de novo whether the ruling manifests an erroneous understanding of the law. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998); *State v. Martinez*, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001).

ER 803(a)(2) provides that a statement is not excluded as hearsay if it is an excited utterance that relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by that event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d

194 (1992). The key Supreme Court case explaining the nature of the excited utterance exception to the hearsay rule is *Beck v. Dye*, 200 Wash. 1. 9, 92 P.2d 1113, 1118, 127 A.L.R. 1022 (1939). As applicable here:

(1) The statement must relate to a startling event and must explain, elucidate, or in some way characterize that event; (2) the statement must grow out of the event, as opposed to merely narrating a past, completed affair; (3) it must state facts, not merely an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design. *Beck*, 200 Wash. at 9.

Crucially, the circumstances of the statements must preclude reflection and the declarant cannot be narrating past events from memory. *State v. Pugh*, 167 Wn.2d 825, \_\_\_, 225 P.3d 892, 898 (2009), citing Simon Greenleaf, A TREATISE ON THE LAW OF EVIDENCE, § 108, 144-45 (14th ed. 1883).

Here, Stegner pointed to Moeller as her assailant. Then she stopped talking. RP 125. Richards asked her to tell him what happened so he could put it in his report. RP 126. Stegner then narrated how Moeller had kept her in the apartment all weekend and made her do sexual favors. She described how she waited until he went to sleep and then

climbed through the window because he had barricaded the apartment door to keep her inside. Richards said he asked Stegner whether Moeller specified the sexual favors he wanted and that she replied, "He made me suck him off." RP 133.

The statements in Richards' testimony do not constitute excited utterance. They do not arise spontaneously from the events described. Rather, Stegner was narrating her recollection of past facts. Richards thought Stegner appeared not to feel safe. RP 127. The declarant's not feeling safe is distinguishable from the event speaking for itself; feeling insecure does not rule out the opportunity for reflection or shaping the narrative out of self interest. All Stegner's statements were delayed responses to Richards' questions. He had to coax her to respond by saying he needed the information for his report. RP 128. Richards speculated that the delays between question and answer were due to fear rather than Stegner's need to formulate an answer. RP 129. A true excited utterance, however, is unmistakable from the circumstances without recourse to unfounded speculation by an observer whose perception inevitably is colored by the evidence-gathering process in which he is engaged.

It is particularly prejudicial for the jury to hear incriminating facts repeated and given credence by a law enforcement officer.

H. HEARSAY TESTIMONY BY THE FORENSIC EXAMINER WAS NOT ADMISSIBLE UNDER THE MEDICAL TREATMENT EXCEPTION.

An evidentiary error that is not of constitutional magnitude requires reversal if, within reasonable probability, the error materially affected the outcome of the trial. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *State v. Jenkins*, 53 Wn. App. 228, 231, 766 P.2d 499, *review denied*, 112 Wn.2d 1016 (1989).

Here, the court admitted, for the purpose of proving the matter asserted, voluminous statements Stegner made to a forensic sexual assault examiner for the purpose of amassing evidence of a crime. “Forensic” is not a medical term. It means “belonging to courts of justice.” BLACK’S LAW DICTIONARY, 6<sup>th</sup> Ed. page 648. Accordingly, this evidence was not admissible under ER 803(a)(4), the medical treatment exception to the hearsay rule. The record overwhelmingly supports this. Lopez consistently testified that the services she provided did not include medical treatment, by contrast with the emergency room physicians and nurses.

Stegner — not a physician — requested an optional forensic exam after all necessary medical treatment had been provided. RP 228. Lopez testified it was not her function to provide medical treatment; that was done before patients were brought for a forensic exam. If a patient so

much as mentioned a medical concern, Lopez would summon a medical treatment provider to handle the situation. She herself did not provide treatment. RP 222-23.

Lopez did that here. She observed what she called “battle sign” bruising behind Stegner’s ear. RP 224. Lopez immediately called in a physician to reexamine Stegner. Lopez thought (wrongly) that this particular type of bruise must be due to a closed head injury such as a basal or skull fracture. RP 224. Dr. Woods, an ER physician, responded to summons and assured Lopez she was wrong. The medical treatment had included complete CAT scans which were negative. RP 244-45.

Besides being medically out in left field, Lopez’s observations did not even correlate with Stegner’s own statements. For example, Lopez reported ligature marks on the neck. RP 249. But Stegner said Moeller put his right arm across her neck with his hand under her ear, which is consistent with the photographs. RP 51; Ex. 66, 132, 142, 143.

Unlike evidence collector Lopez, the medical treatment providers noted Stegner’s pre-existing liver dysfunction and her current medications. Ex 7. This unbiased medical report also noted that Stegner was extremely bruisable and had a blood clotting disorder. Ex. 7 at 9.<sup>8</sup>

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<sup>8</sup> Ms. Stegner had no memory of any of this. RP 111.

The same canons of construction apply to court rules as to statutes. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996). When interpreting rules and statutes, the Court must look first to the plain language. *State v. Jones*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_ (2010), Slip Op. at 9. If a rule is clear on its face, its meaning is derived from its language alone. *Id.*, citing *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006).

The plain language of ER 803(a)(4) says that, for a hearsay statement to be admissible, it must be made for for purposes of medical diagnosis or treatment **and** must describe medical history, or past or present symptoms, pain, or sensations, **or** the inception or general character of the cause *thereof* insofar as reasonably pertinent to diagnosis or treatment.<sup>9</sup> This is not ambiguous. It imposes two conditions for admissibility. One, the statement must have been made for the purposes of medical diagnosis or treatment. **And**, two, it must describe medical history, or past or present symptoms, pain, or sensations. The statement **may** also describe the cause ***thereof***. “Thereof” can only refer to the past or present symptoms, pain, or sensations. But a statement describing the

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<sup>9</sup> Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. ER 803(a)(4).

cause of symptoms, etc., must be reasonably pertinent to the diagnosis or treatment that is the purpose of the statements describing symptoms. ER 803(a)(4).

This Court in *State v. Williams*, 137 Wn. App. 736, 154 P.3d 322, 325 (2007), construed this as permitting causal descriptions that are *either* made for for purposes of medical diagnosis or treatment *or* reasonably pertinent to diagnosis or treatment. But the rule does not say for purposes of medical treatment *or* reasonably pertinent thereto. It says for the purposes of treatment *and* describing the cause of symptoms *if* the cause is reasonably related to treatment. The statement must be for the purposes of — not merely pertinent to — diagnosis and treatment. The *Williams* court concluded that out-of-court accusations offered to prove facts alleged in a sexual assault charge were admissible under the medical treatment exception of ER 803(a)(4) because they were “reasonably pertinent to” medical diagnosis or treatment. *Williams*, 137 Wn.2d at 740. This is contrary to the plain language of the rule.

Moreover, *Williams* is distinguishable on its facts. Like Lopez here, a forensic nurse in *Williams* took swabs and asked questions. Unlike Lopez, however, the *Williams* forensic evidence was collected “as part of a medical examination.” *Williams*, 137 Wn. App. at 741. At minimum, the examination was conducted for “a combination’ of purposes —

medical as well as forensic.” *Williams*, 137 Wn. App. at 746. Lopez’s examination of Stegner, by contrast, was solely for the purpose of gathering forensic evidence. The medical examination had already been completed, and Lopez referred any medical diagnosis or treatment issues back to emergency room medical treatment providers. RP 233.

The Court then concluded that statements are reasonably pertinent when (1) the declarant’s motive in making the statement is to promote treatment, and (2) the medical professional reasonably relies on the statement for purposes of treatment. *Williams*, at 746, citing *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).

No Washington court has held that statements to a forensic evidence collector are automatically admissible just because the examiner is a nurse. Diagnosis and treatment must be part of the purpose. In *State v. Sandoval*, 137 Wn. App. 532, 537, 154 P.3d 271 (2007), statements by domestic violence victim to a doctor for purposes of treatment were admissible. Lopez was not a doctor and Stegner’s statements were not for purposes of treatment. In *State v. Perez*, 137 Wn. App. 97, 106, 151 P.3d 249 (2007), statements to a sex abuse therapist also were properly admitted under the medical diagnosis and treatment exception to the hearsay rule. Lopez did not claim to be a sex abuse therapist any more

than she was a treatment provider. She was an examiner and evidence gather.

This is consistent with the logical foundation of exceptions to the hearsay rules. Certain “indicia of reliability” are recognized as intrinsic to the particular circumstances in which the certain out-of-court statements are made. Specifically, ER803(a)(4) reflects the belief that “the declarant has a strong motive to speak truthfully and accurately because his successful treatment depends upon it.” *State v. Carol M.D.*, 89 Wn. App. 77, 85, 948 P.2d 837, 842 (1997). It is this strong self-interest that makes ER 803(a)(4) a “firmly rooted” hearsay exception. *Carole*, 89 Wn. App. at 85, citing *Ring v. Erickson*, 983 F.2d 818, 820 (8th Cir.1992), quoting *Idaho v. Wright*, 497 U.S. 805, 815, 110 S. Ct. 3139, 3146, 111 L. Ed. 2d 638 (1990). The statement comes with its own inherent “particularized guarantees of trustworthiness.” *Id.* quoting *Wright*, 497 U.S. at 816.

Accordingly, not all statements to doctors are deemed inherently trustworthy – only those made for diagnosis and treatment. Statements by adults identifying the perpetrator of a crime, for example, are not admissible under the medical diagnosis or treatment exception. *State v. Hopkins*, 134 Wn. App. 780, 788, 142 P.3d 1104 (2006); *State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993).

For the same reason, Stegner's statements to Lopez carry absolutely zero indicia of reliability. They were not made for the purposes of treatment. They were made for purposes of incriminating Mr. Moeller. Declarant Stegner could have said she was abducted by extraterrestrials with no effect on her already-completed treatment.

Moeller was immensely prejudiced by Lopez's hearsay testimony, which reinforced the otherwise shaky testimony of Stegner. Ms. Stegner admitted to frequent blackouts and memory loss during the relevant time. RP 49. She told the medical treatment providers she drank 18 beers between Saturday and Sunday. Ex. 8 at 6.<sup>10</sup> And more than nine months elapsed between that weekend and the trial. Like the testimony of Officer Richards, Lopez's extended testimony about Stegner's contemporaneous statements bolstered her credibility. The erroneous admission of this hearsay may well have caused defense counsel to view the State's evidence as overwhelming and consequently become discouraged. Despair can lead to major errors in judgment, which happened here when counsel elected not to put Moeller on the stand. Please see issue G.

Had Stegner herself been the sole witness to the events she alleged — as she should have been under the rules of evidence — the jury might well have believed Moeller's conflicting account.

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<sup>10</sup> Ms. Stegner did not remember having said this. RP 186.

I. THE LIMITING INSTRUCTION REGARDING  
SIZEMORE'S TESTIMONY WAS ERRONEOUS.

The court gave the following instruction to Moeller's jury:

"Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the testimony of Dale Sizemore regarding a conversation with James Hettich on the morning of 11/17/2008 and may be considered by you only for the purpose of judging Mr. Hettich's credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Instr. 5A, CP 143.

Moeller objected to this instruction because neither party had asked the court to limit Sizemore's testimony, both sides having elected not to request a limiting instruction in front of the jury based on the evidence. Counsel argued it was inappropriate for the court to inject a limiting instruction sua sponte after both sides had rested. RP 324.

All relevant evidence is admissible unless a party challenges its admissibility. ER 402. The court may exclude relevant evidence only "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. If evidence is admitted for a limited purpose, then the court must give a limiting instruction upon request by the party against whom the evidence is admitted. *State v. Freeburg*, 105

Wn. App. 492, 501, 20 P.3d 984 (2001). But our courts routinely presume that trial counsels' decision not to request a limiting instruction is a matter of legitimate trial tactics. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447 (1993).

Moreover, the evidence rules do not supersede the open door doctrine. *State v. Brush*, 32 Wn. App. 445, 451, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983). “[O]nce a party has raised a material issue, the opposing party is permitted to explain, clarify, or contradict the evidence.” *State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008).

Finally, a limiting instruction is erroneous unless the court identifies the evidence as being admitted for a limited purpose when that evidence was introduced. *Freeburg*, 105 Wn. App. at 501, citing note on use for WPIC 365.04. The court has discretion as to when — not whether — to give a limiting instruction, although it is usually preferable to give it when the evidence comes in. *State v. Ramirez*, 62 Wn. App. 301, 305, 814 P.2d 227 (1991).

Here, the prosecutor opened the door to Sizemore's evidence when, in the State's case in chief, he questioned Hettich about seeing Moeller and Stegner in his apartment. Neither side asked the court to limit

Sizemore's evidence, presumably based on sound tactical reasons, as defense counsel argued. The court violated the appearance of fairness doctrine<sup>11</sup> by jumping in sua sponte on the side of the prosecution when it is unheard-of for a trial judge to give an unsolicited limiting instruction that might benefit the defense.

J. THE PROSECUTOR'S CLOSING ARGUMENT  
EMPLOYED FLAGRANT MISCONDUCT.

In closing argument, the prosecutor told the jury: "Now, when you go back there, what you, essentially, have to say to yourself is, I find the defendant not guilty, and my reason is blank. That is a reasonable doubt."

RP 346.

This Court has repeatedly held that Pierce County prosecutors commit reversible misconduct by employing this same 'fill-in-the-blank' definition of doubt.

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [him] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

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<sup>11</sup> Could a reasonably prudent, disinterested observer conclude that all parties received a fair, impartial and neutral hearing? *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

*Venegas*, Slip Op. 37828-2-II at 15, quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). “We reiterate that prosecutors who continue to employ an improper “fill-in-the-blank” argument needlessly risk reversal of their convictions.” *Venegas*, Slip Op. 37828-2-II at 15.

Such misconduct is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury. *Id.*; *Fisher*, 165 Wn.2d at 747. Failure to object to the improper remark waives the issue on appeal unless the remark was “flagrant and ill-intentioned” and “evinces an enduring and resulting prejudice” that could not be cured by a jury instruction. *Venegas*, Slip Op. 37828-1-II at 16, citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006), quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

The presumption of innocence is the bedrock of our criminal justice system, and misstating it is “flagrant misconduct.” *Venegas*, Slip Op. 37828-1-II, quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

That is precisely what happened here.

K. MOELLER’S FATE WAS SEALED BY  
INEFFECTIVE ASSISTANCE OF COUNSEL.

The United States and Washington constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art.

1. § 22. A successful ineffective assistance of counsel claim must establish deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d at 705. Prejudice is established by a showing that, had counsel performed effectively, the outcome of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The Court begins with a strong but rebuttable presumption that counsel was effective. *McFarland*, 127 Wn.2d at 335. Legitimate trial tactics will not support an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The fundamental question in judging any claim of ineffective assistance is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, at 686; *In re Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). That is what happened here.

(1) During the unconstitutionally protracted delay of trial, defense counsel failed to contact essential witnesses and investigate potentially exculpatory evidence in a timely manner. This eliminated any opportunity for Moeller to present evidence refuting the State's case.

(2) Even without corroborating evidence, counsel should have put Moeller on the witness stand. At sentencing, Moeller articulated a plausible story that explained Stegner's injuries and constituted a complete defense. 10/23RP 58. After listening to Moeller, the sentencing judge said it was "kind of hard to know what went on that weekend because [Stegner] was very highly intoxicated. There is no question about that." 10/23RP 61. The judge then concluded that a psychosexual evaluation would not be necessary. 10/23RP 62. The court also imposed a sentence in the middle of the standard range despite the State's request for an exceptional sentence based on deliberate cruelty. CP 200, 204 (J&S); 10/23RP 62-63.

If the jurors had heard Mr. Moeller's testimony, they too might have entertained reasonable doubts and reached a different verdict.

L. CUMULATIVE TRIAL ERRORS DENIED  
MOELLER A FAIR TRIAL UNDER ART. 1, § 22  
AND THE FIFTH AND SIXTH AMENDMENTS.

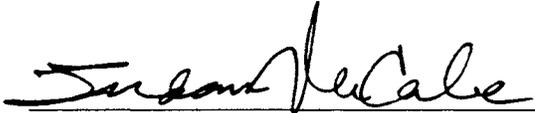
This Court will reverse a conviction when the cumulative effect of errors during trial "effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, Slip Op. 37828-8 at 11, citing *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).

Even if the Court finds some of the assigned errors insufficient standing alone to justify reversal, Moeller was denied a fair trial by the overall weight of error. Namely, Moeller was prejudiced by the cumulative effect of:

- The nine and a half months delay in bringing him to trial;
- The failure of due diligence in the defense investigation that resulted in crucial witnesses and evidence slipping away;
- Failure to identify the forensic expert or the photographs that CrR 4.7(a) obliged the prosecutor to provide to the defense;
- Exclusion of critical bias evidence;
- Hearsay to the police erroneously admitted as excited utterance;
- Hearsay to the forensic specialist erroneously admitted under the medical treatment exception;
- Failure to put Moeller on the stand, even though, without his testimony, it was not possible for the jury to imagine a plausible alternative scenario explaining Ms. Stegner's condition.

V. CONCLUSION

This Court should reverse Mr. Moeller's convictions and vacate the judgment and sentence. Respectfully submitted this <sup>24<sup>th</sup></sup> 23<sup>rd</sup> day of April, 2010.

 4-24-10  
Jordan B. McCabe, WSBA No. 27211  
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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of the foregoing Appellant's Brief to:

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